# AMENDMENTS TO THE CONSTITUTION

## FIRST THROUGH TENTH AMENDMENTS

### Bill of Rights

On September 12, five days before the Convention adjourned, Mason and Gerry raised the question of adding a bill of rights to the Constitution. Said Mason: "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours." But the motion of Gerry and Mason to appoint a committee for the purpose of drafting a bill of rights was rejected.[1] Again, on September 14, Pinckney and Gerry sought to add a provision "that the liberty of the Press should be inviolably observed—." But after Sherman observed that such a declaration was unnecessary, because "[t]he power of Congress does not extend to the Press," this suggestion too was rejected.[2] It cannot be known accurately why the Convention opposed these suggestions. Perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the States, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration would deny, perhaps all these contributed to the rejection.[3]

In any event, the opponents of ratification soon made the absence of a bill of rights a major argument,[4] and some friends of the document, such as Jefferson,[5] strongly urged amendment to in-

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[1] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587–88 (rev. ed. 1937).

[2] Id. at 617–618.

[3] The argument most used by proponents of the Constitution was that inasmuch as Congress was delegated no power to do those things which a bill of rights would proscribe no bill of rights was necessary and that it might be dangerous because it would contain exceptions to powers not granted and might therefore afford a basis for claiming more than was granted. THE FEDERALIST No. 84 at 555–67 (Alexander Hamilton) (Modern Library ed. 1937).

[4] Substantial excerpts from the debate in the country and in the ratifying conventions are set out in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 435–620 (B. Schwartz ed., 1971); 2 id. at 627–980. The earlier portions of volume 1 trace the origins of the various guarantees back to the Magna Carta.

[5] In a letter to Madison, Jefferson indicated what he did not like about the proposed Constitution. "First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations.... Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

clude a declaration of rights.[6] Several state conventions ratified while urging that the new Congress to be convened propose such amendments, 124 amendments in all being put forward by these States.[7] Although some dispute has occurred with regard to the obligation of the first Congress to propose amendments, Madison at least had no doubts[8] and introduced a series of proposals,[9] which

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12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (J. Boyd ed., 1958). He suggested that nine States should ratify and four withhold ratification until amendments adding a bill of rights were adopted. Id. at 557, 570, 583. Jefferson still later endorsed the plan put forward by Massachusetts to ratify and propose amendments. 14 id. at 649.

[6] Thus, George Washington observed in letters that a ratified Constitution could be amended but that making such amendments conditions for ratification was ill-advised. 11 THE WRITINGS OF GEORGE WASHINGTON 249 (W. Ford ed., 1891).

[7] 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 627–980 (B. Schwartz ed., 1971). *See also* H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 19 (1896).

[8] Madison began as a doubter, writing Jefferson that while "[m]y own opinion has always been in favor of a bill of rights," still "I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment. . . ." 5 THE WRITINGS OF JAMES MADISON 269 (G. Hunt ed., 1904). His reasons were four. (1) The Federal Government was not granted the powers to do what a bill of rights would proscribe. (2) There was reason "to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." (3) A greater security was afforded by the jealousy of the States of the national government. (4) "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . . Wherever there is a interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince." Id. at 272–73. Jefferson's response acknowledged the potency of Madison's reservations and attempted to answer them, in the course of which he called Madison's attention to an argument in favor not considered by Madison "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed., 1958). Madison was to assert this point when he introduced his proposals for a bill of rights in the House of Representatives. 1 ANNALS OF CONGRESS 439 (June 8, 1789).

In any event, following ratification, Madison in his successful campaign for a seat in the House firmly endorsed the proposal of a bill of rights. "[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants & c." 5 THE WRITINGS OF JAMES MADISON 319 (G. Hunt ed., 1904).

[9] 1 ANNALS OF CONGRESS 424–50 (June 8, 1789). The proposals as introduced are at pp. 433–36. The Members of the House were indisposed to moving on the proposals.

he had difficulty claiming the interest of the rest of Congress in considering. At length, the House of Representatives adopted 17 proposals; the Senate rejected two and reduced the remainder to twelve, which were accepted by the House and sent on to the States [10] where ten were ratified and the other two did not receive the requisite number of concurring States. [11]

***Bill of Rights and the States***.—One of the amendments which the Senate refused to accept—declared by Madison to be "the most valuable of the whole list" [12] —read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State." [13] In spite of this rejection, the contention that the Bill of Rights—or at least the first eight—was applicable to the States was repeatedly pressed upon the Supreme Court. By a long series of decisions, beginning with the opinion of Chief Justice Marshall in *Barron v. Baltimore*, [14] the argument was consistently rejected. Nevertheless, the enduring vitality of natural law concepts encouraged renewed appeals for judicial protection through application of the Bill of Rights. [15]

***The Fourteenth Amendment***.—Following the ratification of the Fourteenth Amendment, litigants disadvantaged by state laws and policies first resorted unsuccessfully to the privileges or immunities clause of § 1 for judicial protection. [16] Then, claimants seized upon the due process clause of the Fourteenth Amendment as guaranteeing certain fundamental and essential safeguards, without

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[10] Debate in the House began on July 21, 1789, and final passage was had on August 24, 1789. 1 ANNALS OF CONGRESS 660–779. The Senate considered the proposals from September 2 to September 9, but no journal was kept. The final version compromised between the House and Senate was adopted September 24 and 25. *See* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983–1167 (B. Schwartz ed., 1971).

[11] The two not ratified dealt with the ratio of population to representatives and with compensation of Members of Congress. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 184, 185 (1896). The latter proposal was deemed ratified in 1992 as the 27th Amendment.

[12] 1 ANNALS OF CONGRESS 755 (August 17, 1789).

[13] Id.

[14] 32 U.S. (7 Pet.) 243 (1833). *See also* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869).

[15] Thus, Justice Miller for the Court in Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662, 663 (1875): "It must be conceded that there are . . . rights in every free government beyond the control of the State . . . There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

[16] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

pressing the point of the applicability of the Bill of Rights.[17] It was not until 1887 that a litigant contended that, although the Bill of Rights had not limited the States, yet so far as they secured and recognized the fundamental rights of man they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment.[18] This case the Court decided on other grounds, but in a series of subsequent cases it confronted the argument and rejected it,[19] though over the dissent of the elder Justice Harlan, who argued that the Fourteenth Amendment in effect incorporated the Bill of Rights and made them effective restraints on the States.[20] Until 1947,

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[17] Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886). In *Hurtado*, in which the Court held that indictment by information rather than by grand jury did not offend due process, the elder Justice Harlan entered a long dissent arguing that due process preserved the fundamental rules of procedural justice as they had existed in the past, but he made no reference to the possibility that the Fourteenth Amendment due process clause embodied the grand jury indictment guarantee of the Fifth Amendment.

[18] Spies v. Illinois, 123 U.S. 131 (1887).

[19] In re Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892).

[20] In O'Neil v. Vermont, 144 U.S. 323, 370 (1892), Justice Harlan, with Justice Brewer concurring, argued "that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Field took the same position. Id. at 337. Thus, he said: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." Id. at 363. Justice Harlan reasserted this view in Maxwell v. Dow, 176 U.S. 581, 605 (1900) (dissenting opinion), and in Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion). Justice Field was no longer on the Court and Justice Brewer did not in either case join Justice Harlan as he had done in *O'Neil*.

this dissent made no headway,[21] but in *Adamson v. California*[22] a minority of four Justices adopted it. Justice Black, joined by three others, contended that his researches into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[23] Scholarly research stimulated by Justice Black's view tended to discount the validity of much of the history recited by him and to find in the debates in Congress and in the ratifying conventions no support for his contention.[24] Other scholars, going beyond the immediate debates, found in the pre-and post-Civil War period a substantial body of abolitionist constitutional thought which could be shown to have greatly influenced the principal architects, and observed that all three formulations of § 1, privileges and immunities, due process, and equal protection, had long been in use as shorthand descriptions for the principal provisions of the Bill of Rights.[25]

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[21] Cf. Palko v. Connecticut, 302 U.S. 319, 323 (1937), in which Justice Cardozo for the Court, including Justice Black, said: "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule." *See* Frankfurter, *Memorandum on 'Incorporation,' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). According to Justice Douglas' calculations, ten Justices had believed that the Fourteenth Amendment incorporated the Bill of Rights, but a majority of the Court at any one particular time had never been of that view. Gideon v. Wainwright, 372 U.S. 335, 345–47 (1963) (concurring opinion). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). It must be said, however, that many of these Justices were not consistent in asserting this view. Justice Goldberg probably should be added to the list. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).

[22] 332 U.S. 46 (1947).

[23] Id. at 74, Justice Black's contentions, id. at 68–123, were concurred in by Justice Douglas. Justices Murphy and Rutledge also joined this view but went further. "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Id. at 124. Justice Black rejected this extension as an invocation of "natural law due process." For examples in which he and Justice Douglas split over the application of nonspecified due process limitations, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); In re Winship, 397 U.S. 358 (1970).

[24] The leading piece is Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

[25] Graham, *Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WISC. L. REV. 479, 610; Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954); J. tenBROEK, EQUAL UNDER LAW (1965 enlarged ed.). The argu-

Unresolved perhaps in theory, the controversy in fact has been mostly mooted through the "selective incorporation" of a majority of the provisions of the Bill of Rights.[26] This process seems to have had its beginnings in an 1897 case in which the Court, without mentioning the just compensation clause of the Fifth Amendment, held that the Fourteenth Amendment's due process clause forbade the taking of private property without just compensation.[27] Then, in *Twining v. New Jersey*[28] the Court observed that "it is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law .... If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such nature that they are included in the conception of due process of law." And in *Gitlow v. New York*,[29] the Court in dictum said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." After quoting the language set out above from *Twining v. New Jersey*, the Court in 1932 said that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."[30] The doctrine of this period was best for-

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ment of these scholars tends to support either a "selective incorporation" theory or a fundamental rights theory, but it emphasized the abolitionist stress on speech and press as well as on jury trials as included in either construction.

[26] Williams v. Florida, 399 U.S. 78, 130–32 (1970) (Justice Harlan concurring in part and dissenting in part). The language of this process is somewhat abstruse. Justice Frankfurter objected strongly to "incorporation" but accepted other terms. "The cases say the First [Amendment] is 'made applicable' by the Fourteenth or that it is taken up into the Fourteenth by 'absorption,' but not that the Fourteenth 'incorporates' the First. This is not a quibble. The phrase 'made applicable' is a neutral one. The concept of 'absorption' is a progressive one, i.e., over the course of time something gets absorbed into something else. The sense of the word 'incorporate' implies simultaneity. One writes a document incorporating another by reference at the time of the writing. The Court has used the first two forms of language, but never the third." Frankfurter, *Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 747–48 (1965). It remains true that no opinion of the Court has used "incorporation" to describe what it is doing, cf. Washington v. Texas, 388 U.S. 14, 18 (1967); Benton v. Maryland, 395 U.S. 784, 794 (1969), though it has regularly been used by dissenters. *E.g.*, Pointer v. Texas, 380 U.S. 400, 408 (1965) (Justice Harlan); Williams v. Florida, 399 U.S. 78, 130 (1970) (Justice Harlan); Williams v. Florida, 399 U.S. at 143 (Justice Stewart).

[27] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[28] 211 U.S. 78, 99 (1908).

[29] 268 U.S. 652, 666 (1925).

[30] Powell v. Alabama, 287 U.S. 45, 68 (1932).

mulated by Justice Cardozo, who observed that the due process clause of the Fourteenth Amendment might proscribe a certain state procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[31] because certain proscriptions were "implicit in the concept of ordered 'liberty.'"[32]

As late as 1958, Justice Harlan was able to assert in an opinion of the Court that a certain state practice fell afoul of the Fourteenth Amendment because "[i]t is beyond debate that freedom 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, which embraces freedom of speech . . . ."[33]

But this process of "absorption" into due process of rights which happened also to be specifically named in the Bill of Rights came to be supplanted by a doctrine which had for a time coexisted with it, the doctrine of "selective incorporation." This doctrine holds that the due process clause incorporates the text of certain of the provisions of the Bill of Rights. Thus in *Malloy v. Hogan*,[34] Justice Brennan was enabled to say: "We have held that the guarantees of the First Amendment, . . . the prohibition of unreasonable

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[31] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[32] Palko v. Connecticut, 302 U.S. 319, 325 (1937). Justice Frankfurter was a strong advocate of this approach to the Fourteenth Amendment's due process clause. *E.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46, 59 (1947) (concurring opinion). Justice Harlan followed him in this regard. *E.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of the principles to void state practices, *see* Moore v. Dempsey, 261 U.S. 86 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Tumey v. Ohio, 273 U.S. 510 (1927); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, supra.

[33] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[34] 378 U.S. 1, 10 (1964). In Washington v. Texas, 388 U.S. 14, 18 (1967), Chief Justice Warren for the Court said that the Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." And in Benton v. Maryland, 395 U.S. 784, 794 (1969), Justice Marshall for the Court wrote: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." In this process, the Court has substantially increased the burden of showing that a procedure is fundamentally fair as carried by those who would defend a departure from the requirement of the Bill of Rights. That is, previously the Court has asked whether a civilized system of criminal justice could be imagined that did not accord the particular procedural safeguard. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937). The present approach is to ascertain whether a particular guarantee is fundamental in the light of the system existent in the United States, which can make a substantial difference. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). *Quaere*, the approach followed in Williams v. Florida, 399 U.S. 78 (1970), and Apodaca v. Oregon, 406 U.S. 404 (1972).

searches and seizures of the Fourth Amendment, . . . and the right to counsel guaranteed by the Sixth Amendment, . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." And Justice Clark was enabled to say: "First, this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment."[35] Similar language asserting that particular provisions of the Bill of Rights have been applied to the States through the Fourteenth Amendment's due process clause may be found in numerous cases.[36] Most of the provisions have now been so applied.[37]

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[35] Abington School District v. Schempp, 374 U.S. 203, 215 (1963). Similar formulations for the speech and press clauses appeared early. *E.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Schneider v. Irvington, 308 U.S. 147, 160 (1939). In Griffin v. California, 380 U.S. 609, 615 (1965), Justice Douglas stated the holding as "that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids" the state practice at issue.

[36] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Klopfer v. North Carolina, 386 U.S. 213 (1967); Duncan v. Louisiana, 391 U.S. 145 (1968); Ashe v. Swenson, 397 U.S. 436 (1970); Baldwin v. New York, 399 U.S. 66 (1970).

[37] The following list does not attempt to distinguish between those Bill of Rights provisions which have been held to have themselves been incorporated or absorbed by the Fourteenth Amendment and those provisions which the Court indicated at the time were applicable against the States because they were fundamental and not merely because they were named in the Bill of Rights. Whichever formulation was originally used, the former is now the one used by the Court. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

First Amendment—

Religion—

Free exercise: Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296, 300, 303 (1940).

Establishment: Everson. v. Board of Education, 330 U.S. 1, 3, 7, 8 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

Speech— Gitlow v. New York, 268 U.S. 652, 666 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

Press— Near v. Minnesota ex rel. Olson, 283 U.S. 697, 701 (1931).

Assembly— DeJonge v. Oregon, 299 U.S. 353 (1937).

Petition— DeJonge v. Oregon, 299 U.S. at 364, 365; Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941).

Fourth Amendment—

Search and seizure— Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961).

Fifth Amendment—

Double jeopardy— Benton v. Maryland, 395 U.S. 784 (1969); Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel).

Self-incrimination— Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965).

Just compensation— Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

Aside from the theoretical and philosophical considerations raised by the question whether the Bill of Rights is incorporated into the Fourteenth Amendment or whether due process subsumes certain fundamental rights that are named in the Bill of Rights, the principal relevant controversy is whether, once a guarantee or a right set out in the Bill of Rights is held to be a limitation on the States, the same standards which restrict the Federal Government restrict the States. The majority of the Court has consistently held that the standards are identical, whether the Federal Government or a State is involved,[38] and "has rejected the notion that the Fourteenth Amendment applies to the State only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[39] Those who have argued for the application of a dual-standard test of due process for the Federal Government and the

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Sixth Amendment—

Speedy trial— Klopfer v. North Carolina, 386 U.S. 213 (1967).

Public trial— In re Oliver, 333 U.S. 257 (1948).

Jury trial— Duncan v. Louisiana, 391 U.S. 145 (1968).

Impartial Jury— Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965).

Notice of charges— In re Oliver, 333 U.S. 257 (1948).

Confrontation— Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

Compulsory process— Washington v. Texas, 388 U.S. 14 (1967).

Counsel— Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

Eighth Amendment—

Cruel and unusual punishment— Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

*Provisions not applied are:*

Second Amendment—

Right to keep and bear arms—Cf. United States v. Cruikshank, 92 U.S. 542, 553 (1876); Presser v. Illinois, 116 U.S. 252, 265 (1886).

Third Amendment—

Quartering troops in homes—No cases.

Fifth Amendment—

Grand Jury indictment— Hurtado v. California, 110 U.S. 516 (1884).

Seventh Amendment—

Jury trial in civil cases in which value of controversy exceeds $20— *Cf.* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Justice Frankfurter concurring). *See* Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

Eighth Amendment—

Bail— *But see* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

Excessive Fines— *But see* Tate v. Short, 401 U.S. 395 (1971) (utilizing equal protection to prevent automatic jailing of indigents when others can pay a fine and avoid jail).

[38] Malloy v. Hogan, 378 U.S. 1, 10–11 (1964); Ker v. California, 374 U.S. 23 (1963); Griffin v. California, 380 U.S. 609 (1965); Baldwin v. New York, 399 U.S. 66 (1970); Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978); First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (specifically the First Amendment speech and press clauses); Crist v. Bretz, 437 U.S. 28 (1978); Burch v. Louisiana, 441 U S. 130 (1979).

[39] Williams v. Florida, 399 U.S. 78, 106–107 (1970) (Justice Black concurring in part and dissenting in part), quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964).

States, most notably Justice Harlan,[40] but including Justice Stewart,[41] Justice Fortas,[42] Justice Powell,[43] and Justice Rehnquist,[44] have not only rejected incorporation, but have also argued that, if the same standards are to apply, the standards previously developed with the Federal Government in mind would have to be diluted in order to give the States more leeway in the operation of their criminal justice systems.[45] The latter result seems to have been reached for application of the jury trial guarantee of the Sixth Amendment.[46]

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[40] Justice Harlan first took this position in Roth v. United States, 354 U.S. 476, 496 (1957) (concurring in part and dissenting in part). *See also* Ker v. California, 374 U.S. 23, 45–46 (1963) (concurring). His various opinions are collected in Williams v. Florida, 399 U.S. 78, 129–33 (1970) (concurring in part and dissenting in part).

[41] Williams v. Florida, 399 U.S. 78, 143–45 (1970) (concurring in part and dissenting in part); Duncan v. Louisiana, 391 U.S. 145, 173–83 (1968) (Justices Harlan and Stewart dissenting). *But see* Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (dissenting). *See also* Crist v. Bretz, 437 U.S. 28 (1978) (Justice Stewart writing opinion of the Court).

[42] Bloom v. Illinois, 391 U.S. 194, 211 (1968) (concurring).

[43] Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (concurring); Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (dissenting, joined by Chief Justice Burger and Justice Rehnquist). *But see* First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (rejecting theory in First Amendment context in opinion for the Court, joined by Chief Justice Burger).

[44] Buckley v. Valeo, 424 U.S. 1, 290 (1976) (concurring in part and dissenting in part); First National Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (dissenting). *See also* Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (joining Justice Powell's dissent). Justice Jackson was also apparently of this view. Beauharnais v. Illinois, 343 U.S. 250, 288 (1952) (dissenting).

[45] *E.g.*, Williams v. Florida, 399 U.S. 78, 129–38 (1970) (Justice Harlan concurring in part and dissenting in part); Bloom v. Illinois, 391 U.S. 194, 213–215 (1968) (Justice Fortas concurring). *But see* Williams v. Florida, 399 U.S. at 106–08 (Justice Black concurring in part and dissenting in part).

[46] Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404 (1972). *But cf.* Ballew v. Georgia, 435 U.S. 223 (1978).

# FIRST AMENDMENT

## RELIGION AND EXPRESSION

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# RELIGION AND FREE EXPRESSION

## FIRST AMENDMENT

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.

## RELIGION

### An Overview

Madison's original proposal for a bill of rights provision concerning religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[1] The language was altered in the House to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[2] In the Senate, the section adopted read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, . . ."[3] It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with its somewhat

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

[2] The committee appointed to consider Madison's proposals, and on which Madison served, with Vining as chairman, had rewritten the religion section to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." After some debate during which Madison suggested that the word "national" might be inserted before the word "religion" as "point[ing] the amendment directly to the object it was intended to prevent," the House adopted a substitute reading: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONGRESS 721–31 (August 15, 1789). On August 20, on motion of Fisher Ames, the language of the clause as quoted in the text was adopted. Id. at 766. According to Madison's biographer, "[t]here can be little doubt that this was written by Madison." I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800 at 271 (1950).

[3] This text, taken from the Senate Journal of September 9, 1789, appears in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (B. Schwartz ed., 1971). It was at this point that the religion clauses were joined with the freedom of expression clauses.

more indefinite "respecting" phraseology.[4] Debate in Congress lends little assistance in interpreting the religion clauses; Madison's position, as well as that of Jefferson, who influenced him, is fairly clear,[5] but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the States who voted to ratify is subject to speculation.

***Scholarly Commentary***.—The explication of the religion clauses by scholars in the nineteenth century gave a restrained sense of their meaning. Story, who thought that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice,"[6] looked upon the prohibition simply as an exclusion from the Federal Government of all power to act upon the subject. "The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by

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[4] 1 ANNALS OF CONGRESS 913 (September 24, 1789). The Senate concurred the same day. *See* I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800 271–72 (1950).

[5] During House debate, Madison told his fellow Members that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any Manner contrary to their conscience." 1 ANNALS OF CONGRESS 730 (August 15, 1789). That his conception of "establishment" was quite broad is revealed in his veto as President in 1811 of a bill which in granting land reserved a parcel for a Baptist Church in Salem, Mississippi; the action, explained President Madison, "comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 8 THE WRITINGS OF JAMES MADISON (G. Hunt, ed.) 132–33 (1904). Madison's views were no doubt influenced by the fight in the Virginia legislature in 1784–1785 in which he successfully led the opposition to a tax to support teachers of religion in Virginia and in the course of which he drafted his "Memorial and Remonstrance against Religious Assessments" setting forth his thoughts. Id. at 183–91; I. BRANT, JAMES MADISON—THE NATIONALIST 1780–1787 343–55 (1948). Acting on the momentum of this effort, Madison secured passage of Jefferson's "Bill for Religious Liberty". Id. at 354; D. MALONE, JEFFERSON THE VIRGINIAN 274–280 (1948). The theme of the writings of both was that it was wrong to offer public support of any religion in particular or of religion in general.

[6] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1865 (1833).

a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. 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." [7]

"Probably," Story also wrote, "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." [8] The object, then, of the religion clauses in this view was not to prevent general governmental encouragement of religion, of Christianity, but to prevent religious persecution and to prevent a national establishment. [9]

Not until the Supreme Court held the religion clauses applicable to the states in the 1940s [10] did it have much opportunity to interpret them. But it quickly gave them a broad construction. In *Everson v. Board of Education*, [11] the Court, without dissent on this point, declared that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but also those that "aid all religions." With respect to the Free Exercise Clause, it asserted in *Wisconsin v. Yoder* [12] that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

More recent decisions, however, evidence a narrower interpretation of the religion clauses. Indeed, in *Employment Division, Oregon Department of Human Resources v. Smith* [13] the Court abandoned its earlier view and held that the Free Exercise Clause *never* "relieve(s) an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" On the Establish-

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[7] Id. at 1873.

[8] Id. at 1868.

[9] For a late expounding of this view, *see* T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 224–25 (3d ed. 1898).

[10] Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Education, 330 U.S. 1 (1947) (establishment clause).

[11] 330 U.S. 1, 15 (1947). Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view.

[12] 406 U.S. 205, 215 (1972).

[13] 494 U.S. 872, 879 (1990).

ment Clause the Court has not wholly repudiated its previous holdings, but recent decisions have evidenced a greater sympathy for the view that the clause bars "preferential" governmental promotion of some religions but allows governmental promotion of all religion in general.[14] Nonetheless, the Court remains sharply split on how to interpret both clauses.

***Court Tests Applied to Legislation Affecting Religion.***— Before considering in detail the development of the two religion clauses by the Supreme Court, one should notice briefly the tests the Court has articulated to adjudicate the religion cases. At the same time it should be emphasized that the Court has noted that the language of earlier cases "may have [contained] too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[15] While later cases have relied on a series of well-defined, if difficult-to-apply, tests, the Court has cautioned that "the purpose [of the religion clauses] was to state an objective, not to write a statute."[16]

In 1802, President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State."[17] In *Reynolds v. United States*,[18] Chief Justice Waite for the Court characterized the phrase as "almost an authoritative declaration of the scope and effect of the amendment." In its first encounters with religion-based challenges to state programs, the Court looked to Jefferson's metaphor for substantial guidance.[19] But a metaphor may obscure as well as illuminate, and the Court soon began to emphasize neutrality and vol-

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[14] *See* Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); and Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002). The fullest critique of the Court's broad interpretation of the establishment clause was given by then-Justice Rehnquist in dissent in Wallace v. Jaffree, 472 U.S. 38, 91 (1985).

[15] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[16] 397 U.S. at 668.

[17] 16 THE WRITINGS OF THOMAS JEFFERSON 281 (A. Libscomb ed., 1904).

[18] 98 U.S. 145, 164 (1879).

[19] Everson v. Board of Education, 330 U.S. 1, 16 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 212 (1948); *cf.* Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Justice Black dissenting). In Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), Chief Justice Burger remarked that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." Similar observations were repeated by the Chief Justice in his opinion for the Court in Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

untarism as the standard of restraint on governmental action.[20] The concept of neutrality itself is "a coat of many colors,"[21] and three standards that seemingly could be stated in objective fashion emerged as tests of Establishment Clause validity. The first two standards emerged together. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[22] The third test emerged several years later and asks whether the governmental program results in "an excessive government entanglement with religion. The test is inescapably one of degree . . . [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[23] In 1971 these three tests were combined and restated in Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*,[24] and are frequently referred to by reference to that case name.

Although at one time accepted in principle by all of the Justices,[25] the tests have sometimes been difficult to apply,[26] have re-

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[20] Zorach v. Clauson, 343 U.S. 306, 314 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Sherbert v. Verner, 374 U.S. 398 (1963); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Justice Goldberg concurring); Walz v. Tax Comm'n, 397 U.S. 664, 694–97 (1970) (Justice Harlan concurring). In the opinion of the Court in the latter case, Chief Justice Burger wrote: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. at 669.

[21] Board of Education v. Allen, 392 U.S. 236, 249 (1968) (Justice Harlan concurring).

[22] Abington School District v. Schempp, 374 U.S. 203, 222 (1963).

[23] Walz v. Tax Comm'n, 397 U.S. 664, 674–75 (1970).

[24] 403 U.S. 602, 612–13 (1971).

[25] *E.g.*, Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissenting opinion); Stone v. Graham, 449 U.S. 39, 40 (1980), and id. at 43 (dissenting opinion).

[26] The tests provide "helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973), and are at best "guidelines" rather than a "constitutional caliper;" they must be used to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action." Inevitably, "no 'bright line' guidance is afforded." Tilton v. Richardson, 403 U.S. 672, 677–78 (1971). *See also* Committee

cently come under direct attack by some Justices,[27] and in several instances have not been applied at all by the Court.[28] Nonetheless, the Court employed the *Lemon* tests in several of its most recent establishment clause decisions,[29] and it remains the case that those tests have served as the primary standard of establishment clause validity for the past three decades. However, other tests have also been formulated and used. Justice Kennedy has proffered "coercion" as an alternative test for violations of the establishment clause,[30] and the Court has used that test as the basis for decision from time to time.[31] But that test has been criticized on the

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for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 & n.5, 773 n.31 (1973); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980), and id. at 663 (Justice Blackmun dissenting).

[27] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Justice Scalia, joined by Chief Justice Rehnquist, dissenting) (advocating abandonment of the "purpose" test); Wallace v. Jaffree, 472 U.S. 38, 108–12 (1985) (Justice Rehnquist dissenting); Aguilar v. Felton, 473 U.S. 402, 426–30 (1985) (Justice O'Connor, dissenting) (addressing difficulties in applying the entanglement prong); Roemer v. Maryland Bd. of Public Works, 426 U.S. 736, 768–69 (Justice White concurring in judgment) (objecting to entanglement test). Justice Kennedy has also acknowledged criticisms of the *Lemon* tests, while at the same time finding no need to reexamine them. *See, e.g.*, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655–56 (1989). At least with respect to public aid to religious schools, Justice Stevens would abandon the tests and simply adopt a "no-aid" position. Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980).

[28] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers on the basis of historical practice); Lee v. Weisman, 505 U.S. 577, 587 (1992) (rejecting a request to reconsider *Lemon* because the practice of invocations at public high school graduations was invalid under established school prayer precedents). The Court has also held that the tripartite test is not applicable when law grants a denominational preference, distinguishing between religions; rather, the distinction is to be subjected to the strict scrutiny of a suspect classification. Larson v. Valente, 456 U.S. 228, 244–46 (1982). *See also* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding provision of sign-language interpreter to deaf student attending parochial school); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994) (invalidating law creating special school district for village composed exclusively of members of one religious sect); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (upholding the extension of a university subsidy of student publications to a student religious publication).

[29] Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the *Lemon* tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional under the *Lemon* tests as well as under the coercion and endorsement tests a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); and Mitchell v. Helms, 530 U.S. 793 (2000) (upholding under the *Lemon* tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).

[30] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy concurring in part and dissenting in part); and Lee v. Weisman, 505 U.S. 577 (1992).

[31] Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

grounds it would eliminate a principal distinction between the establishment clause and the free exercise clause and make the former a "virtual nullity."[32] Justice O'Connor has suggested "endorsement" as a clarification of the *Lemon* test, i.e., that the establishment clause is violated if the government intends its action to endorse or disapprove of religion or if a "reasonable observer" would perceive the government's action as such an endorsement or disapproval.[33] But others have criticized that test as too amorphous to provide certain guidance.[34] Justice O'Connor has also suggested that it may be inappropriate to try to shoehorn all establishment clause cases into one test, and has called instead for recognition that different contexts may call for different approaches.[35] In two of its most recentestablishment clause decisions, it might be noted, the Court employed all three tests in one decision[36] and relied primarily on a modified version of the *Lemon* tests in the other.[37]

In interpreting and applying the Free Exercise Clause, the Court has consistently held religious beliefs to be absolutely immune from governmental interference.[38] But it has used a number of standards to review government action restrictive of religiously motivated conduct, ranging from formal neutrality[39] to clear and present danger[40] to strict scrutiny.[41] For cases of intentional governmental discrimination against religion, the Court still employs strict scrutiny[42] But for most other free exercise cases it has now reverted to a standard of formal neutrality. "[T]he right of free exercise," it recently stated, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applica-

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

[33] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (concurring); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 625 (1989) (concurring); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712 (1994) (concurring).

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

[35] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 718–723 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

[36] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[37] Mitchell v. Helms, 530 U.S. 793 (2000).

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

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

[40] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[41] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[42] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

bility on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[43]

***Government Neutrality in Religious Disputes***.—One value that both clauses of the religion section serve is to enforce governmental neutrality in deciding controversies arising out of religious disputes. Schism sometimes develops within churches or between a local church and the general church, resulting in secession or expulsion of one faction or of the local church. A dispute over which body is to have control of the property of the church will then often be taken into the courts. It is now established that both religion clauses prevent governmental inquiry into religious doctrine in settling such disputes, and instead require courts simply to look to the decision-making body or process in the church and to give effect to whatever decision is officially and properly made.

The first such case was *Watson v. Jones*,[44] which was decided on common-law grounds in a diversity action without explicit reliance on the First Amendment. A constitutionalization of the rule was made in *Kedroff v. St. Nicholas Cathedral*,[45] in which the Court held unconstitutional a state statute that recognized the autonomy and authority of those North American branches of the Russian Orthodox Church which had declared their independence from the general church. Recognizing that *Watson v. Jones* had been decided on nonconstitutional grounds, the Court thought nonetheless that the opinion "radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[46] The power of civil courts to resolve church property disputes was severely circumscribed, the Court held, because to permit resolution of doctrinal disputes in court was to jeopardize First Amendment values. What a court must do, it was held, is to look at the church rules: if the church is a hierarchical one which reposes determination of ecclesiastical issues in a certain body, the resolution by that body is determinative, while if the church is a congregational one prescribing action by a majority vote, that determination will prevail.[47] On the other hand, a court

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

[44] 80 U.S. (13 Wall.) 679 (1872).

[45] 344 U.S. 94 (1952). *Kedroff* was grounded on the Free Exercise Clause. Id. at 116. But the subsequent cases used a collective "First Amendment" designation.

[46] 344 U.S. at 116. On remand, the state court adopted the same ruling on the merits but relied on a common-law rule rather than the statute. This too was struck down. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

[47] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 450–51 (1969); Maryland and Virginia Eldership of the Churches of God v.

confronted with a church property dispute could apply "neutral principles of law, developed for use in all property disputes," when to do so would not require resolution of doctrinal issues.[48] In a later case the Court elaborated on the limits of proper inquiry, holding that an argument over a matter of internal church government, the power to reorganize the dioceses of a hierarchical church in this country, was "at the core of ecclesiastical affairs" and a court could not interpret the church constitution to make an independent determination of the power but must defer to the interpretation of the church body authorized to decide.[49]

In *Jones v. Wolf*,[50] however, a divided Court, while formally adhering to these principles, appeared to depart in substance from their application. A schism had developed in a local church which was a member of a hierarchical church, and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the "true congregation" of the local church and awarded them authority over it. But rather than requiring deference to the decision of the church body, the Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church's constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregational majority.[51] Further, the Court held, the First Amendment did not prevent the state court from applying a presumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the

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Church of God at Sharpsburg, 396 U.S. 367 (1970). For a similar rule of neutrality in another context, *see* United States v. Ballard, 322 U.S. 78 (1944) (denying defendant charged with mail fraud through dissemination of purported religious literature the right to present to the jury evidence of the truthfulness of the religious views he urged).

[48] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God of Sharpsburg, 396 U.S. 367, 368 (1970). *See also* id. at 368–70 (Justice Brennan concurring).

[49] The Serbian Eastern Orthodox Diocese v. Dionisije Milivojevich, 426 U.S. 697, 720–25 (1976). In Gonzalez v. Archbishop, 280 U.S. 1 (1929), the Court had permitted limited inquiry into the legality of the actions taken under church rules. The Serbian Eastern Court disapproved of this inquiry with respect to concepts of "arbitrariness," although it reserved decision on the "fraud" and "collusion" exceptions. 426 U.S. at 708–20.

[50] 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

[51] 443 U.S. at 602-06.

local church is to be determined by some other means as expressed perhaps in the general church charter.[52] The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted it to ignore the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.[53]

Thus, it is unclear where the Court is on this issue. *Jones v. Wolf* restated the rule that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but by approving a neutral principles inquiry which in effect can filter out the doctrinal issues underlying a church dispute, the Court seems to have approved at least an indirect limitation of the authority of hierarchical churches.[54]

**Establishment of Religion**

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[55] "[The] Court has long held that the First Amendment reaches more than classic, 18th century establishments."[56] However, the Court's reading of the clause has never resulted in the barring of all assistance which aids, however incidentally, a religious institution. Outside this area, the decisions generally have more rigorously prohibited what may be deemed governmental promotion of religious doctrine.

***Financial Assistance to Church-Related Institutions.***— The Court's first opportunity to rule on the validity of governmental financial assistance to a religiously affiliated institution occurred in 1899, the assistance being a federal grant for the construction of a wing of a hospital owned and operated by a Roman

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[52] 443 U.S. at 606-10. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

[53] 443 U.S. at 610.

[54] The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation," and this would appear to constitute as definitive a ruling as the Court's suggested alternatives. 443 U.S. at 606.

[55] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools .... In my opinion both avenues were closed by the Constitution." Everson v. Board of Education, 330 U.S. 1, 63 (1947) (Justice Rutledge dissenting).

[56] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 709 (1994) (citing Torcaso v. Watkins, 367 U.S. 488, 492–95 (1961)).

Catholic order which was to be devoted to the care of the poor. The Court viewed the hospital primarily as a secular institution so chartered by Congress and not as a religious or sectarian body, and thus avoided the constitutional issue.[57] But when the right of local authorities to provide free transportation for children attending parochial schools reached the Court, it adopted a very broad view of the restrictions imposed by the establishment clause. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State."[58]

But despite this interpretation, the majority sustained the provision of transportation. While recognizing that "it approaches the verge" of the State's constitutional power, still, Justice Black thought, the transportation was a form of "public welfare legislation" which was being extended "to all its citizens without regard to their religious belief."[59] "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."[60] Transportation benefited the

[57] Bradfield v. Roberts, 175 U.S. 291 (1899). *Cf.* Abington School District v. Schempp, 374 U.S. 203, 246 (1963) (Justice Brennan concurring). In Cochran v. Louisiana Board of Education, 281 U.S. 370 (1930), a state program furnishing textbooks to parochial schools was sustained under a due process attack without reference to the First Amendment. *See also* Quick Bear v. Leupp, 210 U.S. 50 (1908) (statutory limitation on expenditures of public funds for sectarian education does not apply to treaty and trust funds administered by the Government for Indians).

[58] Everson v. Board of Education, 330 U.S. 1, 15–16 (1947).

[59] 330 U.S. at 16.

[60] 330 U.S. at 17. It was in *Everson* that the Court, without much discussion of the matter, held that the Establishment Clause applied to the States through the Fourteenth Amendment and limited both national and state governments equally.

child, just as did police protection at crossings, fire protection, connections for sewage disposal, public highways and sidewalks. Thus was born the "child benefit" theory.[61]

The Court in 1968 relied on the "child benefit" theory to sustain state loans of textbooks to parochial school students.[62] Utilizing the secular purpose and effect tests,[63] the Court determined that the purpose of the loans was the "furtherance of the educational opportunities available to the young," while the effect was hardly less secular. "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."[64]

From these beginnings, the case law on the discretion of state and federal governmental assistance to sectarian elementary and secondary schools as well as other religious entities has multiplied. Through the 1970s, at least, the law became as restrictive in fact as the dicta in the early cases suggested, save for the provision of some assistance to children under the "child benefit" theory. Since that time the Court has gradually adopted a more accommodating approach. It has upheld direct aid programs that have been of only marginal benefit to the religious mission of the recipient elementary and secondary schools, tax benefit and scholarship aid programs where the schools have received the assistance as the result of the independent decisions of the parents or students who initially receive the aid, and in its most recent decisions direct aid programs which substantially benefit the educational function of such schools. Indeed, in its most recent decisions the Court has overturned several of the most restrictive school aid precedents from its earlier jurisprudence. Throughout, the Court has allowed

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Id. at 8, 13, 14–16. The issue is discussed at some length by Justice Brennan in Abington School Dist. v. Schempp, 374 U.S. 203, 253–58 (1963).

[61] *And see* Zorach v. Clauson, 343 U.S. 306, 312–13 (1952) (upholding program allowing public schools to excuse students to attend religious instruction or exercises).

[62] Board of Education v. Allen, 392 U.S. 236 (1968).

[63] *See* discussion under "Court Tests Applied to Legislation Affecting Religion," supra.

[64] 392 U.S. at 243–44 (1968).

greater discretion with respect to aid programs benefiting religiously affiliated colleges and social services agencies.

A secular purpose is the first requirement of the *Lemon* tripartite test to sustain the validity of legislation touching upon religion, and upon this standard the Justices display little disagreement. There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public school system that would accompany the financial failure of private schools.[65]

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

In applying the primary effect and excessive entanglement tests, the Court has drawn a distinction between public aid programs that directly aid sectarian entities and those that do so only indirectly. Aid provided directly, the Court has said, must be limited to secular use lest it have a primary effect of advancing religion. The establishment clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[66] The government may provide direct support to the secular services and programs sponsored by religious entities, but it cannot directly subsidize such organizations' religious activities or proselytizing.[67] Thus, the Court has struck down as unconstitutional a program providing grants for the maintenance and repair of sectarian elementary and secondary school facilities, because the grants had no restrictions to prevent their use for such purposes as defraying the costs of building or maintaining

[65] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). *See also* id. at 805 (Chief Justice Burger dissenting), 812–13 (Justice Rehnquist dissenting), 813 (Justice White dissenting). *And see* Wolman v. Walter, 433 U.S. 229, 240 (1977) (plurality opinion); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653–54 (1980), and id. at 665 (Justice Blackmun dissenting).

[66] Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985).

[67] Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Mitchell v. Helms, 530 U.S. 793 (2000).

chapels or classrooms in which religion is taught,[68] and a program subsidizing field trip transportation for children attending sectarian elementary and secondary schools, because field trips are inevitably interwoven with the schools' educational functions.[69]

But the Court has not imposed a secular use limitation on aid programs that benefit sectarian entities only indirectly, i.e., as the result of decisions by someone other than the government itself. The initial beneficiaries of the public aid must be determined on the basis of religiously neutral criteria, and they must have a genuine choice about whether to use the aid at sectarian or nonsectarian entities. But where those standards have been met, the Court has upheld indirect aid programs even though the sectarian institutions that ultimately benefit may use the aid for religious purposes. Moreover, the Court has gradually broadened its understanding of what constitutes a genuine choice so that now most voucher or tax benefit programs benefiting the parents of children attending sectarian schools seem able to pass constitutional muster. Thus, the Court initially struck down tax benefit and educational voucher programs where the initial beneficiaries were limited to the universe of parents of children attending sectarian schools and where the aid, as a consequence, was virtually certain to go to sectarian schools.[70] But subsequently it has upheld a state program allowing taxpayers to take a deduction from their gross income for educational expenses, including tuition, incurred in sending their children to public or private schools, because the deduction was "available for educational expenses incurred by all parents" and the aid became available to sectarian schools "only as a result of numerous, private choices of individual parents of school-age children."[71] It has upheld for the same reasons a vocational rehabilitation program that made a grant to a blind person for training at a Bible college for a religious vocation[72] and another program that provided a sign-language interpreter for a deaf student attending a sectarian secondary school.[73] Most recently, it upheld as constitutional a tuition voucher program made available to the parents of children attending failing public schools, notwithstanding the fact that most of the private schools at which the

[68] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

[69] Wolman v. Walter, 433 U.S. 229 (1977).

[70] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) and Sloan v. Lemon, 413 U.S. 825 (1973).

[71] Mueller v. Allen, 463 U.S. 388, 397–399 (1983).

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

[73] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

vouchers could be used were sectarian in nature.[74] Whether the parents had a genuine choice among religious and secular options in using the vouchers, the Court said, had to be evaluated on the basis not only of the private schools where the vouchers could be redeemed but also by examining the full range of educational options open to them, including various public school options.

In applying the primary effect and excessive entanglement tests, the Court has also, until recently, drawn a distinction between religious institutions that are pervasively sectarian and those that are not. Organizations that are permeated by a religious purpose and character in all that they do have often been held by the Court to be constitutionally ineligible for direct public aid. Direct aid to religion-dominated institutions inevitably violates the primary effect test, the Court has said, because such aid generally cannot be limited to secular use in such entities and, as a consequence, it has a primary effect of advancing religion.[75] Moreover, any effort to limit the use of public aid by such entities to secular use inevitably falls afoul of the excessive entanglement test, according to the Court, because the risk of diversion of the aid to religious use is so great that it necessitates an intrusive government monitoring.[76] But direct aid to religious entities that are not pervasively sectarian, the Court has held, is constitutionally permissible, because the secular functions of such entities can be distinguished from their religious ones for purposes of public aid and because the risk of diversion of the aid to religious use is attenuated and does not require an intrusive government monitoring. As a practical matter, this distinction has had its most serious consequences for programs providing aid directly to sectarian elementary and secondary schools, because the Court has, until recently, presumed such schools to be pervasively sectarian and direct aid, as a consequence, to be severely limited.[77] The Court has presumed to the contrary with respect to religiously-affiliated colleges, hospitals,

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[74] Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

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

[76] See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971) (subsidies for teachers of secular subjects) and Aguilar v. Felton, 473 U.S. 402 (1985) (provision of remedial and enrichment services by public school teachers to eligible children attending sectarian elementary and secondary schools on the premises of those schools).

[77] See cases cited in the preceding two footnotes.

and social services providers; and as a consequence it has found direct aid programs to such entities to be permissible.[78]

In its most recent decisions the Court has modified both the primary effect and excessive entanglement prongs of the *Lemon* test as they apply to aid programs directly benefiting sectarian elementary and secondary schools; and in so doing it has overturned several prior decisions imposing tight constraints on aid to pervasively sectarian institutions. In *Agostini v. Felton*[79] the Court, in a 5–4 decision, abandoned the presumptions that public school teachers giving instruction on the premises of sectarian elementary and secondary schools will be so affected by the religiosity of the environment that they will inculcate religion and that, consequently, an excessively entangling monitoring of their services is constitutionally necessary. In *Mitchell v. Helms*,[80] in turn, it abandoned the presumptions that such schools are so pervasively sectarian that their secular educational functions cannot be differentiated from their religious educational functions and that direct aid to their educational functions, consequently, violates the establishment clause. In reaching these conclusions and upholding the aid programs in question, the Court overturned its prior decision in *Aguilar v. Felton*[81] and parts of its decisions in *Meek v. Pittenger*,[82] *Wolman v. Walter*,[83] and *Grand Rapids School District v. Ball*.[84]

Thus, the Court's jurisprudence concerning public aid to sectarian organizations has evolved over time, particularly as it concerns public aid to sectarian elementary and secondary schools. That evolution has given some uncertainty to the rules that apply to any given form of aid; and in both *Agostini v. Felton*[85] and *Mitchell v. Helms*[86] the Court left open the possibility of a further

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

[79] 521 U.S. 203 (1997).

[80] 530 U.S. 793 (2000).

[81] 473 U.S. 402 (1985).

[82] 421 U.S. 349 (1975).

[83] 433 U.S. 229 (1977).

[84] 473 U.S. 373 (1985).

[85] 521 U.S. 203 (1994).

[86] 530 U.S. 793 (2000).

evolution in its thinking. Nonetheless, the cases give substantial guidance.

State aid to church-connected schools was first found to have gone over the "verge"[87] in *Lemon v. Kurtzman*.[88] Involved were two state statutes, one of which authorized the "purchase" of secular educational services from nonpublic elementary and secondary schools, a form of reimbursement for the cost to religious schools of the teaching of such things as mathematics, modern foreign languages, and physical sciences, and the other of which provided salary supplements to nonpublic school teachers who taught courses similar to those found in public schools, used textbooks approved for use in public schools, and agreed not to teach any classes in religion. Accepting the secular purpose attached to both statutes by the legislature, the Court did not pass on the secular effect test, but found excessive entanglement. This entanglement arose because the legislature "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[89] Because the schools concerned were religious schools, because they were under the control of the church hierarchy, because the primary purpose of the schools was the propagation of the faith, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [on religious utilization of aid] are obeyed and the First Amendment otherwise respected."[90] Moreover, the provision of public aid inevitably will draw religious conflict into the public arena as the contest for adequate funding goes on. Thus, the Court held, both programs were unconstitutional because the state supervision necessary to ensure a secular purpose and a secular effect inevitably involved the state authorities too deeply in the religious affairs of the aided institutions.[91]

Two programs of assistance through provision of equipment and services to private, including sectarian, schools were invalidated in *Meek v. Pittenger*.[92] First, the loan of instructional mate-

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[87] Everson v. Board of Education, 330 U.S. 1, 16 (1947).

[88] 403 U.S. 602 (1971).

[89] 403 U.S. at 619.

[90] 403 U.S. at 619.

[91] Only Justice White dissented. 403 U.S. at 661. In Lemon v. Kurtzman, 411 U.S. 192 (1973), the Court held that the State could reimburse schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. *But see* New York v. Cathedral Academy, 434 U.S. 125 (1977).

[92] 421 U.S. 349 (1975). Chief Justice Burger and Justices Rehnquist and White dissented. Id. at 385, 387.

rial and equipment directly to qualifying nonpublic elementary and secondary schools was voided as an impermissible extension of assistance of religion. This conclusion was reached on the basis that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions and the assistance was available without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion.[93] Second, the provision of auxiliary services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court thought the program had to be policed closely to ensure religious neutrality and it saw no way that could be done without impermissible entanglement. The fact that the teachers would, under this program and unlike one of the programs condemned in *Lemon v. Kurtzman*, be public employees rather than employees of the religious schools and possibly under religious discipline was insufficient to permit the State to fail to make certain that religion was not inculcated by subsidized teachers.[94]

The Court in two 1985 cases again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District v. Ball*,[95] the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers,[96] and the other taught after regular school hours by part-time "public" teachers otherwise employed as full-time teachers by the sectarian school.[97] Both programs, the Court held, had the effect of promoting religion in three distinct ways. The teachers might be influenced by the "pervasively sectarian nature"

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[93] 421 U.S. at 362-66. *See also* Wolman v. Walter, 433 U.S. 229, 248–51 (1977). The Court in Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661–62 (1980), held that *Meek* did not forbid all aid that benefited religiously pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. *See also* Wolman v. Walter, 433 U.S. at 262 (Justice Powell concurring in part and dissenting in part).

[94] Meek v. Pittenger, 421 U.S. 349, 367–72 (1975). *But see* Wolman v. Walter, 433 U.S. 229, 238–48 (1977).

[95] 473 U.S. 373 (1985).

[96] The vote on this "Shared Time" program was 5–4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

[97] The vote on this "Community Education" program was 7–2, Chief Justice Burger and Justice O'Connor concurring with the "Shared Time" majority.

of the environment and might "subtly or overtly indoctrinate the students in particular religious tenets at public expense"; use of the parochial school classrooms "threatens to convey a message of state support for religion" through "the symbolic union of government and religion in one sectarian enterprise"; and "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."[98] In *Aguilar v. Felton*,[99] the Court invalidated a program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This "pervasive monitoring" did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."[100]

A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between secular and potentially religious services the costs of which would be reimbursed.[101] Similarly, a program of direct monetary grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[102] But a plan of direct monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and which contained safeguards against reli-

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[98] 473 U.S. at 397.

[99] 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan's opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissenting.

[100] 473 U.S. at 413.

[101] Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973). Justice White dissented, id. at 482. Among the services reimbursed was the cost of preparing and grading examinations in the nonpublic schools by the teachers there. In New York v. Cathedral Academy, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in Levitt.

[102] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774–80 (1973). Chief Justice Burger and Justice Rehnquist concurred, id. at 798, and Justice White dissented. Id. at 820.

gious utilization of the tests was sustained even though the Court recognized the incidental benefit to the schools.[103]

The "child benefit" theory, under which it is permissible for government to render ideologically neutral assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools, has not proved easy to apply. A number of different forms of assistance to students were at issue in *Wolman v. Walter*.[104] The Court approved the following: standardized tests and scoring services used in the public schools, with private school personnel not involved in the test drafting and scoring; speech, hearing, and psychological diagnostic services provided in the private schools by public employees; and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious utilization. But while the Court adhered to its ruling permitting the States to loan secular textbooks used in the public schools to pupils attending religious schools,[105] it declined to extend the precedent to permit the loan to pupils or their parents of instructional materials and equipment, such as projectors, tape recorders, maps, globes and science kits, although they were identical to those used in the

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[103] Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id. at 662, 671. The dissenters thought that the authorization of direct reimbursement grants was distinguishable from previously approved plans that had merely relieved the private schools of the costs of preparing and grading state-prepared tests. *See* Wolman v. Walter, 433 U.S. 229, 238–41 (1977).

[104] 433 U.S. 229 (1977). The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus requiring little supervision that would give rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id. at 243, quoting Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. 433 U.S. at 255. Justice Marshall would have approved only the diagnostic services, id. at 256, while Justice Stevens would generally approve closely administered public health services. Id. at 264.

[105] Meek v. Pittenger, 421 U.S. 349, 359–72 (1975); Wolman v. Walter, 433 U.S. 229, 236–38 (1977). *Allen* was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." There was "a tension" between Nyquist, Meek, and Wolman, on the one hand, and Allen on the other; while Allen was to be followed "as a matter of stare decisis," the "presumption of neutrality" embodied in Allen would not be extended to other similar assistance. Id. at 251 n.18. A more recent Court majority revived the Allen presumption, however, applying it to uphold tax deductions for tuition and other school expenses in Mueller v. Allen, 463 U.S. 388 (1983). Justice Rehnquist wrote the Court's opinion, joined by Justices White, Powell, and O'Connor, and by Chief Justice Burger.

public schools.[106] Nor was a State permitted to expend funds to pay the costs to religious schools of field trip transportation such as was provided to public school students.[107]

The Court's more recent decisions, however, have rejected the reasoning and overturned the results of several of these decisions. In two rulings the Court reversed course with respect to the constitutionality of public school personnel providing educational services on the premises of pervasively sectarian schools. First, in *Zobrest v. Catalina Foothills School District*[108] the Court held the public subsidy of a sign-language interpreter for a deaf student attending a parochial school to create no primary effect or entanglement problems. The payment did not relieve the school of an expense that it would otherwise have borne, the Court stated, and the interpreter had no role in selecting or editing the content of any of the lessons. Reviving the child benefit theory of its earlier cases, the Court said that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."

Secondly, and more pointedly, the Court in *Agostini v. Felton*[109] overturned both the result and the reasoning of its decision in *Aguilar v. Felton*[110] striking down the Title I program as administered in New York City as well as the analogous parts of its decisions in *Meek v. Pittenger*[111] and *Grand Rapids School District v. Ball*.[112] The assumptions on which those decisions had rested, the Court explicitly stated, had been "undermined" by its more recent decisions. Decisions such as *Zobrest* and *Witters v. Washington Department of Social Services*,[113] it said, had repudiated the notions that the placement of a public employee in a sectarian school creates an "impermissible symbolic link" between government and religion, that "all government aid that directly aids the educational function of religious schools" is constitutionally forbidden, that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, and that "pervasive monitoring of [such] teachers is required." The proper criterion under the pri-

[106] 433 U.S. at 248–51. *See also* id. at 263–64 (Justice Powell concurring in part and dissenting in part).

[107] 433 U.S. at 252-55. Justice Powell joined the other three dissenters who would have approved this expenditure. Id. at 264.

[108] 509 U.S. 1 (1993).

[109] 521 U.S. 203 (1997).

[110] 473 U.S. 402 (1985).

[111] 421 U.S. 349 (1975).

[112] 473 U.S. 373 (1985).

[113] 474 U.S. 481 (1986).

mary effect prong of the *Lemon* test, the Court asserted, is religious neutrality, i.e., whether "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[114] Finding the Title I program to meet that test, the Court concluded that "accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law."[115]

Most recently, in *Mitchell v. Helms*[116] the Court abandoned the presumptions that religious elementary and secondary schools are so pervasively sectarian that they are constitutionally ineligible to participate in public aid programs directly benefiting their educational functions and that direct aid to such institutions must be subject to an intrusive and constitutionally fatal monitoring. At issue in the case was a federal program providing funds to local educational agencies to provide instructional materials and equipment such as computer hardware and software, library books, movie projectors, television sets, VCRs, laboratory equipment, maps, and cassette recordings to public and private elementary and secondary schools. Virtually identical programs had previously been held unconstitutional by the Court in *Meek v. Pittenger*[117] and *Wolman v. Walter*.[118] But in this case the Court overturned those decisions and held the program to be constitutional.

The Justices could agree on no majority opinion in *Mitchell* but instead joined in three different opinions. The opinions of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, and of Justice O'Connor, joined by Justice Breyer, found the program constitutional. They agreed that to pass muster under the primary effect prong of the *Lemon* test direct public aid has to be secular in nature and distributed on the basis of religiously neutral criteria. They also agreed, in contrast to past rulings, that sectarian elementary and secondary schools should not be deemed constitutionally ineligible for direct aid on the grounds their secular

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[114] In *Agostini* the Court nominally eliminated entanglement as a separate prong of the *Lemon* test. "[T]he factors we use to assess whether an entanglement is 'excessive,'" the Court stated, "are similar to the factors we use to examine 'effect.'" "Thus," it concluded, "it is simplest to recognize why entanglement is significant and treat it as we did in *Walz* as an aspect of the inquiry into a statute's effect." Agostini v. Felton, supra, at 232, 233.

[115] Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the Court's ruling, contending that the establishment clause mandates a "flat ban on [the] subsidization" of religion (521 U.S. at 243) and that the Court's contention that recent cases had undermined the reasoning of *Aguilar* was a "mistaken reading" of the cases. Id. at 248. Justice Breyer joined in the second dissenting argument.

[116] 530 U.S. 793 (2000).

[117] 421 U.S. 349 (1975).

[118] 433 U.S. 229 (1977).

educational functions are "inextricably intertwined" with their religious educational functions, i.e,, that they are pervasively sectarian. But their rationales for the program's constitutionality then diverged. For Justice Thomas it was sufficient that the instructional materials were secular in nature and were distributed according to neutral criteria. It made no difference whether the schools used the aid for purposes of religious indoctrination or not. But that was not sufficient for Justice O'Connor. She adhered to the view that direct public aid has to be limited to secular use by the recipient institutions. She further asserted that a limitation to secular use could be honored by the teachers in the sectarian schools and that the risk that the aid would be used for religious purposes was not so great as to require an intrusive and entangling government monitoring. [119]

Justice Souter, joined by Justices Stevens and Ginsburg, dissented on the grounds the establishment clause bars "aid supporting a sectarian school's religious exercise or the discharge of its religious mission." Adhering to the "substantive principle of no aid" first articulated in the *Everson* case, he contended that direct aid to pervasively sectarian institutions inevitably results in the diversion of the aid for purposes of religious indoctrination. He further argued that the aid in this case had been so diverted.

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

The Court has similarly loosened the constitutional restrictions on public aid programs indirectly benefiting sectarian elementary and secondary schools. Initially, the Court in 1973 struck down substantially similar programs from New York and Pennsylvania providing for tuition reimbursement to parents of religious school children. New York's program provided reimbursements out of general tax revenues for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who sent their children to nonpublic elemen-

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

tary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance to sectarian institutions with no attempt to segregate the benefits so that religion was not advanced.[120]

New York had also enacted a separate program providing tax relief for low-income parents not qualifying for the tuition reimbursements; here relief was in the form of a deduction or credit bearing no relationship to the amounts of tuition paid, but keyed instead to adjusted gross income. This too was invalidated in *Nyquist*. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition [reimbursement] grant. . . . The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'"[121] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[122]

Two subsidiary arguments were rejected by the Court in these cases. First, it had been argued that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses," but explained that the tension is ordinarily resolved through application of the "neutrality" principle: government may neither advance nor inhibit religion. The tuition program ines-

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[120] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–798 (1973) (New York); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania). The Court distinguished *Everson* and *Allen* on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. 413 U.S. at 781–82. Chief Justice Burger thought that Everson and Allen were controlling. Id. at 798.

[121] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–94 (1973). The quoted paragraph is at 790–91.

[122] 413 U.S. at 791-94. Principally, *Walz* was said to be different because of the long-standing nature of the property tax exemption there dealt with, because the *Walz* exemption was granted in the spirit of neutrality while the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement while the credit would promote more.

capably advanced religion and thereby violated this principle.[123] In the Pennsylvania case, it was argued that because the program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones, the portion respecting the former parents was valid and "parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious.... The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."[124]

The limits of the *Nyquist* holding were clarified in 1983. In *Mueller v. Allen*,[125] the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it "vitally different from the scheme struck down in *Nyquist*," and more similar to the benefits upheld in *Everson* and *Allen* as available to *all* schoolchildren.[126] The Court declined to look behind the "facial neutrality" of the law and consider empirical evidence of its actual impact, citing a need for "certainty" and the lack of "principled standards" by which to evaluate such evidence.[127] Also important to the Court's refusal to

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[123] 413 U.S. at 788-89. *But cf.* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (due to Free Exercise Clause, Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions").

[124] Sloan v. Lemon, 413 U.S. 825, 833–35 (1973). In any event, the Court sustained the district court's refusal to sever the program and save that portion as to children attending non-sectarian schools on the basis that since so large a portion of the children benefitted attended religious schools it could not be assumed the legislature would have itself enacted such a limited program.

In Wheeler v. Barrera, 417 U.S. 402 (1974), the Court held that States receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

[125] 463 U.S. 388 (1983).

[126] 463 U.S. at 398. *Nyquist* had reserved the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 782–83 n.38.

[127] 463 U.S. at 401. Justice Marshall's dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most significant, and that the deduction as a whole "was little more that a subsidy of tuition masquerading as a subsidy of general educational expenses." 463 U.S. at 408–09. *Cf.* Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated were sectarian in nature; and Widmar v. Vincent, 454 U.S. 263, 275 (1981), holding that a college's open forum policy had no primary effect of advancing religion "[a]t

consider the alleged disproportionate benefits to parents of parochial schools was the assertion that, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools." [128]

A second factor important in *Mueller*, present but not controlling in *Nyquist*, was that the financial aid was provided to the parents of schoolchildren rather than to the school, and thus in the Court's view was "attenuated" rather than direct; since aid was "available only as a result of decisions of individual parents," there was no "imprimatur of state approval." The Court noted that, with the exception of *Nyquist*, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves." [129] Thus *Mueller* seemingly stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.

The Court confirmed this proposition three years later in *Witters v. Washington Department of Social Services for the Blind*. [130] At issue was the constitutionality of a grant made by a state vocational rehabilitation program to a blind person who wanted to use the grant to attend a religious school and train for a religious ministry. Again, the Court emphasized that in the vocational rehabilitation program "any aid provided is 'made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" and "ultimately flows to religious institutions ... only as a result of the genuinely independent and private choices of aid recipients." The program, the Court stated, did not have the purpose of providing support for nonpublic, sectarian institutions; created no financial incentive for students to undertake religious education; and gave recipients "full opportunity to expend vocational rehabiiltation aid on wholly secular education." "In this case," the Court found, "the fact that the aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." Finally, the Court concluded, there was no evidence that "any significant por-

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least in the absence of evidence that religious groups will dominate [the] forum." *But cf.* Bowen v. Kendrick, 487 U.S. 589 (1988), permitting religious institutions to be recipients under a "facially neutral" direct grant program.

[128] 463 U.S. at 402.

[129] 463 U.S. at 399.

[130] 474 U.S. 481 (1986).

tion of the aid expended under the Washington program as a whole will end up flowing to religious education."

In *Zobrest v. Catalina Foothills School District* [131] the Court reaffirmed this line of reasoning. The case involved the provision of a sign language interpreter pursuant to the Individuals with Disabilities Act (IDEA) [132] to a deaf high school student who wanted to attend a Catholic high school. In upholding the assistance as constitutional, the Court emphasized that "the service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." Thus, it held that the presence of the interpreter in the sectarian school resulted not from a decision of the state but from the "private decision of individual parents."

Finally, the Court in *Zelman v. Simmons-Harris* [133] reinterpreted the genuine private choice criterion in a manner that seems to render most voucher programs constitutional. At issue in the case was an Ohio program providing vouchers to the parents of children in failing public schools in Cleveland for use at private schools in the city. The Court upheld the program notwithstanding that, as in *Nyquist*, most of the schools at which the vouchers could be redeemed were religious and most of the voucher students attended such schools. But the Court found that the program still involved "true private choice." "Cleveland schoolchildren," the Court said, "enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* of the options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." [134]

In contrast to its rulings concerning direct aid to sectarian elementary and secondary schools, the Court, although closely divided

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[131] 474 U.S. 481 (1986).
[132] 20 U.S.C. 1400 et seq.
[133] 122 S.Ct. 2460 (2002).
[134] 122 S.Ct. at 2460, 2472.

at times, has from the start approved quite extensive public assistance to institutions of higher learning. On the same day that it first struck down an assistance program for elementary and secondary private schools, the Court sustained construction grants to church-related colleges and universities.[135] The specific grants in question were for construction of two library buildings, a science building, a music, drama, and arts building, and a language laboratory. The law prohibited the financing of any facility for, or the use of any federally-financed building for, religious purposes, although the restriction on use ran for only twenty years.[136] The Court found that the purpose and effect of the grants were secular and that, unlike elementary and secondary schools, religious colleges were not so devoted to inculcating religion.[137] The supervision required to ensure conformance with the non-religious-use requirement was found not to constitute "excessive entanglement," inasmuch as a building is nonideological in character, unlike teachers, and inasmuch as the construction grants were onetime things and did not continue as did the state programs.

Also sustained was a South Carolina program under which a state authority would issue revenue bonds for construction projects on campuses of private colleges and universities. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited, nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[138] The colleges involved, though they were affiliated with religious institutions, were not shown to be so pervasively religious—no religious test existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation—and state

[135] Tilton v. Richardson, 403 U.S. 672 (1971). This was a 5–4 decision.

[136] Because such buildings would still have substantial value after twenty years, the Court found that a religious use then would be an unconstitutional aid to religion, and it struck down the period of limitation. 403 U.S. at 682-84.

[137] It was no doubt true, Chief Justice Burger conceded, that construction grants to religious-related colleges did in some measure benefit religion, since the grants freed money that the colleges would be required to spend on the facilities for which the grants were made. Bus transportation, textbooks, and tax exemptions similarly benefited religion and had been upheld. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." 403 U.S. at 679.

[138] Hunt v. McNair, 413 U.S. 734, 743 (1973).

law precluded the use of any state-financed project for religious activities. [139]

The kind of assistance permitted by *Tilton* and by *Hunt v. McNair* seems to have been broadened when the Court sustained a Maryland program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed by the administering agency. [140] The plurality opinion found a secular purpose; found that the limitation of funding to secular activities was meaningful, [141] since the religiously affiliated institutions were not so pervasively sectarian that secular activities could not be separated from sectarian ones; and determined that excessive entanglement was improbable, given the fact that aided institutions were not pervasively sectarian. The annual nature of the subsidy was recognized as posing the danger of political entanglement, but the plurality thought that the character of the aided institutions— "capable of separating secular and religious functions"— was more important. [142]

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[139] 413 U.S. at 739-40, 741-45. Justices Brennan, Douglas, and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id. at 749.

[140] Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976). Justice Blackmun's plurality opinion was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id. at 767. Justice Brennan, joined by Justice Marshall, dissented, and Justices Stewart and Stevens each dissented separately. Id. at 770, 773, 775.

[141] 426 U.S. at 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view, id. at 773, but overweighed by other factors in the plurality's view.

[142] 426 U.S. at 755-66. The plurality also relied on the facts that the student body was not local but diverse, and that large numbers of non-religiously affiliated institutions received aid. A still further broadening of governmental power to extend aid affecting religious institutions of higher education occurred in several subsequent decisions. First, the Court summarily affirmed two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat pro forma. Smith v. Board of Governors of Univ. of North Carolina, 434 U.S. 803 (1977), aff'g 429 F. Supp. 871 (W.D.N.C. 1977); Americans United v. Blanton, 434 U.S. 803 (1977), aff'g 433 F. Supp. 97 (M.D. Tenn. 1977). Second, in Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the State to sponsor or subsidize religion. Third, in Rosenberger v. The Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), the Court held that a public university cannot exclude a student religious publication from a program subsidizing the printing costs of all other student publications. The Court said

Finally, in the only case since *Bradfield v. Roberts* [143] to challenge the constitutionality of public aid to non-educational religious institutions, the Court in *Bowen v. Kendrick* [144] by a 5–4 vote upheld the Adolescent Family Life Act (AFLA) [145] against facial challenge. The Act permits direct grants to religious organizations for provision of health care and for counseling of adolescents on matters of pregnancy prevention and abortion alternatives, and requires grantees to involve other community groups, including religious organizations, in delivery of services. All of the Justices agreed that AFLA had valid secular purposes; their disagreement related to application of the effects and entanglement tests. The Court relied on analogy to the higher education cases rather than the cases involving aid to elementary and secondary schools. [146] The case presented conflicting factual considerations. On the one hand, the class of beneficiaries was broad, with religious groups not predominant among the wide range of eligible community organizations. On the other hand, there were analogies to the parochial school aid cases: secular and religious teachings might easily be mixed, and the age of the targeted group (adolescents) suggested susceptibility. The Court resolved these conflicts by holding that AFLA is facially valid, there being insufficient indication that a significant proportion of the AFLA funds would be disbursed to "pervasively sectarian" institutions, but by remanding to the district court to determine whether particular grants to pervasively sectarian institutions were invalid. The Court emphasized in both parts of its opinion that the fact that "views espoused [during counseling] on matters of premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show [an Establishment Clause violation]." [147]

At the time it was rendered, *Bowen* differed from the Court's decisions concerning direct aid to sectarian elementary and secondary schools primarily in that it refused to presume that religiously affiliated social welfare entities are pervasively sectarian. That difference had the effect of giving greater constitutional lati-

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the fund was essentially a religiously neutral subsidy promoting private student speech without regard to content.

[143] 175 U.S. 291 (1899).

[144] 487 U.S. 589 (1988). Chief Justice Rehnquist wrote the Court's opinion, and was joined by Justices White, O'Connor, Scalia, and Kennedy; in addition, Justice O'Connor and Justice Kennedy, joined by Justice Scalia, filed separate concurring opinions. Justice Blackmun's dissenting opinion was joined by Justices Brennan, Marshall, and Stevens.

[145] Pub. L. 97–35, 95 Stat. 578 (1981), codified at 42 U.S.C. § 300z *et seq*.

[146] The Court also noted that the 1899 case of *Bradfield v. Roberts* had established that religious organizations may receive direct aid for support of secular social-welfare cases.

[147] 487 U.S. at 621.

tude to public aid to such entities than was afforded direct aid to religious elementary and secondary schools. As noted above, the Court in its recent decisions has now eliminated the presumption that such religious schools are pervasively sectarian and has extended the same constitutional latitude to aid programs benefiting such schools as it gives to aid programs benefiting religiously affiliated social welfare programs.

***Governmental Encouragement of Religion in Public Schools: Released Time***.—Introduction of religious education into the public schools, one of Justice Rutledge's "great drives," [148] has also occasioned a substantial amount of litigation in the Court. In its first two encounters, the Court voided one program and upheld another, in which the similarities were at least as significant as the differences. Both cases involved "released time" programs, the establishing of a period during which pupils in public schools were to be allowed, upon parental request, to receive religious instruction. In the first, the religious classes were conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance reports were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular studies. "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." [149] The case was also noteworthy because of the Court's express rejection of the contention "that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." [150]

Four years later, the Court upheld a different released-time program. [151] In this one, schools released pupils during school hours, on written request of their parents, so that they might leave

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[148] Everson v. Board of Education, 330 U.S. 1, 63 (Justice Rutledge dissenting) (quoted supra).

[149] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 209–10 (1948).

[150] 333 U.S. at 211.

[151] Zorach v. Clauson, 343 U.S. 306 (1952). Justices Black, Frankfurter, and Jackson dissented. Id. at 315, 320, 323.

the school building and go to religious centers for religious instruction or devotional exercises. The churches reported to the schools the names of children released from the public schools who did not report for religious instruction; children not released remained in the classrooms for regular studies. The Court found the differences between this program and the program struck down in *McCollum* to be constitutionally significant. Unlike *McCollum*, where "the classrooms were used for religious instruction and force of the public school was used to promote that instruction," religious instruction was conducted off school premises and "the public schools do no more than accommodate their schedules." [152] "We are a religious people whose institutions presuppose a Supreme Being," Justice Douglas wrote for the Court. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

***Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading***.—Upon recommendation of the state governing board, a local New York school required each class to begin each school day by reading aloud the following prayer in the presence of the teacher: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country." Students who wished to do so could remain silent or leave the room. Said the Court: "We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by

[152] 343 U.S. at 315. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 261–63 (1963) (Justice Brennan concurring) (suggesting that the important distinction was that "the *McCollum* program placed the religious instruction in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not").

government." [153] "Neither the fact that the prayer may be nondenominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause.... The Establishment Clause ... does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [154]

Following the prayer decision came two cases in which parents and their school age children challenged the validity under the Establishment Clause of requirements that each school day begin with readings of selections from the Bible. Scripture reading, like prayers, the Court found, was a religious exercise. "Given that finding the exercises and the law requiring them are in violation of the Establishment Clause." [155] Rejected were contentions by the State that the object of the programs was the promotion of secular purposes, such as the expounding of moral values, the contradiction of the materialistic trends of the times, the perpetuation of traditional institutions, and the teaching of literature [156] and that to forbid the particular exercises was to choose a "religion of secularism" in their place. [157] Though the "place of religion in our society is an exalted one," the Establishment Clause, the Court continued, prescribed

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[153] Engel v. Vitale, 370 U.S. 421, 424, 425 (1962).

[154] 370 U.S. at 430. Justice Black for the Court rejected the idea that the prohibition of religious services in public schools evidenced "a hostility toward religion or toward prayer." Id. at 434. Rather, such an application of the First Amendment protected religion from the coercive hand of government and government from control by a religious sect. Dissenting alone, Justice Stewart could not "see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id. at 444, 445.

[155] Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). "[T]he States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson*." Id.

[156] 374 U.S. at 223-24. The Court thought the exercises were clearly religious.

[157] 374 U.S. at 225. "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" Zorach v. Clauson, 343 U.S. at 314. "We do not agree, however, that this decision in any sense has that effect."

that in "the relationship between man and religion," the State must be "firmly committed to a position of neutrality."[158]

In *Wallace v. Jaffree*,[159] the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools "for meditation or prayer." Because the only evidence in the record indicated that the words "or prayer" had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the *Lemon* test had been violated, i.e. that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday,"[160] and both Justices Powell and O'Connor in concurring opinions suggested that other state statutes authorizing moments of silence might pass constitutional muster.[161]

The school prayer decisions served as precedent for the Court's holding in *Lee v. Weisman*[162] that a school-sponsored invocation at a high school commencement violated the Establishment Clause. The Court rebuffed a request to reexamine the *Lemon* test, finding "[t]he government involvement with religious activity in this case

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[158] 374 U.S. at 226. Justice Brennan contributed a lengthy concurrence in which he attempted to rationalize the decisions of the Court on the religion clauses and to delineate the principles applicable. He concluded that what the establishment clause foreclosed "are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." Id. at 230, 295. Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

While numerous efforts were made over the years to overturn these cases, through constitutional amendment and through limitations on the Court's jurisdiction, the Supreme Court itself has had no occasion to review the area again. *But see* Stone v. Graham, 449 U.S. 39 (1980) (summarily reversing state court and invalidating statute requiring the posting of the Ten Commandments, purchased with private contributions, on the wall of each public classroom, on the grounds the Ten Commandments are "undeniably a sacred text" and the "pre-eminent purpose" of the posting requirement was "plainly religious in nature").

[159] 472 U.S. 38 (1985).

[160] 472 U.S. at 59.

[161] Justice O'Connor's concurring opinion is notable for its effort to synthesize and refine the Court's Establishment and Free Exercise tests (*see also* the Justice's concurring opinion in *Lynch v. Donnelly*), and Justice Rehnquist's dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test, discarding any requirement that government be neutral between religion and "irreligion," and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

[162] 505 U.S. 577 (1992).

[to be] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." State officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers. The Court, in an opinion by Justice Kennedy, viewed this state participation as coercive in the elementary and secondary school setting.[163] The state "in effect required participation in a religious exercise," since the option of not attending "one of life's most significant occasions" was no real choice. "At a minimum," the Court concluded, the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise."

In *Santa Fe Independent School District v. Doe*[164] the Court held a school district's policy permitting high school students to vote on whether to have an "invocation and/or prayer" delivered prior to home football games by a student elected for that purpose to violate the establishment clause. It found the policy to violate each one of the tests it has formulated for establishment clause cases. The preference given for an "invocation" in the text of the school district's policy, the long history of pre-game prayer led by a student "chaplain" in the school district, and the widespread perception that "the policy is about prayer," the Court said, made clear that its purpose was not secular but was to preserve a popular state-sponsored religious practice in violation of the first prong of the *Lemon* test. Moreover, it said, the policy violated the coercion test by forcing unwilling students into participating in a religious exercise. Some students – the cheerleaders, the band, football players – had to attend, it noted, and others were compelled to do so by peer pressure. "The constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game," the Court held. Finally, it said, the speech sanctioned by the policy was not private speech but government-sponsored speech that would be perceived as a government endorsement of religion. The long history of pre-game prayer, the bias toward religion in the policy itself, the fact that the message would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property" and over the school's public address

[163] The Court distinguished Marsh v. Chambers, 463 U.S. 783, 792 (1983), holding that the opening of a state legislative session with a prayer by a state-paid chaplain does not offend the Establishment Clause. The *Marsh* Court had distinguished *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure,'" and the *Lee v. Weisman* Court reiterated this distinction. 505 U.S. at 596-97.

[164] 530 U.S. 790 (2000).

system, the Court asserted, all meant that the speech was not genuine private speech but would be perceived as "stamped with the school's seal of approval." The Court concluded that "the policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."

***Governmental Encouragement of Religion in Public Schools: Curriculum Restriction***.—In *Epperson v. Arkansas*,[165] the Court struck down a state statute which made it unlawful for any teacher in any state-supported educational institution "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Agreeing that control of the curriculum of the public schools was largely in the control of local officials, the Court nonetheless held that the motivation of the statute was a fundamentalist belief in the literal reading of the Book of Genesis and that this motivation and result required the voiding of the law. "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First . . . Amendment to the Constitution."[166]

Similarly invalidated as having the improper purpose of advancing religion was a Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools. "The preeminent purpose of the Louisiana legislature," the Court found in *Edwards v. Aguillard*, "was clearly to advance the religious viewpoint that a supernatural being created humankind."[167] The Court viewed as a "sham" the stated purpose of protecting academic freedom, and concluded instead that the legislature's purpose was to narrow the science curriculum in order to discredit evolution "by counterbalancing its teaching at every turn with the teaching of creation science."[168]

***Access of Religious Groups to Public Property***.—Although government may not promote religion through its educational facilities, it may not bar student religious groups from meeting on public school property if it makes those facilities available to non-

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[165] 393 U.S. 97 (1968).

[166] 393 U.S. at 109.

[167] 482 U.S. 578, 591 (1987).

[168] 482 U.S. at 589. The Court's conclusion was premised on its finding that "the term 'creation science,' as used by the legislature . . . embodies the religious belief that a supernatural creator was responsible for the creation of humankind." Id. at 592.

religious student groups. In the case of *Widmar v. Vincent* [169] the Court held that allowing student religious groups equal access to a public college's facilities would further a secular purpose, would not constitute an impermissible benefit to religion, and would pose little hazard of entanglement. Subsequently, the Court has held that these principles apply to public secondary schools as well as to institutions of higher learning. In *Westside Community Board of Education v. Mergens* [170] in 1990 the Court upheld application of the Equal Access Act [171] to prevent a secondary school from denying access to school premises to a student religious club while granting access to such other "noncurriculum" related student groups as a scuba diving club, a chess club, and a service club. [172] Justice O'Connor stated in a plurality opinion that "there is a crucial difference between *government* speech endorsing religion and *private* speech endorsing religion. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." [173]

Similarly, public schools may not rely on the Establishment Clause as grounds to discriminate against religious groups in afterhours use of school property otherwise available for non-religious social, civic, and recreational purposes. In *Lamb's Chapel v. Center Moriches School District*, [174] the Court held that a school district could not, consistent with the free speech clause, refuse to allow a religious group to use school facilities to show a film series on family life when the facilities were otherwise available for community use. "It discriminates on the basis of viewpoint," the Court ruled, "to permit school property to be used for the presentation of all

[169] 454 U.S. 263, 270–75 (1981)

[170] 496 U.S. 226 (1990). The Court had noted in *Widmar* that university students ″are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion,″ 454 U.S. at 274 n.14. The *Mergens* plurality ignored this distinction, suggesting that secondary school students are also able to recognize that a school policy allowing student religious groups to meet in school facilities is one of neutrality toward religion. 496 U.S. at 252.

[171] Pub. L. 98–377, title VIII, 98 Stat. 1302 (1984); 20 U.S.C. §§ 4071–74. The Act requires secondary schools that receive federal financial assistance to allow student religious groups to meet in school facilities during noncurricular time to the same extent as other student groups and had been enacted by Congress in 1984 to apply the *Widmar* principles to the secondary school setting.

[172] There was no opinion of the Court on Establishment Clause issues, a plurality of four led by Justice O'Connor applying the three-part *Lemon* test, and concurring Justices Kennedy and Scalia proposing a less stringent test under which "neutral" accommodations of religion would be permissible as long as they do not in effect establish a state religion, and as long as there is no coercion of students to participate in a religious activity.

[173] 496 U.S. at 242.

[174] 508 U.S. 384 (1993).

views about family issues and child-rearing except those dealing with the subject matter from a religious viewpoint." In response to the school district's claim that the establishment clause required it to deny use of its facilities to a religious group, the Court said that there was "no realistic danger" in this instance that "the community would think that the District was endorsing religion or any particular creed" and that such permission would satisfy the requirements of the *Lemon* test.[175] Similarly, in *Good News Club v. Milford Central School*,[176] the Court held the free speech clause to be violated by a school policy that barred a religious children's club from meeting on school premises after school. Given that other groups teaching morals and character development to young children were allowed to use the school's facilities, the exclusion, the Court said, "constitutes unconstitutional viewpoint discrimination." Moreover, it said, the school had "no valid Establishment Clause interest" because permitting the religious club to meet would not show any favoritism toward religion but would simply "ensure neutrality."

Finally, the Court has made clear that public colleges may not exclude student religious organizations from benefits otherwise provided to a full spectrum of student "news, information, opinion, entertainment, or academic communications media groups." In *Rosenberger v. Board of Visitors of the University of Virginia*,[177] the Court struck down a university policy that afforded a school subsidy to all student publications except religious ones. Once again, the Court held the denial of the subsidy to constitute viewpoint discrimination violative of the free speech clause of the First Amendment. In response to the University's argument that the Establishment Clause required it not to subsidize an enterprise that promotes religion, the Court emphasized that the forum created by the University's subsidy policy had neither the purpose nor the effect of advancing religion and, because it was open to a variety of viewpoints, was neutral toward religion.

These cases make clear that the Establishment Clause does not necessarily trump the First Amendment's protection of freedom of speech. In regulating private speech in a public forum, govern-

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[175] 508 U.S. at 395. Concurring opinions by Justice Scalia, joined by Justice Thomas, and by Justice Kennedy, criticized the Court's reference to *Lemon*. Justice Scalia lamented that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." Id. at 398. Justice White pointedly noted, however, that "*Lemon*... has not been overruled." Id at 395, n.7.

[176] 533 U.S. 98 (2001).

[177] 515 U.S. 819 (1995).

ment may not justify discrimination against religious viewpoints as necessary to avoid creating an "establishment" of religion.

***Tax Exemptions of Religious Property***.—Every State and the District of Columbia provide for tax exemptions for religious institutions, and the history of such exemptions goes back to the time of our establishment as a polity. The only expression by a Supreme Court Justice prior to 1970 was by Justice Brennan, who deemed tax exemptions constitutional because the benefit conferred was incidental to the religious character of the institutions concerned.[178] Then, in 1970, a nearly unanimous Court sustained a state exemption from real or personal property taxation of "property used exclusively for religious, educational or charitable purposes" owned by a corporation or association which was conducted exclusively for one or more of these purposes and did not operate for profit.[179] The first prong of a two-prong argument saw the Court adopting Justice Brennan's rationale. Using the secular purpose and effect test, Chief Justice Burger noted that the purpose of the exemption was not to single out churches for special favor; instead, the exemption applied to a broad category of associations having many common features and all dedicated to social betterment. Thus, churches as well as museums, hospitals, libraries, charitable organizations, professional associations, and the like, all non-profit, and all having a beneficial and stabilizing influence in community life, were to be encouraged by being treated specially in the tax laws. The primary effect of the exemptions was not to aid religion; the primary effect was secular and any assistance to religion was merely incidental.[180]

For the second prong, the Court created a new test, the entanglement test,[181] by which to judge the program. There was some entanglement whether there were exemptions or not, Chief Justice Burger continued, but with exemptions there was minimal involvement. But termination of exemptions would deeply involve government in the internal affairs of religious bodies, because evaluation of religious properties for tax purposes would be required and there would be tax liens and foreclosures and litigation concerning such matters.[182]

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[178] "If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups." Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (concurring opinion).

[179] Walz v. Tax Comm'n, 397 U.S. 664 (1970). Justice Douglas dissented.

[180] 397 U.S. at 672–74.

[181] *See* discussion under "Court Tests Applied to Legislation Affecting Religion," supra.

[182] 397 U.S. at 674–76.

While the general issue is now settled, it is to be expected that variations of the exemption upheld in *Walz* will present the Court with an opportunity to elaborate the field still further.[183] For example, the Court determined that a sales tax exemption applicable only to religious publications constituted a violation of the Establishment Clause,[184] and, on the other hand, that application of a general sales and use tax provision to religious publications violates neither the Establishment Clause nor the Free Exercise Clause.[185]

***Exemption of Religious Organizations from Generally Applicable Laws***.—The Civil Rights Act's exemption of religious organizations from the prohibition against religious discrimination in employment[186] does not violate the Establishment Clause when applied to a religious organization's secular, nonprofit activities. The Court held in *Corporation of the Presiding Bishop v. Amos*[187] that a church-run gymnasium operated as a nonprofit facility open to the public could require that its employees be church members. Declaring that "there is ample room for accommodation of religion under the Establishment Clause,"[188] the Court identified a legitimate purpose in freeing a religious organization from the burden of predicting which of its activities a court will consider to be secular and which religious. The rule applying across-the-board to nonprofit activities and thereby "avoid[ing] ... intrusive inquiry into religious belief" also serves to lessen entanglement of church and state.[189] The exemption itself does not have a principal effect

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[183] For example, the Court subsequently accepted for review a case concerning property tax exemption for church property used as a commercial parking lot, but state law was changed, denying exemption for purely commercial property and requiring a pro rata exemption for mixed use, and the Court remanded so that the change in the law could be considered. Differderfer v. Central Baptist Church, 404 U.S. 412 (1972).

[184] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) .

[185] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990). Similarly, there is no constitutional impediment to straightforward application of 26 U.S.C. § 170 to disallow a charitable contribution for payments to a church found to represent a reciprocal exchange rather than a contribution or gift. Hernandez v. Commissioner, 490 U.S. 680 (1989).

[186] Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, makes it unlawful for any employer to discriminate in employment practices on the basis of an employee's religion. Section 702, 42 U.S.C. § 2000e–1, exempts from the prohibition "a religious corporation ... with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation ... of its activities."

[187] 483 U.S. 327 (1987).

[188] 483 U.S. at 338.

[189] 483 U.S. at 339.

of advancing religion, the Court concluded, but merely allows churches to advance religion.[190]

***Sunday Closing Laws***.—The history of Sunday Closing Laws goes back into United States colonial history and far back into English history.[191] Commonly, the laws require the observance of the Christian Sabbath as a day of rest, although in recent years they have tended to become honeycombed with exceptions. The Supreme Court rejected an Establishment Clause challenge to Sunday Closing Laws in *McGowan v. Maryland*.[192] The Court acknowledged that historically the laws had a religious motivation and were designed to effectuate concepts of Christian theology. However, "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. . . ."[193] "[T]he fact that this [prescribed day of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."[194] The choice of Sunday as the day of rest, while originally religious, now reflected simple legislative inertia or recognition that Sunday was a traditional day for the choice.[195] Valid secular reasons existed for not simply requiring one day of rest and leaving to each individual to choose the day, reasons of ease of enforcement and of assuring

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[190] "For a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. Justice O'Connor's concurring opinion suggests that practically any benefit to religion can be "recharacterized as simply 'allowing' a religion to better advance itself," and that a "necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." Id. at 347, 348.

[191] The history is recited at length in the opinion of the Court in McGowan v. Maryland, 366 U.S. 420, 431–40 (1961), and in Justice Frankfurter's concurrence. Id. at 459, 470–551 and appendix.

[192] 366 U.S. 420 (1961). Decision on the establishment question in this case also controlled the similar decision on that question in Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961), Braunfeld v. Brown, 366 U.S. 599 (1961), and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). On free exercise in these cases, *see* discussion infra.

[193] McGowan v. Maryland, 366 U.S. 420, 444 (1961).

[194] 366 U.S. at 445.

[195] 366 U.S. at 449-52.

a common day in the community for rest and leisure.[196] More recently, a state statute mandating that employers honor the Sabbath day of the employee's choice was held invalid as having the primary effect of promoting religion by weighing the employee's Sabbath choice over all other interests.[197]

***Conscientious Objection***.—Historically, Congress has provided for alternative service for men who had religious scruples against participating in either combat activities or in all forms of military activities; the fact that Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question, which, however, the Court chose to avoid by a somewhat disingenuous interpretation of the statute.[198] In *Gillette v. United States*,[199] a further constitutional problem arose in which the Court did squarely confront and validate the congressional choice. Congress had restricted conscientious objection status to those who objected to "war in any form" and the Court conceded that there were religious or conscientious objectors who were not opposed to all wars but only to particular wars based upon evaluation of a number of factors by which the "justness" of any particular war could be judged; "properly construed," the Court said, the statute did draw a line relieving from military service some religious objectors while not relieving others.[200] Purporting to apply the secular purpose and effect test, the Court looked almost exclusively to purpose and hardly at all to effect. Although it is not clear, the Court seemed to require that a classification must be religiously based "on its face"[201] or lack any "neutral, secular basis for the lines government has drawn"[202] in order that it be held to violate the Establishment Clause. The classification here was not

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[196] 366 U.S. at 449-52. Justice Frankfurter, with whom Justice Harlan concurred, arrived at the same conclusions by a route that did not require approval of Everson v. Board of Education, from which he had dissented.

[197] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[198] In United States v. Seeger, 380 U.S. 163 (1965), a unanimous Court construed the language of the exemption limiting the status to those who by "religious training and belief" (that is, those who believed in a "Supreme Being"), to mean that a person must have some belief which occupies in his life the place or role which the traditional concept of God occupies in the orthodox believer. After the "Supreme Being" clause was deleted, a plurality in Welsh v. United States, 398 U.S. 333 (1970), construed the religion requirement as inclusive of moral, ethical, or religious grounds. Justice Harlan concurred on constitutional grounds, believing that the statute was clear that Congress had intended to restrict conscientious objection status to those persons who could demonstrate a traditional religious foundation for their beliefs and that this was impermissible under the Establishment Clause. Id. at 344. The dissent by Justices White and Stewart and Chief Justice Burger rejected both the constitutional and the statutory basis. 398 U.S. at 367.

[199] 401 U.S. 437 (1971).

[200] 401 U.S. at 449.

[201] 401 U.S. at 450.

[202] 401 U.S. at 452.

religiously based "on its face," and served "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."[203] These purposes, related to the difficulty in separating sincere conscientious objectors to particular wars from others with fraudulent claims, included the maintenance of a fair and efficient selective service system and protection of the integrity of democratic decision-making.[204]

***Regulation of Religious Solicitation***.—Although the solicitation cases have generally been decided under the free exercise or free speech clauses,[205] in one instance the Court, intertwining establishment and free exercise principles, voided a provision in a state charitable solicitations law that required only those religious organizations that received less than half their total contributions from members or affiliated organizations to comply with the registration and reporting sections of the law.[206] Applying strict scrutiny equal protection principles, the Court held that by distinguishing between older, well-established churches that had strong membership financial support and newer bodies lacking a contributing constituency or that may favor public solicitation over general reliance on financial support from the members, the statute granted denominational preference forbidden by the Establishment Clause.[207]

***Religion in Governmental Observances***.—The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh v. Chambers*,[208] a case involving prayers in the Nebraska Legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court's view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other states. Most importantly, the First Amendment had been drafted in the First Congress with an awareness of the chap-

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[203] 401 U.S. at 452.

[204] 401 U.S. at 452-60.

[205] *See* discussion under "Door-to-Door Solicitation," infra.

[206] Larson v. Valente, 456 U.S. 228 (1982). Two Justices dissented on the merits, id. at 258 (Justices White and Rehnquist), while two other Justices dissented on a standing issue. Id. at 264 (Chief Justice Burger and Justice O'Connor)

[207] 456 U.S. at 246-51. *Compare* Heffron v. ISKCON, 452 U.S. 640, 652–53 (1981), *and* id. at 659 n.3 (Justice Brennan, concurring in part and dissenting in part) (dealing with a facially neutral solicitation rule distinguishing between religious groups that have a religious tenet requiring peripatetic solicitation and those who do not).

[208] 463 U.S. 783 (1983). *Marsh* was a 6–3 decision, with Chief Justice Burger's opinion for the Court being joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, and with Justices Brennan, Marshall, and Stevens dissenting.

laincy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court's findings,[209] amplified in Justice Brennan's dissent, that each aspect of the *Lemon v. Kurtzman* tripartite test had been violated. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.[210]

***Religious Displays on Government Property***.—A different form of governmentally sanctioned religious observance—inclusion of religious symbols in governmentally sponsored holiday displays—was twice before the Court, with varying results. In 1984, in *Lynch v. Donnelly*,[211] the Court found no violation of the Establishment Clause occasioned by inclusion of a Nativity scene (creche) in a city's Christmas display; in 1989, in *Allegheny County v. Greater Pittsburgh ACLU*,[212] inclusion of a creche in a holiday display was found to constitute a violation. Also at issue in *Allegheny County* was inclusion of a menorah in a holiday display; here the Court found no violation. The setting of each display was crucial to the varying results in these cases, the determinant being whether the Court majority believed that the overall effect of the display was to emphasize the religious nature of the symbols, or whether instead the emphasis was primarily secular. Perhaps equally important for future cases, however, was the fact that the four dissenters in *Allegheny County* would have upheld both the creche and menorah displays under a more relaxed, deferential standard.

Chief Justice Burger's opinion for the Court in *Lynch* began by expanding on the religious heritage theme exemplified by *Marsh*; other evidence that "'[w]e are a religious people whose institutions presuppose a Supreme Being'"[213] was supplied by reference to the national motto "In God We Trust," the affirmation "one nation under God" in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city's inclusion of the creche in its Christmas display had a legitimate secular pur-

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[209] Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

[210] School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests themselves.

[211] 465 U.S. 668 (1984). *Lynch* was a 5–4 decision, with Justice Blackmun, who voted with the majority in *Marsh*, joining the Marsh dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority Justices, and again Justice Brennan wrote a dissent, joined by the other dissenters. A concurring opinion was added by Justice O'Connor, and a dissenting opinion was added by Justice Blackmun.

[212] 492 U.S. 573 (1989).

[213] 465 U.S. at 675, quoting Zorach v. Clausen, 343 U.S. 306, 313 (1952).

pose in recognizing "the historical origins of this traditional event long [celebrated] as a National Holiday,"[214] and that its primary effect was not to advance religion. The benefit to religion was called "indirect, remote, and incidental," and in any event no greater than the benefit resulting from other actions that had been found to be permissible, e.g. the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers.[215] The Court also reversed the lower court's finding of entanglement based only on "political divisiveness."[216]

*Allegheny County* was also decided by a 5–4 vote, Justice Blackmun writing the opinion of the Court on the creche issue, and there being no opinion of the Court on the menorah issue.[217] To the majority, the setting of the creche was distinguishable from that in *Lynch*. The creche stood alone on the center staircase of the county courthouse, bore a sign identifying it as the donation of a Roman Catholic group, and also had an angel holding a banner proclaiming "Gloria in Exclesis Deo." Nothing in the display "detract[ed] from the creche's religious message," and the overall effect was to endorse that religious message.[218] The menorah, on the other hand, was placed outside a government building alongside a Christmas tree and a sign saluting liberty, and bore no religious messages. To Justice Blackmun, this grouping merely recognized "that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status";[219] to concurring Justice O'Connor, the display's "message of pluralism" did not endorse religion over nonreligion even though Chanukah is primarily a religious holiday and even though the menorah is a religious symbol.[220] The dissenters, critical of the endorsement test proposed by Justice O'Connor and of the three-part *Lemon* test, would instead distill two principles from the Establishment Clause: "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in

[214] 465 U.S. at 680.

[215] 465 U.S. at 681-82. Note that, while the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.

[216] 465 U.S. at 683-84.

[217] Justice O'Connor, who had concurred in *Lynch*, was the pivotal vote, joining the *Lynch* dissenters to form the majority in *Allegheny County*. Justices Scalia and Kennedy, not on the Court in 1984, replaced Chief Justice Burger and Justice Powell in voting to uphold the creche display; Justice Kennedy authored the dissenting opinion, joined by the other three.

[218] 492 U.S. at 598, 600.

[219] 492 U.S. at 616.

[220] 492 U.S. at 635.

such a degree that it in fact 'establishes a state religion or religious faith, or tends to do so.'" [221]

In *Capitol Square Review Bd. v. Pinette*, [222] the Court distinguished privately sponsored from governmentally sponsored religious displays on public property. There the Court ruled that Ohio violated free speech rights by refusing to allow the Ku Klux Klan to display an unattended cross in a publicly owned plaza outside the Ohio Statehouse. Because the plaza was a public forum in which the State had allowed a broad range of speakers and a variety of unattended displays, the State could regulate the expressive content of such speeches and displays only if the restriction was necessary, and narrowly drawn, to serve a compelling state interest. The Court recognized that compliance with the Establishment Clause can be a sufficiently compelling reason to justify content-based restrictions on speech, but saw no need to apply this principle when permission to display a religious symbol is granted through the same procedures, and on the same terms, required of other private groups seeking to convey non-religious messages.

***Miscellaneous***.—In *Larkin v. Grendel's Den*, [223] the Court held that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. While the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, e.g. an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because "the mere appearance of a joint ex-

[221] 492 U.S. at 659.

[222] 515 U.S. 753 (1995). The Court was divided 7–2 on the merits of *Pinette*, a vote that obscured continuing disagreement over analytical approach. The portions of Justice Scalia's opinion that formed the opinion of the Court were joined by Chief Justice Rehnquist and by Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. A separate part of Justice Scalia's opinion, joined only by the Chief Justice and by Justices Kennedy and Thomas, disputed the assertions of Justices O'Connor, Souter, and Breyer that the "endorsement" test should be applied. Dissenting Justice Stevens thought that allowing the display on the Capitol grounds did carry "a clear image of endorsement" (id. at 811), and Justice Ginsburg's brief opinion seemingly agreed with that conclusion.

[223] 459 U.S. 116 (1982).

ercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some." [224] Moreover, the Court determined, because the veto "enmeshes churches in the processes of government," it represented an entanglement offensive to the "core rationale underlying the Establishment Clause"— "[to prevent] 'a fusion of governmental and religious functions.'" [225]

Using somewhat similar reasoning, the Court in *Board of Education of Kiryas Joel Village v. Grumet*, [226] invalidated a New York law creating a special school district for an incorporated village composed exclusively of members of one small religious sect. The statute failed "the test of neutrality," the Court concluded, since it delegated power "to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." It was the "anomalously case-specific nature of the legislature's exercise of authority" that left the Court "without any direct way to review such state action" for conformity with the neutrality principle. Because the village did not receive its governmental authority simply as one of many communities eligible under a general law, the Court explained, there was no way of knowing whether the legislature would grant similar benefits on an equal basis to other religious and nonreligious groups.

## FREE EXERCISE OF RELIGION

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." [227] It bars "governmental regulation of religious *beliefs* as such," [228] prohibiting misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." [229] Freedom of conscience is the basis of the free exercise clause, and government may not penalize

[224] 459 U.S. at 125–26. *But cf.* Marsh v. Chambers, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

[225] 459 U.S. at 126–27, quoting *Abington*, 374 U.S. 203, 222.

[226] 512 U.S. 687 (1994). Only four Justices (Souter, Blackmun, Stevens, and Ginsburg) thought that the *Grendel's Den* principle applied; in their view the distinction that the delegation was to a village electorate rather than to a religious body "lack[ed] constitutional significance" under the peculiar circumstances of the case.

[227] Abington School District v. Schempp, 374 U.S. 203, 222–23 (1963).

[228] Sherbert v. Verner, 374 U.S 398, 402 (1963) (emphasis in original).

[229] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs.[230] Interpretation is complicated, however, by the fact that exercise of religion usually entails ritual or other practices that constitute "conduct" rather than pure "belief." When it comes to protecting conduct as free exercise, the Court has been inconsistent.[231] It has long been held that the Free Exercise Clause does not necessarily prevent government from requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question.[232] What has changed over the years is the Court's willingness to hold that some religiously motivated conduct is protected from generally applicable prohibitions.

The relationship between the Free Exercise and Establishment Clauses varies with the expansiveness of interpretation of the two clauses. In a general sense both clauses proscribe governmental involvement with and interference in religious matters, but there is possible tension between a requirement of governmental neutrality derived from the Establishment Clause and a Free-Exercise-derived requirement that government accommodate some religious practices.[233] So far, the Court has harmonized interpretation by denying that free-exercise-mandated accommodations create establishment violations, and also by upholding some legislative accommodations not mandated by free exercise requirements. "This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[234] In holding that a state could

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[230] Sherbert v. Verner, 374 U.S. 398, 402 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

[231] Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause. For contrasting academic views of the origins and purposes of the Free Exercise Clause, *compare* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (concluding that constitutionally compelled exemptions from generally applicable laws are consistent with the Clause's origins in religious pluralism) *with* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989–90) (arguing that such exemptions establish an invalid preference for religious beliefs over nonreligious beliefs).

[232] *E.g.*, Reynolds v. United States, 98 U.S. 145 (1879); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); United States v. Lee, 455 U.S. 252 (1982); Employment Division v. Smith, 494 U.S. 872 (1990).

[233] "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 668–69 (1970).

[234] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987). A similar accommodative approach was suggested in Walz: "there is room for play in

not deny unemployment benefits to Sabbatarians who refused Saturday work, for example, the Court denied that it was "fostering an 'establishment' of the Seventh-Day Adventist religion, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[235] Legislation granting religious exemptions not held to have been required by the Free Exercise Clause has also been upheld against Establishment Clause challenge,[236] although it is also possible for legislation to go too far in promoting free exercise.[237]

**The Belief-Conduct Distinction**

While the Court has consistently affirmed that the Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exer-

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the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference." 397 U.S. at 669.

[235] Sherbert v. Verner, 374 U.S. 398, 409 (1963). *Accord*, Thomas v. Review Bd., 450 U.S. 707, 719–20 (1981). Dissenting in Thomas, Justice Rehnquist argued that Sherbert and Thomas created unacceptable tensions between the Establishment and Free Exercise Clauses, and that requiring the States to accommodate persons like Sherbert and Thomas because of their religious beliefs ran the risk of "establishing" religion under the Court's existing tests. He argued further, however, that less expansive interpretations of both clauses would eliminate this artificial tension. Thus, Justice Rehnquist would have interpreted the Free Exercise Clause as not requiring government to grant exemptions from general requirements that may burden religious exercise but that do not prohibit religious practices outright, and would have interpreted the Establishment Clause as not preventing government from voluntarily granting religious exemptions. 450 U.S. at 720–27. By 1990 these views had apparently gained ascendancy, Justice Scalia's opinion for the Court in the "peyote" case suggesting that accommodation should be left to the political process, i.e., that states could constitutionally provide exceptions in their drug laws for sacramental peyote use, even though such exceptions are not constitutionally required. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[236] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (upholding property tax exemption for religious organizations); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding Civil Rights Act exemption allowing religious institutions to restrict hiring to members of religion); Gillette v. United States, 401 U.S. 437, 453–54 (1971) (interpreting conscientious objection exemption from military service).

[237] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973) (tuition reimbursement grants to parents of parochial school children violate Establishment Clause in spite of New York State's argument that program was designed to promote free exercise by enabling low-income parents to send children to church schools); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (state sales tax exemption for religious publications violates the Establishment Clause) (plurality opinion); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 706–07 (1994) ("accommodation is not a principle without limits;" one limitation is that "neutrality as among religions must be honored").

cise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[238] In its first free exercise case, involving the power of government to prohibit polygamy, the Court invoked a hard distinction between the two, saying that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices."[239] The rule thus propounded protected only belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives. The *Reynolds* no-protection rule was applied in a number of cases,[240] but later cases established that religiously grounded conduct is not always outside the protection of the free exercise clause.[241] Instead, the Court began to balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected; only if the governmental interest was "compelling" and if no alternative forms of regulation would serve that interest was the claimant required to yield.[242] Thus, while freedom to engage in religious practices was not absolute, it was entitled to considerable protection.

Recent cases evidence a narrowing of application of the compelling interest test, and a corresponding constriction on the freedom to engage in religiously motivated conduct. First, the Court pur-

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[238] Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[239] Reynolds v. United States, 98 U.S. 145, 166 (1878). "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" Davis v. Beason, 133 U.S. 333, 345 (1890). In another context, Justice Sutherland in United States v. Macintosh, 283 U.S. 605, 625 (1931), suggested a plenary governmental power to regulate action in denying that recognition of conscientious objection to military service was of a constitutional magnitude, saying that "unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

[240] Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Cleveland v. United States, 329 U.S. 14 (1946) (polygamy). In Sherbert v. Verner, 374 U.S. 398, 403 (1963), Justice Brennan asserted that the "conduct or activities so regulated [in the cited cases] have invariably posed some substantial threat to public safety, peace or order."

[241] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961): "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

[242] Sherbert v. Verner, 374 U.S. 398, 403, 406–09 (1963). In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court recognized compelling state interests in provision of public education, but found insufficient evidence that those interests (preparing children for citizenship and for self-reliance) would be furthered by requiring Amish children to attend public schools beyond the eighth grade. Instead, the evidence showed that the Amish system of vocational education prepared their children for life in their self-sufficient communities.

ported to apply strict scrutiny, but upheld the governmental action anyhow.[243] Next the Court held that the test is inappropriate in the contexts of military and prison discipline.[244] Then, more importantly, the Court ruled in *Employment Division v. Smith* that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[245] Therefore, the Court concluded, the Free Exercise Clause does not prohibit a state from applying generally applicable criminal penalties to the use of peyote in a religious ceremony, or from denying unemployment benefits to persons dismissed from their jobs because of religious ceremonial use of peyote. Accommodation of such religious practices must be found in "the political process," the Court noted; statutory religious-practice exceptions are permissible, but not "constitutionally required."[246] The result is tantamount to a return to the *Reynolds* belief-conduct distinction.

**The Mormon Cases**

The Court's first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, inasmuch as it could distinguish between beliefs and acts.[247] But the presence of large numbers of Mormons in some of the territories made convictions for bigamy difficult to obtain, and in 1882 Congress enacted a statute which barred "bigamists," "polygamists," and "any person cohabiting with more than one woman" from voting or serving on juries. The Court sustained the law, even as applied to persons entering the state prior to enactment of the original law prohibiting bigamy and to persons as to whom the statute of limitations had run.[248] Subse-

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[243] United States v. Lee, 455 U.S. 252 (1982) (holding mandatory participation in the Social Security system by an Amish employer religiously opposed to such social welfare benefits to be "indispensable" to the fiscal vitality of the system); Bob Jones Univ. v. United States, 461 U.S. 754 (1983) (holding government's interest in eradicating racial discrimination in education to outweigh the religious interest of a private college whose racial discrimination was founded on religious beliefs); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (holding that government has a compelling interest in maintaining a uniform tax system "free of 'myriad exceptions flowing from a wide variety of religious beliefs'")

[244] Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[245] 494 U.S. 872, 878 (1990).

[246] 494 U.S. at 890.

[247] Reynolds v. United States, 98 U.S. 145 (1879); *cf.* Cleveland v. United States, 329 U.S. 14 (1946) (no religious-belief defense to Mann Act prosecution for transporting a woman across state line for the "immoral purpose" of polygamy).

[248] Murphy v. Ramsey, 114 U.S. 15 (1885).

quently, an act of a territorial legislature which required a prospective voter not only to swear that he was not a bigamist or polygamist but also that "I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy ... or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy ... ," was upheld in an opinion that condemned plural marriage and its advocacy as equal evils.[249] And, finally, the Court sustained the revocation of the charter of the Mormon Church and confiscation of all church property not actually used for religious worship or for burial.[250]

**The Jehovah's Witnesses Cases**

In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were,[251] provoked from the Court a lengthy series of decisions[252] expanding the rights of religious proselytizers and other advocates to utilize the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the speech clause than on the free exercise clause. The leading case is *Cantwell v. Connecticut*.[253] Three Jehovah's Witnesses were convicted under a statute which forbade the unlicensed soliciting of funds for religious or charitable purposes, and also under a general charge of breach of the peace. The solicitation count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the applicant did have a religious cause and to

[249] Davis v. Beason, 133 U.S. 333 (1890). "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.... To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." Id. at 341–42.

[250] The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). "[T]he property of the said corporation ... [is to be used to promote] the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world.... The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world." Id. at 48–49.

[251] For recent cases dealing with other religious groups discomfiting to the mainstream, *see* Heffron v. ISKCON, 452 U.S. 640 (1981) (Hare Krishnas); Larson v. Valente, 456 U.S. 228 (1982) (Unification Church). Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Santeria faith).

[252] Most of the cases are collected and categorized by Justice Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion).

[253] 310 U.S. 296 (1940).

decline a license if in his view the cause was not religious. Such power amounted to a previous restraint upon the exercise of religion and was invalid, the Court held.[254] The breach of the peace count arose when the three accosted two Catholics in a strongly Catholic neighborhood and played them a phonograph record which grossly insulted the Christian religion in general and the Catholic Church in particular. The Court voided this count under the clear-and-present danger test, finding that the interest sought to be upheld by the State did not justify the suppression of religious views that simply annoyed listeners.[255]

There followed a series of sometimes conflicting decisions. At first, the Court sustained the application of a non-discriminatory license fee to vendors of religious books and pamphlets,[256] but eleven months later it vacated its former decision and struck down such fees.[257] A city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held in violation of the First Amendment when applied to distributors of leaflets advertising a religious meeting.[258] But a state child labor law was held to be validly applied to punish the guardian of a nine-year old child who permitted her to engage in "preaching work" and the sale of religious publications after hours.[259] The

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[254] 310 U.S. at 303-07. "The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Id. at 304.

[255] 310 U.S. at 307-11. "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Id. at 310.

[256] Jones v. Opelika, 316 U.S. 584 (1942).

[257] Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943). *See also* Follett v. McCormick, 321 U.S. 573 (1944) (invalidating a flat licensing fee for booksellers). *Murdock* and *Follett* were distinguished in Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 389 (1990) as applying "only where a flat license fee operates as a prior restraint"; upheld in Swaggart was application of a general sales and use tax to sales of religious publications.

[258] Martin v. City of Struthers, 319 U.S. 141 (1943). *But cf.* Breard v. City of Alexandria, 341 U.S. 622 (1951) (similar ordinance sustained in commercial solicitation context).

[259] Prince v. Massachusetts, 321 U.S. 158 (1944).

Court decided a number of cases involving meetings and rallies in public parks and other public places by upholding licensing and permit requirements which were premised on nondiscriminatory "times, places, and manners" terms and which did not seek to regulate the content of the religious message to be communicated.[260] Most recently, the Court struck down on free speech grounds a town ordinance requiring door-to-door solicitors, including persons seeking to proselytize about their faith, to register with the town and obtain a solicitation permit.[261] The Court stated that the requirement was "offensive ... to the very notion of a free society."

**Free Exercise Exemption From General Governmental Requirements**

As described above, the Court gradually abandoned its strict belief-conduct distinction, and developed a balancing test to determine when a uniform, nondiscriminatory requirement by government mandating action or nonaction by citizens must allow exceptions for citizens whose religious scruples forbid compliance. Then, in 1990, the Court reversed direction in *Employment Division v. Smith*,[262] confining application of the "compelling interest" test to a narrow category of cases.

In early cases the Court sustained the power of a State to exclude from its schools children who because of their religious beliefs would not participate in the salute to the flag,[263] only within a short time to reverse itself and condemn such exclusions, but on speech grounds rather than religious grounds.[264] Also, the Court seemed to be clearly of the view that government could compel those persons religiously opposed to bearing arms to take an oath to do so or to receive training to do so,[265] only in later cases to cast

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[260] *E.g.*, Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); Poulos v. New Hampshire, 345 U.S. 395 (1953). *See also* Larson v. Valente, 456 U.S. 228 (1982) (solicitation on state fair ground by Unification Church members).

[261] Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton 122 S. Ct. 2080 (2002).

[262] 494 U.S. 872 (1990).

[263] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[264] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). On the same day, the Court held that a State may not forbid the distribution of literature urging and advising on religious grounds that citizens refrain from saluting the flag. Taylor v. Mississippi, 319 U.S. 583 (1943).

[265] *See* United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); and United States v. Bland, 283 U.S. 636 (1931) (all interpreting the naturalization law as denying citizenship to a conscientious objector who would not swear to bear arms in defense of the country), all three of which were overruled by Girouard v. United States, 328 U.S. 61 (1946), on strictly statutory grounds. *See also* Hamilton v. Board of Regents, 293 U.S. 245 (1934) (upholding expulsion from state university for a religiously based refusal to take a required

doubt on this resolution by statutory interpretation,[266] and still more recently to leave the whole matter in some doubt.[267]

*Braunfeld v. Brown*[268] held that the free exercise clause did not mandate an exemption from Sunday Closing Laws for an Orthodox Jewish merchant who observed Saturday as the Sabbath and was thereby required to be closed two days of the week rather than one. This requirement did not prohibit any religious practices, the Court's plurality pointed out, but merely regulated secular activity in a manner making religious exercise more expensive.[269] "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[270]

Within two years the Court in *Sherbert v. Verner*[271] reversed this line of analysis to require a religious exemption from a secular, regulatory piece of economic legislation. Sherbert was disqualified from receiving unemployment compensation because, as a Seventh Day Adventist, she would not accept Saturday work; according to state officials, this meant she was not complying with the statutory requirement to stand ready to accept suitable employment. This denial of benefits could be upheld, the Court said, only if "her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or [if] any incidental burden on the free exercise of appellant's religions may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'"[272] First, the disqualification was held to impose a burden on the free exercise of Sherbert's religion; it was an indirect burden and it did

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course in military training); In re Summers, 325 U.S. 561 (1945) (upholding refusal to admit applicant to bar because as conscientious objector he could not take required oath).

[266] United States v. Seeger, 380 U.S. 163 (1965); *see* id. at 188 (Justice Douglas concurring); Welsh v. United States, 398 U.S. 333 (1970); *and see* id. at 344 (Justice Harlan concurring).

[267] Gillette v. United States, 401 U.S. 437 (1971) (holding that secular considerations overbalanced free exercise infringement of religious beliefs of objectors to particular wars).

[268] 366 U.S. 599 (1961). *See* section on "Sunday Closing Laws," supra, for application of the establishment clause.

[269] 366 U.S. at 605-06.

[270] 366 U.S. at 607 (plurality opinion). The concurrence balanced the economic disadvantage suffered by the Sabbatarians against the important interest of the State in securing its day of rest regulation. McGowan v. Maryland, 366 U.S. at 512–22. Three Justices dissented. Id. at 561 (Justice Douglas); Braunfeld v. Brown, 366 U.S. at 610 (Justice Brennan), 616 (Justice Stewart).

[271] 374 U.S. 398 (1963).

[272] 374 U.S. at 403, quoting NAACP v. Button, 371 U.S. 415, 438 (1963).

not impose a criminal sanction on a religious practice, but the disqualification derived solely from her practice of her religion and constituted a compulsion upon her to forgo that practice.[273] Second, there was no compelling interest demonstrated by the State. The only interest asserted was the prevention of the possibility of fraudulent claims, but that was merely a bare assertion. Even if there was a showing of demonstrable danger, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[274]

*Sherbert* was reaffirmed and applied in subsequent cases involving denial of unemployment benefits. *Thomas v. Review Board*[275] involved a Jehovah's Witness who quit his job when his employer transferred him from a department making items for industrial use to a department making parts for military equipment. While his belief that his religion proscribed work on war materials was not shared by all other Jehovah's Witnesses, the Court held that it was inappropriate to inquire into the validity of beliefs asserted to be religious so long as the claims were made in good faith (and the beliefs were at least arguably religious). The same result was reached in a 1987 case, the fact that the employee's religious conversion rather than a job reassignment had created the conflict between work and Sabbath observance not being considered material to the determination that free exercise rights had been burdened by the denial of unemployment compensation.[276] Also, a state may not deny unemployment benefits solely because refusal to work on the Sabbath was based on sincere religious beliefs held independently of membership in any established religious church or sect.[277]

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[273] 374 U.S. at 403–066.

[274] 374 U.S. at 407. *Braunfeld* was distinguished because of "a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers." That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. Id. at 408–09. Other Justices thought that Sherbert overruled Braunfeld. Id. at 413, 417 (Justice Stewart concurring), 418 (Justice Harlan and White dissenting).

[275] 450 U.S. 707 (1981).

[276] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

[277] Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989). *Cf.* United States v. Seeger , 380 U.S. 163 (1965) (interpreting the religious objection exemption from military service as encompassing a broad range of formal and personal religious beliefs).

The Court applied the *Sherbert* balancing test in several areas outside of unemployment compensation. The first two such cases involved the Amish, whose religion requires them to lead a simple life of labor and worship in a tight-knit and self-reliant community largely insulated from the materialism and other distractions of modern life. *Wisconsin v. Yoder*[278] held that a state compulsory attendance law, as applied to require Amish children to attend ninth and tenth grades of public schools in contravention of Amish religious beliefs, violated the Free Exercise Clause. The Court first determined that the beliefs of the Amish were indeed religiously based and of great antiquity.[279] Next, the Court rejected the State's arguments that the Free Exercise Clause extends no protection because the case involved "action" or "conduct" rather than belief, and because the regulation, neutral on its face, did not single out religion.[280] Instead, the Court went on to analyze whether a "compelling" governmental interest required such "grave interference" with Amish belief and practices.[281] The governmental interest was not the general provision of education, inasmuch as the State and the Amish were in agreement on education through the first eight grades and since the Amish provided their children with additional education of a primarily vocational nature. The State's interest was really that of providing two additional years of public schooling. Nothing in the record, felt the Court, showed that this interest outweighed the great harm which it would do to traditional Amish religious beliefs to impose the compulsory ninth and tenth grade attendance.[282]

But a subsequent decision involving the Amish reached a contrary conclusion. In *United States v. Lee*,[283] the Court denied the Amish exemption from compulsory participation in the Social Security system. The objection was that payment of taxes by Amish employers and employees and the receipt of public financial assistance were forbidden by their religious beliefs. Accepting that this was true, the Court nonetheless held that the governmental interest was compelling and therefore sufficient to justify the burdening of religious beliefs.[284] Compulsory payment of taxes was necessary for

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[278] 406 U.S. 205 (1972).

[279] 406 U.S. at 215-19. Why the Court felt impelled to make these points is unclear, since it is settled that it is improper for courts to inquire into the interpretation of religious belief. *E.g.*, United States v. Lee, 455 U.S. 252, 257 (1982).

[280] 406 U.S. at 219-21.

[281] 406 U.S. at 221.

[282] 406 U.S. at 221-29.

[283] 455 U.S. 252 (1982).

[284] The Court's formulation was whether the limitation on religious exercise was "essential to accomplish an overriding governmental interest." 455 U.S. at 257-58. *Accord*, Hernandez v. Commissioner, 490 U.S. 680, 699–700 (1989) (any burden on

the vitality of the system; either voluntary participation or a pattern of exceptions would undermine its soundness and make the program difficult to administer.

"A compelling governmental interest" was also found to outweigh free exercise interests in *Bob Jones University v. United States*,[285] in which the Court upheld the I.R.S.'s denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived from religious beliefs. The Federal Government's "fundamental, overriding interest in eradicating racial discrimination in education"—found to be encompassed in common law standards of "charity" underlying conferral of the tax exemption on "charitable" institutions— "substantially outweighs" the burden on free exercise. Nor could the schools' free exercise interests be accommodated by less restrictive means.[286]

In other cases the Court found reasons not to apply compelling interest analysis. Religiously motivated speech, like other speech, can be subjected to reasonable time, place, or manner regulation serving a "substantial" rather than "compelling" governmental interest.[287] *Sherbert*'s threshold test, inquiring "whether government has placed a substantial burden on the observation of a central religious belief or practice,"[288] eliminates other issues. As long as a particular religion does not proscribe the payment of taxes (as was the case with the Amish in *Lee*), the Court has denied that there is any constitutionally significant burden resulting from "imposition of a generally applicable tax [that] merely decreases the amount of money [adherents] have to spend on [their] religious activities."[289] The one caveat the Court left—that a generally applicable tax might be so onerous as to "effectively choke off an adher-

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free exercise imposed by disallowance of a tax deduction was "justified by the 'broad public interest in maintaining a sound tax system' free of 'myriad exceptions flowing from a wide variety of religious beliefs'").

[285] 461 U.S. 574 (1983).

[286] 461 U.S. at 604.

[287] Heffron v. ISKCON, 452 U.S. 640 (1981). Requiring Krishnas to solicit at fixed booth sites on county fair grounds is a valid time, place, and manner regulation, although, as the Court acknowledged, id. at 652, peripatetic solicitation was an element of Krishna religious rites.

[288] As restated in Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

[289] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 391 (1990). *See also* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (questioning but not deciding whether any burden was imposed by administrative disallowal of deduction for payments deemed to be for commercial rather than religious or charitable purposes).

ent's religious practices"[290] —may be a moot point in light of the Court's general ruling in *Employment Division v. Smith*, discussed below.

The Court also drew a distinction between governmental regulation of individual conduct, on the one hand, and restraint of governmental conduct as a result of individuals' religious beliefs, on the other. *Sherbert's* compelling interest test has been held inapplicable in cases viewed as involving attempts by individuals to alter governmental actions rather than attempts by government to restrict religious practices. Emphasizing the absence of coercion on religious adherents, the Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[291] held that the Forest Service, even absent a compelling justification, could construct a road through a portion of a national forest held sacred and used by Indians in religious observances. The Court distinguished between governmental actions having the indirect effect of frustrating religious practices and those actually prohibiting religious belief or conduct: "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[292] Similarly, even a sincerely held religious belief that assignment of a social security number would rob a child of her soul was held insufficient to bar the government from using the number for purposes of its own recordkeeping.[293] It mattered not how easily the government could accommodate the religious beliefs or practices (an exemption from the social security number requirement might have been granted with only slight impact on the government's recordkeeping capabilities), since the nature of the governmental actions did not implicate free exercise protections.[294]

Compelling interest analysis is also wholly inapplicable in the context of military rules and regulations, where First Amendment review "is far more deferential than . . . review of similar laws or regulations designed for civilian society."[295] Thus the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer

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[290] Jimmy Swaggart Ministries, 493 U.S. at 392.

[291] 485 U.S. 439 (1988).

[292] 485 U.S. at 451, quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

[293] Bowen v. Roy, 476 U.S. 693 (1986).

[294] "In neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity." Lyng, 485 U.S. at 449.

[295] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

compelled by his Orthodox Jewish religious beliefs to wear the yarmulke.[296]

A high degree of deference is also due decisions of prison administrators having the effect of restricting religious exercise by inmates. The general rule is that prison regulations impinging on exercise of constitutional rights by inmates are "valid if . . . reasonably related to legitimate penological interests."[297] Thus because general prison rules requiring a particular category of inmates to work outside of buildings where religious services were held, and prohibiting return to the buildings during the work day, could be viewed as reasonably related to legitimate penological concerns of security and order, no exemption was required to permit Muslim inmates to participate in Jumu'ah, the core ceremony of their religion.[298] The fact that the inmates were left with no alternative means of attending Jumu'ah was not dispositive, the Court being "unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."[299]

Finally, in *Employment Division v. Smith*[300] the Court indicated that the compelling interest test may apply only in the field of unemployment compensation, and in any event does not apply to require exemptions from generally applicable criminal laws. Criminal laws are "generally applicable" when they apply across the board regardless of the religious motivation of the prohibited conduct, and are "not specifically directed at . . . religious practices."[301] The unemployment compensation statute at issue in *Sherbert* was peculiarly suited to application of a balancing test because denial of benefits required a finding that an applicant had refused work "without good cause." *Sherbert* and other unemployment compensation cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hard-

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[296] Congress reacted swiftly by enacting a provision allowing military personnel to wear religious apparel while in uniform, subject to exceptions to be made by the Secretary of the relevant military department for circumstances in which the apparel would interfere with performance of military duties or would not be "neat and conservative." Pub. L. 100–180, § 508(a)(2), 101 Stat. 1086 (1987); 10 U.S.C. § 774.

[297] O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987) ).

[298] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[299] 482 U.S. at 351-52 (also suggesting that the ability of the inmates to engage in other activities required by their faith, e.g., individual prayer and observance of Ramadan, rendered the restriction reasonable).

[300] 494 U.S. 872 (1990) (holding that state may apply criminal penalties to use of peyote in a religious ceremony, and may deny unemployment benefits to persons dismissed from their jobs because of religiously inspired use of peyote).

[301] 494 U.S. at 878.

ship' without compelling reason."[302] *Wisconsin v. Yoder* and other decisions holding "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" were distinguished as involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections" such as free speech or "parental rights."[303] Except in the relatively uncommon circumstance when a statute calls for individualized consideration, then, the Free Exercise Clause affords no basis for exemption from a "neutral, generally applicable law." As the Court concluded in *Smith*, accommodation for religious practices incompatible with general requirements must ordinarily be found in "the political process."[304]

The ramifications of *Smith* are potentially widespread. The Court has apparently returned to a belief-conduct dichotomy under which religiously motivated conduct is not entitled to special protection. Laws may not single out religiously motivated conduct for adverse treatment,[305] but formally neutral laws of general applicability may regulate religious conduct (along with other conduct) regardless of the adverse or prohibitory effects on religious exercise. That the Court views the principle as a general one, not limited to criminal laws, seems evident from its restatement in *Church of the Lukumi Babalu Aye v. City of Hialeah*: "our cases establish the general proposition that a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[306] Similar rules govern taxation. Under the Court's rulings in *Smith* and *Swaggart*, religious exemptions from most taxes are a matter of legislative grace rather than constitutional command, since most important taxes (e.g., income, property, sales and use) satisfy the criteria of formal neutrality and general applicability, and are not license fees that can be viewed as prior restraints on expression.[307] The result is equal protection, but not substantive protection, for religious exercise.[308] The Court's ap-

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[302] 494 U.S. at 884.

[303] 494 U.S. at 881.

[304] 494 U.S. at 890.

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

[306] 508 U.S. 520, 531 (1993).

[307] This latter condition derives from the fact that the Court in *Swaggart* distinguished earlier decisions by characterizing them as applying only to flat license fees. 493 U.S. at 386. *See also* Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 39–41.

[308] Justice O'Connor, concurring in *Smith*, argued that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause." 494 U.S. at 901.

proach also accords less protection to religiously-based conduct than is accorded expressive conduct that implicates speech but not religious values.[309] On the practical side, relegation of free exercise claims to the political process may, as concurring Justice O'Connor warned, result in less protection for small, unpopular religious sects.[310]

Because of the broad ramifications of *Smith*, the political processes were soon used in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA),[311] Congress sought to supersede *Smith* and substitute a statutory rule of decision for free exercise cases. The Act provides that laws of general applicability—federal, state, and local—may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[312] But this legislative effort was partially frustrated in 1997 when the Court in *City of Boerne v. Flores*[313] held the Act to be unconstitutional as applied to the states. In applying RFRA to the states Congress had utilized its power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the due process clause. But the Court held that RFRA exceeded Congress' power under § 5, because the measure did not simply enforce a constitutional right but substantively altered that right. "Congress," the Court said, "does not enforce a constitutional right by changing what the right is."[314] Moreover, it said, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... [and] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[315] "RFRA," the Court concluded, "contradicts vital principles

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[309] Although neutral laws affecting expressive conduct are not measured by a "compelling interest" test, they are "subject to a balancing, rather than categorical, approach." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[310] 494 U.S. at 902-03.

[311] Pub. L. 103–141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb to 2000bb–4.

[312] Pub. L. 103–141, § 2(b)(1) (citations omitted). Congress also avowed a purpose of providing "a claim or defense to persons whose religious exercise is substantially burdened by government." §2(b)(2).

[313] 521 U.S. 507 (1997).

[314] 521 U.S. at 519.

[315] 521 U.S. at 533–34.

necessary to maintain separation of powers and the federal balance."[316]

*Boerne* does not close the books on *Smith*, however. It remains an open issue whether RFRA remains valid as applied to the federal government, and Congress has recently relied on its power over interstate commerce and its power to attach conditions to federal financial assistance to enact legislation providing a higher level of protection than that afforded by *Smith* to religious institutions involved in land use disputes and to religious practices by persons in state institutions.[317] These issues ensure continuing litigation over the appropriate test for free exercise cases.[318]

**Religious Test Oaths**

However the Court has been divided in dealing with religiously-based conduct and governmental compulsion of action or nonaction, it was unanimous in voiding a state constitutional provision which required a notary public, as a condition of perfecting his appointment, to declare his belief in the existence of God. The First Amendment, considered with the religious oath provision of Article VI, makes it impossible "for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly, profess to have, a belief in some particular kind of religious concept."[319]

**Religious Disqualification**

Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute barring ministers and priests from service in a specially called state constitutional convention.[320]

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[316] 521 U.S. at 536.

[317] The "Religious Land Use and Institutionalized Persons Act," P.L. 106-274 (2000); 42 U.S.C. 2000cc *et seq.*. The Act utilizes Congress' spending power and its power over interstate commerce to impose a strict scrutiny test on state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion. It utilizes the same powers to impose a strict scrutiny test on state and local governments for any substantial burdens they impose on the exercise of religion by persons in state or locally run institutions such as prisons, mental hospitals, juvenile detention facilities, and nursing homes.

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

[319] Torcaso v. Watkins, 367 U.S. 488, 494 (1961).

[320] McDaniel v. Paty, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by *Sherbert v. Verner's* strict scrutiny test. The State had failed to show that its view of the dangers of clergy participation in the political process had any validity; *Torcaso v. Watkins* was distinguished because the State was acting on the status

The Court's decision necessarily implied that the constitutional provision on which the statute was based, barring ministers and priests from service as state legislators, was also invalid.

## FREEDOM OF EXPRESSION—SPEECH AND PRESS

### Adoption and the Common Law Background

Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[321] The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."[322] In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[323] Subsequently, the religion clauses and these clauses were combined by the Senate.[324] The final language was agreed upon in conference.

Debate in the House is unenlightening with regard to the meaning the Members ascribed to the speech and press clause and there is no record of debate in the Senate.[325] In the course of debate, Madison warned against the dangers which would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine

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of being a clergyman rather than on one's beliefs. Justice Brennan, joined by Justice Marshall, found *Torcaso* controlling because imposing a restriction upon one's status as a religious person did penalize his religious belief, his freedom to profess or practice that belief. Id. at 629. Justice Stewart also found *Torcaso* dispositive, id. at 642, and Justice White found an equal protection violation because of the restraint upon seeking political office. Id. at 643.

[321] 1 ANNALS OF CONGRESS 434 (1789). Madison had also proposed language limiting the power of the States in a number of respects, including a guarantee of freedom of the press. Id. at 435. Although passed by the House, the amendment was defeated by the Senate. *See* "Bill of Rights and the States," supra.

[322] Id. at 731 (August 15, 1789).

[323] THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1148–49 (B. Schwartz ed. 1971).

[324] Id. at 1153.

[325] The House debate insofar as it touched upon this amendment was concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their Representatives. 1 ANNALS OF CONGRESS 731–749 (August 15, 1789). There are no records of debates in the States on ratification.

ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty." [326] That the "simple, acknowledged principles" embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language. Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects." [327]

Whatever the general unanimity on this proposition at the time of the proposal of and ratification of the First Amendment, [328]

[326] Id. at 738.

[327] 4 W. BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (T. Cooley, 2d rev. ed. 1872). *See* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1874–86 (1833). The most comprehensive effort to assess theory and practice in the period prior to and immediately following adoption of the Amendment is L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960), which generally concluded that the Blackstonian view was the prevailing one at the time and probably the understanding of those who drafted, voted for, and ratified the Amendment.

[328] It would appear that Madison advanced libertarian views earlier than his Jeffersonian compatriots, as witness his leadership of a move to refuse officially to concur in Washington's condemnation of "[c]ertain self-created societies," by which the President meant political clubs supporting the French Revolution, and his success in deflecting the Federalist intention to censure such societies. I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800 416–20 (1950). "If we advert to the nature of republican government," Madison told the House, "we shall find that the censorial power is in the people over the government, and not in the gov-

it appears that there emerged in the course of the Jeffersonian counterattack on the Sedition Act [329] and the use by the Adams Administration of the Act to prosecute its political opponents, [330] something of a libertarian theory of freedom of speech and press, [331] which, however much the Jeffersonians may have departed from it upon assuming power, [332] was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of all but a narrow range of expression, in political discourse and indeed in all fields of expression, dates from a quite re-

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ernment over the people." 4 ANNALS OF CONGRESS 934 (1794). On the other hand, the early Madison, while a member of his county's committee on public safety, had enthusiastically promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 PAPERS OF JAMES MADISON 147, 161–62, 190–92 (W. Hutchinson & W. Rachal, eds., 1962). There seems little doubt that Jefferson held to the Blackstonian view. Writing to Madison in 1788, he said: "A declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." 13 PAPERS OF THOMAS JEFFERSON 442 (J. Boyd ed., 1955). Commenting a year later to Madison on his proposed amendment, Jefferson suggested that the free speech-free press clause might read something like: "The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." 15 PAPERS, supra, at 367.

[329] The Act, 1 Stat. 596 (1798), punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute." *See* J. SMITH, FREEDOM'S FETTERS—THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

[330] Id. at 159 et seq.

[331] L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY ch. 6 (1960); New York Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964). *But compare* L. LEVY, EMERGENCE OF A FREE PRESS (1985), a revised and enlarged edition of LEGACY OF EXPRESSION, in which Professor Levy modifies his earlier views, arguing that while the intention of the Framers to outlaw the crime of seditious libel, in pursuit of a free speech principle, cannot be established and may not have been the goal, there was a tradition of robust and rowdy expression during the period of the framing that contradicts his prior view that a modern theory of free expression did not begin to emerge until the debate over the Alien and Sedition Acts.

[332] L. LEVY, JEFFERSON AND CIVIL LIBERTIES—THE DARKER SIDE (1963). Thus President Jefferson wrote to Governor McKean of Pennsylvania in 1803: "The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one." 9 WORKS OF THOMAS JEFFERSON 449 (P. Ford ed., 1905).

cent period, although the Court's movement toward that position began in its consideration of limitations on speech and press in the period following World War I.[333] Thus, in 1907, Justice Holmes could observe that, even if the Fourteenth Amendment embodied prohibitions similar to the First Amendment, "still we should be far from the conclusion that the plaintiff in error would have us reach. 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 .... The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all."[334] But as Justice Holmes also observed, "[t]here is no constitutional right to have all general propositions of law once adopted remain unchanged."[335]

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[333] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), provides the principal doctrinal justification for the development, although the results had long since been fully applied by the Court. In Sullivan, Justice Brennan discerned in the controversies over the Sedition Act a crystallization of "a national awareness of the central meaning of the First Amendment," id. at 273, which is that the "right of free public discussion of the stewardship of public officials ... [is] a fundamental principle of the American form of government." Id. at 275. This "central meaning" proscribes either civil or criminal punishment for any but the most maliciously, knowingly false criticism of government. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.... [The historical record] reflect[s] 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." Id. at 276. Madison's Virginia Resolutions of 1798 and his *Report* in support of them brought together and expressed the theories being developed by the Jeffersonians and represent a solid doctrinal foundation for the point of view that the First Amendment superseded the common law on speech and press, that a free, popular government cannot be libeled, and that the First Amendment absolutely protects speech and press. 6 WRITINGS OF JAMES MADISON, 341–406 (G. Hunt ed., 1908).

[334] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis original). Justice Frankfurter had similar views in 1951: "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest... . 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years." Dennis v. United States, 341 U.S. 494, 521–522, 524 (1951) (concurring opinion). The internal quotation is from Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[335] Patterson v. Colorado, 205 U.S. 454, 461 (1907).

But in *Schenck v. United States*,[336] the first of the post-World War I cases to reach the Court, Justice Holmes, in the opinion of the Court, while upholding convictions for violating the Espionage Act by attempting to cause insubordination in the military service by circulation of leaflets, suggested First Amendment restraints on subsequent punishment as well as prior restraint. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints although to prevent them may have been the main purpose .... We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used are used in 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." Justice Holmes along with Justice Brandeis soon went into dissent in their views that the majority of the Court was misapplying the legal standards thus expressed to uphold suppression of speech which offered no threat of danger to organized institutions.[337] But it was with the Court's assumption that the Fourteenth Amendment restrained the power of the States to suppress speech and press that the doctrines developed.[338] At first, Holmes and Brandeis remained in dissent, but in *Fiske v. Kansas*,[339] the Court sustained a First Amendment type of claim in a state case, and in *Stromberg v. California*,[340] a state law was voided on grounds of its interference with free speech.[341] State common law was also voided, the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press,

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[336] 249 U.S. 47, 51–52 (1919) (citations omitted).

[337] Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). A state statute similar to the federal one was upheld in Gilbert v. Minnesota, 254 U.S. 325 (1920).

[338] Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927). The Brandeis and Holmes dissents in both cases were important formulations of speech and press principles.

[339] 274 U.S. 380 (1927).

[340] 283 U.S. 359 (1931). By contrast, it was not until 1965 that a federal statute was held unconstitutional under the First Amendment. Lamont v. Postmaster General, 381 U.S. 301 (1965). *See also* United States v. Robel, 389 U.S. 258 (1967).

[341] *And see* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Lovell v. City of Griffin, 303 U.S. 444 (1938).

and religion beyond those enjoyed under English common law.[342] Development over the years since has been uneven, but by 1964 the Court could say with unanimity: "we 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."[343] And in 1969, the Court said that the cases "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[344] This development and its myriad applications are elaborated in the following sections.

The First Amendment by its terms applies only to laws enacted by Congress, and not to the actions of private persons.[345] This leads to a "state action" (or "governmental action") limitation similar to that applicable to the Fourteenth Amendment.[346] The limitation has seldom been litigated in the First Amendment context, but there is no obvious reason why analysis should differ markedly from Fourteenth Amendment state action analysis. Both contexts require "cautious analysis of the quality and degree of Government relationship to the particular acts in question."[347] In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court declared that "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'... [a]nd under whatever congressional label."[348] The relationship of the government to broadcast licensees

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[342] Bridges v. California, 314 U.S. 252, 263–68 (1941) (overturning contempt convictions of newspaper editor and others for publishing commentary on pending cases).

[343] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[344] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[345] Through interpretation of the Fourteenth Amendment, the prohibition extends to the States as well. *See* discussion on incorporation under Bill of Rights, Fourteenth Amendment, *infra*.

[346] *See* discussion on state action under the Fourteenth Amendment.

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

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

affords other opportunities to explore the breadth of "governmental action." [349]

**Freedom of Expression: The Philosophical Basis**

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guarantee of freedom of expression—the free speech and free press clauses. [350] The argument has been fought out among the commentators. "The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases." [351] Some of the commentators argue in behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression. [352] Others would limit the basis of the First Amendment to only one among a constellation of possible values and would therefore limit coverage or degree of protection of the speech

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

[350] While "expression" is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, which are comprehended by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with "speech," as the following discussion will reveal. The term seems well settled, *see, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970), although it has been criticized. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 50–52 (1982). The term also, as used here, conflates the speech and press clauses, explicitly assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended in the next topic.

[351] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970). The practice in the Court is largely to itemize all the possible values the First Amendment has been said to protect. *See, e.g.*, Consolidated Edison Co. v. PSC, 447 U.S. 530, 534–35 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978).

[352] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970). For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an "eclectic" approach, *see* Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983). A compressive discussion of all the theories may be found in F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY (1982).

and press clauses. For example, one school of thought believes that, because of the constitutional commitment to free self-government, only political speech is within the core protected area,[353] although some commentators tend to define more broadly the concept of "political" than one might suppose from the word alone. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary to the eventual ascertainment of the truth, through conflict of ideas in the marketplace, a view skeptical of our ability to ever know the truth.[354] A broader-grounded view is variously expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment, such as the concept that when speech is freely chosen by the speaker to persuade others it defines and expresses the "self," promotes his liberty,[355] or the concept of "self-realization," the belief that free speech enables the individual to develop his powers and abilities and to make and influence decisions regarding his destiny.[356] The literature is enormous and no doubt the Justices as well as the larger society are influenced by it, and yet the decisions, probably in large part because they are the collective determination of nine individuals, seldom clearly reflect a principled and consistent acceptance of any philosophy.

### Freedom of Expression: Is There a Difference Between Speech and Press?

Use of the single word "expression" to reach speech, press, petition, association, and the like, raises the central question of whether the free speech clause and the free press clause are coextensive; does one perhaps reach where the other does not? It has been much debated, for example, whether the "institutional press"

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[353] *E.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978). This contention does not reflect the Supreme Court's view. "It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' ... But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

[354] The "marketplace of ideas" metaphor is attributable to Justice Holmes' opinion in Abrams v. United States, 250 U.S. 616, 630 (1919). *See* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979). The theory has been the dominant one in scholarly and judicial writings. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967–74 (1978).

[355] *E.g.*, Baker, *Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982).

[356] Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

may assert or be entitled to greater freedom from governmental regulations or restrictions than are non-press individuals, groups, or associations. Justice Stewart has argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively."[357] But as Chief Justice Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others."[358]

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or to give the press access to information that the public generally does not have.[359] Nor in many respects is the press entitled to treatment different in kind from the treatment any other member of the public may be subjected to.[360] "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects."[361] Yet, it does seem clear that to some extent the press, because of the role it plays in keeping the public informed and in the dissemination of news and information, is entitled to particular if not special deference that others are not similarly entitled to, that its role constitutionally entitles it to governmental "sensitivity," to use Justice Stewart's word.[362] What difference such "sensitivity" might make in deciding cases is difficult to say.

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[357] Houchins v. KQED, 438 U.S. 1, 17 (1978) (concurring opinion). Justice Stewart initiated the debate in a speech, subsequently reprinted as Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975). Other articles are cited in First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Chief Justice Burger concurring).

[358] 435 U.S. at 798. The Chief Justice's conclusion was that the institutional press had no special privilege as the press.

[359] Houchins v. KQED, 438 U.S. 1 (1978), and id. at 16 (Justice Stewart concurring); Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Nixon v. Warner Communications, 435 U.S. 589 (1978). The trial access cases, whatever they may precisely turn out to mean, recognize a right of access of both public and press to trials. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[360] Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury testimony be newspaper reporter); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of newspaper offices); Herbert v. Lando, 441 U.S. 153 (1979) (defamation by press); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (newspaper's breach of promise of confidentiality).

[361] Cohen v. Cowles Media, 501 U.S. 663, 669 (1991).

[362] *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Landmark Communications v. Virginia, 435 U.S. 829 (1978). *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978), and id. at 568 (Justice Powell concurring); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Justice Powell concurring). Several concurring opinions in Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), imply recognition of some right of the press to gather information that apparently

The most interesting possibility lies in the area of First Amendment protection of good faith defamation.[363] Justice Stewart argued that the *Sullivan* privilege is exclusively a free press right, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander."[364] To be sure, in all the cases to date that the Supreme Court has resolved, the defendant has been, in some manner, of the press,[365] but the Court's decision that corporations are entitled to assert First Amendment speech guarantees against federal and, through the Fourteenth Amendment, state regulations causes the evaporation of the supposed "conflict" between speech clause protection of individuals only and of press clause protection of press corporations as well as of press individuals.[366] The issue, the Court wrote, was not what constitutional rights corporations have but whether the speech that is being restricted is expression that the First Amendment protects because of its societal significance. Because the speech concerned the enunciation of views on the conduct of governmental affairs, it was protected regardless of its source; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as importantly affords the public access to discussion, debate, and the dissemination of information and ideas. Despite *Bellotti's* emphasis upon the nature of the contested speech being political, it is clear that the same principle, the

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may not be wholly inhibited by nondiscriminatory constraints. Id. at 582–84 (Justice Stevens), 586 n.2 (Justice Brennan), 599 n.2 (Justice Stewart). Yet the Court has also suggested that the press is protected in order to promote and to protect the exercise of free speech in society at large, including peoples' interest in receiving information. *E.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); CBS v. FCC, 453 U.S. 367, 394–95 (1981).

[363] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* discussion of "Defamation," infra.

[364] Stewart, *Or of the Press*, 26 HASTINGS, L. J. 631, 633–35 (1975).

[365] In Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979), the Court noted that it has never decided whether the Times standard applies to an individual defendant. Some think they discern in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), intimations of such leanings by the Court.

[366] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The decision, addressing a question not previously confronted, was 5–to–4. Justice Rehnquist would have recognized no protected First Amendment rights of corporations because, as entities entirely the creation of state law, they were not to be accorded rights enjoyed by natural persons. Id. at 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id. at 802. Previous decisions recognizing corporate free speech had involved either press corporations, id. at 781–83; *and see* id. at 795 (Chief Justice Burger concurring), or corporations organized especially to promote the ideological and associational interests of their members. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

right of the public to receive information, governs nonpolitical, corporate speech.[367]

With some qualifications, therefore, it is submitted that the speech and press clauses may be analyzed under an umbrella "expression" standard, with little, if any, hazard of missing significant doctrinal differences.

**The Doctrine of Prior Restraint**

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[368] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[369] Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[370] Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license that which for a long time could be published only with a license.[371]

The United States Supreme Court's first encounter with a law imposing a prior restraint came in *Near v. Minnesota ex rel. Olson*,[372] in which a five-to-four majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" issue. An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters. While the dissenters maintained that the injunction constituted no prior restraint, inasmuch as that doctrine applied to prohibitions of publication without advance approval of an executive official,[373] the majority deemed the difference of no consequence, since in order to avoid a contempt citation the newspaper would have to clear future publications in advance with the

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[367] Commercial speech when engaged in by a corporation is subject to the same standards of protection as when natural persons engage in it. Consolidated Edison Co. v. PSC, 447 U.S. 530, 533–35 (1980). Nor does the status of a corporation as a government-regulated monopoly alter the treatment. Id. at 534 n.1; Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566–68 (1980).

[368] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

[369] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

[370] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[371] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–14 (1931); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

[372] 283 U.S. 697 (1931).

[373] 283 U.S. at 723, 733-36 (Justice Butler dissenting).

judge.[374] Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[375] The Court did not undertake to explore the kinds of restrictions to which the term "prior restraint" would apply nor to do more than assert that only in "exceptional circumstances" would prior restraint be permissible.[376] Nor did subsequent cases substantially illuminate the murky interior of the doctrine. The doctrine of prior restraint was called upon by the Court as it struck down a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them, and as it voided other restrictions on First Amendment rights.[377] The doctrine that generally emerged was that permit systems—prior licensing, if you will—were constitutionally valid so long as the discretion of the issuing official was limited to questions of times, places, and manners.[378] The most recent Court encounter with the doctrine in the

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[374] 283 U.S. at 712-13.

[375] 283 U.S. at 719-20283 U.S. at 719–20.

[376] 283 U.S. at 715-16.

[377] *E.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). For other applications, *see* Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944).

[378] Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953). In Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), the Court held invalid the issuance of an ex parte injunction to restrain the holding of a protest meeting, holding that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court held invalid as a prior restraint an injunction preventing the petitioners from distributing 18,000 pamphlets attacking respondent's alleged "blockbusting" real estate activities; he was held not to have borne the "heavy burden" of justifying the restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction

national security area occurred when the Government attempted to enjoin press publication of classified documents pertaining to the Vietnam War[379] and, although the Court rejected the effort, at least five and perhaps six Justices concurred on principle that in some circumstances prior restraint of publication would be constitutional.[380] But no cohesive doctrine relating to the subject, its applications, and its exceptions has yet emerged.

***Injunctions and the Press in Fair Trial Cases***.—Confronting a claimed conflict between free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[381] Though agreed on result, the Justices were divided with respect to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The opinion of the Court used the Learned Hand formulation of the "clear and present danger" test[382] and considered as factors

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against peaceful distribution of informational literature of the nature revealed by this record." Id. at 419–20. *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), and seems to explain the Court's action in Philadelphia Newspapers v. Jerome, 434 U.S. 241 (1978). *But see* Moreland v. Sprecher, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it).

[379] New York Times Co. v. United States, 403 U.S. 713 (1971). The vote was six to three, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall in the majority and Chief Justice Burger and Justices Harlan and Blackmun in the minority. Each Justice issued an opinion.

[380] The three dissenters thought such restraint appropriate in this case. Id. at 748, 752, 759. Justice Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," id. at 730, while Justice White did not endorse any specific phrasing of a standard. Id. at 730–33. Justice Brennan would preclude even interim restraint except upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Id. at 712–13.

The same issues were raised in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), in which the United States obtained an injunction prohibiting publication of an article it claimed would reveal information about nuclear weapons, thus increasing the dangers of nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus no appellate review was had of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, *see* Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[381] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[382] 427 U.S. at 562, quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd.*, 341 U.S. 494, 510 (1951).

in any decision on the imposition of a restraint upon press reporters (a) the nature and extent of pretrial news coverage, (b) whether other measures were likely to mitigate the harm, and (c) how effectively a restraining order would operate to prevent the threatened danger.[383] One seeking a restraining order would have a heavy burden to meet to justify such an action, a burden that could be satisfied only on a showing that with a prior restraint a fair trial would be denied, but the Chief Justice refused to rule out the possibility of showing the kind of threat that would possess the degree of certainty to justify restraints.[384] Justice Brennan's major concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would hold, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained."[385] The extremely narrow exceptions under which prior restraints might be permissible relate to probable national harm resulting from publication, the Justice continued; because the trial court could adequately protect a defendant's right to a fair trial through other means even if there were conflict of constitutional rights the possibility of damage to the fair trail right would be so speculative that the burden of justification could not be met.[386] While the result does not foreclose the possibility of fu-

[383] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell). Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id. at 562–67.

[384] The Court differentiated between two kinds of information, however: (1) reporting on judicial proceedings held in public, which has "special" protection and requires a much higher justification than (2) reporting of information gained from other sources as to which the burden of justifying restraint is still high. 427 U.S. at 567-68, 570. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 433 U.S. 97 (1979).

[385] 427 U.S. at 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with Justice Brennan there also. Id. at 617. Justice White, while joining the opinion of the Court, noted that he had grave doubts that "gag orders" could ever be justified but he would refrain from so declaring in the Court's first case on the issue. Id. at 570.

[386] 427 U.S. at 588-95.

ture "gag orders," it does lessen the number to be expected and shifts the focus to other alternatives for protecting trial rights.[387] On a different level, however, are orders restraining the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co. v. Rhinehart*,[388] the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny."[389]

***Obscenity and Prior Restraint***.—Only in the obscenity area has there emerged a substantial consideration of the doctrine of prior restraint, and the doctrine's use there may be based upon the proposition that obscenity is not a protected form of expression.[390] In *Kingsley Books v. Brown*,[391] the Court upheld a state statute that, while it embodied some features of prior restraint, was seen as having little more restraining effect than an ordinary criminal statute; that is, the law's penalties applied only after publication. But in *Times Film Corp. v. City of Chicago*,[392] a divided Court specifically affirmed that, at least in the case of motion pictures, the First Amendment did not proscribe a licensing system under which a board of censors could refuse to license for public exhibition films that it found obscene. Books and periodicals may also be subjected to some forms of prior restraint,[393] but the thrust of the Court's opinions in this area with regard to all forms of communication has been to establish strict standards of procedural protections to ensure that the censoring agency bears the burden of proof on obscenity, that only a judicial order can restrain exhibition, and that a prompt final judicial decision is assured.[394]

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[387] One such alternative is the banning of communication with the press on trial issues by prosecution and defense attorneys, police officials, and court officers. This, of course, also raises First Amendment issues. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F. 2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

[388] 467 U.S. 20 (1984).

[389] 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. Id. at 37, 38.

[390] *See* discussion of "Obscenity," infra.

[391] 354 U.S. 436 (1957). *See also* Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[392] 365 U.S. 43 (1961). *See also* Young v. American Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance prescribing distances adult theaters may be located from residential areas and other theaters is not an impermissible prior restraint).

[393] *Cf.* Kingsley Books v. Brown, 354 U.S. 436 (1957).

[394] Freedman v. Maryland, 380 U.S. 51 (1965); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 367–375 (1971); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (ordinance requiring licensing of "sexually oriented business" places no time limit on approval by inspection agencies and fails to provide an avenue for

**Subsequent Punishment: Clear and Present Danger and Other Tests**

Granted that the context of the controversy over freedom of expression at the time of the ratification of the First Amendment was almost exclusively limited to the problem of prior restraint, still the words speak of laws "abridging" freedom of speech and press, and the modern cases have been largely fought over subsequent punishment. "The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications . . . ."

"[The purpose of the speech-press clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[395] A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues would lead to "self-censorship" by all which would not be relieved by permitting a defense of truth. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved

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prompt judicial review); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (seizure of books and films based on *ex parte* probable cause hearing under state RICO law's forfeiture procedures constitutes invalid prior restraint; instead, there must be a determination in an adversarial proceeding that the materials are obscene or that a RICO violation has occurred). *But cf.* Alexander v. United States, 509 U.S. 544 (1993) (RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses, based on the predicate acts of selling four magazines and three videotapes, does not constitute a prior restraint and is not invalid as "chilling" protected expression that is not obscene).

[395] 2 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 885–86 (8th ed. 1927).

in court or fear of the expense of having to do so .... The rule thus dampens the vigor and limits the variety of public debate." [396]

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But 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. That at any rate is the theory of our Constitution." [397] "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 doctrine; 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. They recognized the risks to which all human institutions are subject. But they knew that 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. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by

[396] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). *See also* Speiser v. Randall, 357 U.S. 513, 526 (1958); Smith v. California, 361 U.S. 147, 153–154 (1959); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[397] Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." [398]

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." [399] The fixing of a standard is necessary, by which it can be determined what degree of evil is sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection and how clear and imminent and likely the danger is. [400] That standard has fluctuated over a period of some fifty years now and it cannot be asserted with a great degree of confidence that the Court has yet settled on any firm standard or any set of standards for differing forms of expression. The cases are instructive of the difficulty.

***Clear and Present Danger***.—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action, may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal. [401] Then, in *Schenck v. United States*, [402] in which defendants had been convicted of seeking to disrupt recruitment of military personnel by dissemination of certain leaflets, Justice Holmes formulated the "clear and present danger" test which has ever since been the starting point of argument. "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

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[398] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Justice Brandeis concurring).

[399] 274 U.S. at 373.

[400] 274 U.S. at 374.

[401] Davis v. Beason, 133 U.S. 333 (1890); Fox v. Washington, 236 U.S. 273 (1915).

[402] 249 U.S. 47 (1919).

degree."[403] The convictions were unanimously affirmed. One week later, the Court again unanimously affirmed convictions under the same Act with Justice Holmes speaking. "[W]e think it necessary to add to what has been said in *Schenck v. United States* . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[404] And in *Debs v. United States*,[405] Justice Holmes was found referring to "the natural and intended effect" and "probable effect" of the condemned speech in common-law tones.

But in *Abrams v. United States*,[406] Justices Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with United States participation in the War. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the Government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense," drew a similar dissent.[407] Moreover, in *Gitlow v. New York*,[408] a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the State. In so doing, the Court discarded Holmes' test. "It is clear that the question in such cases [as this] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases it has been held that the general provisions of the statute may be constitutionally applied to

[403] 249 U.S. at 52.
[404] Frohwerk v. United States, 249 U.S. 204, 206 (1919) (citations omitted).
[405] 249 U.S. 211, 215–16 (1919).
[406] 250 U.S. 616 (1919).
[407] Schaefer v. United States, 251 U.S. 466, 479 (1920). *See also* Pierce v. United States, 252 U.S. 239 (1920).
[408] 268 U.S. 652 (1925)

the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. . . . [T]he general statement in the *Schenck Case* . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[409] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive on the Court.[410] It is not clear what test, if any, the majority would have used, although the "bad tendency" test has usually been associated with the case. In *Whitney v. California*,[411] the Court affirmed a conviction under a criminal syndicalism statute based on defendant's association with and membership in an organization that advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "such danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."[412]

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[409] 268 U.S. at 670-71.

[410] 268 U.S. at 668. Justice Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they would be given their chance and have their way." Id. at 673.

[411] 274 U.S. 357, 371–72 (1927).

[412] 274 U.S. at 376.

***The Adoption of Clear and Present Danger***.—The Court did not invariably affirm convictions during this period in cases like those under consideration. In *Fiske v. Kansas*,[413] it held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged. A conviction for violating a "red flag" law was voided as the statute was found unconstitutionally vague.[414] Neither case mentioned clear and present danger. An "incitement" test seemed to underlie the opinion in *De Jonge v. Oregon*,[415] upsetting a conviction under a criminal syndicalism statute for attending a meeting held under the auspices of an organization which was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon v. Lowry*,[416] the Court narrowly rejected the contention that the standard of guilt could be made the "dangerous tendency" of one's words, and indicated that the power of a State to abridge speech "even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."

Finally, in *Thornhill v. Alabama*,[417] a state anti-picketing law was invalidated because "no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." During the same term, the Court reversed the breach of the peace conviction of a Jehovah's Witness who had played an inflammatory phonograph record to persons on the street, the Court discerning no clear and present danger of disorder.[418]

The stormiest fact situation faced by the Court in applying clear and present danger occurred in *Terminiello v. City of Chicago*,[419] in which a five-to-four majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a dis-

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[413] 274 U.S. 380 (1927).

[414] Stromberg v. California, 283 U.S. 359 (1931).

[415] 299 U.S. 353 (1937). *See* id. at 364–65.

[416] 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. Id. at 261.

[417] 310 U.S. 88, 105 (1940). The Court admitted that the picketing did result in economic injury to the employer, but found such injury "neither so serious nor so imminent" as to justify restriction. The doctrine of clear and present danger was not to play a future role in the labor picketing cases.

[418] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[419] 337 U.S. 1 (1949).

turbance." "A function of free speech under our system of government," wrote Justice Douglas for the majority, "is to invite dispute. It may indeed 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[420] The dissenters focused on the disorders that had actually occurred as a result of Terminiello's speech, Justice Jackson saying: "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish .... In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate."[421] The Jackson position was soon adopted in *Feiner v. New York*,[422] in which Chief Justice Vinson said that "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

***Contempt of Court and Clear and Present Danger***.—The period during which clear and present danger was the standard by which to determine the constitutionality of governmental suppression of or punishment for expression was a brief one, extending roughly from *Thornhill* to *Dennis*.[423] But in one area it was vigorously, though not without dispute, applied to enlarge freedom of utterance and it is in this area that it remains viable. In early contempt-of-court cases in which criticism of courts had been punished as contempt, the Court generally took the position that even if freedom of speech and press was protected against governmental abridgment, a publication tending to obstruct the administration of justice was punishable, irrespective of its truth.[424] But in *Bridges v. California*,[425] in which contempt citations had been brought

[420] 337 U.S. at 4-5.
[421] 337 U.S. at 25-26.
[422] 340 U.S. 315, 321 (1951).
[423] Thornhill v. Alabama, 310 U.S. 88 (1940); Dennis v. United States, 341 U.S. 494 (1951).
[424] Patterson v. Colorado, 205 U.S. 454 (1907); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
[425] 314 U.S. 252 (1941).

against a newspaper and a labor leader for statements made about pending judicial proceedings, Justice Black for a five-to-four Court majority began with application of clear and present danger, which he interpreted to require that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[426] He noted that the "substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." The likelihood that the court will suffer damage to its reputation or standing in the community was not, Justice Black continued, a "substantive evil" which would justify punishment of expression.[427] The other evil, "disorderly and unfair administration of justice," "is more plausibly associated with restricting publications which touch upon pending litigation." But the "degree of likelihood" of the evil being accomplished was not "sufficient to justify summary punishment."[428] In dissent, Justice Frankfurter accepted the application of clear and present danger, but he interpreted it as meaning no more than a "reasonable tendency" test. "Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed."[429]

A unanimous Court next struck down the contempt conviction arising out of newspaper criticism of judicial action already taken, although one case was pending after a second indictment. Specifically alluding to clear and present danger, while seeming to regard it as as stringent a test as Justice Black had in the prior case, Justice Reed wrote that the danger sought to be averted, a "threat to the impartial and orderly administration of justice," "has not the clearness and immediacy necessary to close the door of permissible

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[426] 314 U.S. at 263.

[427] 314 U.S. at 270-71.

[428] 314 U.S. at 271-78.

[429] 314 U.S. at 291. Joining Justice Frankfurter in dissent were Chief Justice Stone and Justices Roberts and Byrnes.

public comment."[430] Divided again, the Court a year later set aside contempt convictions based on publication, while a motion for a new trial was pending, of inaccurate and unfair accounts and an editorial concerning the trial of a civil case. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[431]

In *Wood v. Georgia*,[432] the Court again divided, applying clear and present danger to upset the contempt conviction of a sheriff who had been cited for criticizing the recommendation of a county court that a grand jury look into African-American bloc voting, vote buying, and other alleged election irregularities. No showing had been made, said Chief Justice Warren, of "a substantive evil actually designed to impede the course of justice." The case presented no situation in which someone was on trial, there was no judicial proceeding pending that might be prejudiced, and the dispute was more political than judicial.[433] A unanimous Court recently seems to have applied the standard to set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. Though the defendant's remarks may have been disrespectful of the court, the Supreme Court noted that "[t]here is no indication . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding" and quoted its previous language about the imminence of the threat necessary to constitute contempt.[434]

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[430] Pennekampt v. Florida, 328 U.S. 331, 336, 350 (1946). To Justice Frankfurter, the decisive consideration was whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id. at 369.

[431] Craig v. Harney, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: "We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another." Id. at 390. Justice Jackson also dissented. Id. at 394. *See also* Landmark Communications v. Virginia, 435 U.S. 829, 844 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–63 (1976).

[432] 370 U.S. 375 (1962).

[433] 370 U.S. at 383–85, 386–90. Dissenting, Justices Harlan and Clark thought that the charges made by the defendant could well have influenced the grand jurors in their deliberations and that the fact that laymen rather than judicial officers were subject to influence should call forth a less stringent test than when the latter were the object of comment. Id. at 395.

[434] In re Little, 404 U.S. 553, 555 (1972). The language from Craig v. Harney, 331 U.S. 367, 376 (1947), is quoted in the previous paragraph of text, supra.

***Clear and Present Danger Revised: Dennis***.—In *Dennis v. United States*,[435] the Court sustained the constitutionality of the Smith Act,[436] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. *Dennis*' importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech."[437] Here, by contrast, "[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."[438] And in combating that threat, the Government need not wait to act until the putsch is about to be executed and the plans are set for action. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."[439] Therefore, what does the phrase "clear and present danger" import for judgment? "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: '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.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot

[435] 341 U.S. 494 (1951).

[436] 54 Stat. 670 (1940), 18 U.S.C. § 2385.

[437] Dennis v. United States, 341 U.S. 494, 508 (1951).

[438] 341 U.S. at 509.

[439] 341 U.S. at 508, 509.

expect from words."[440] The "gravity of the evil, discounted by its improbability" was found to justify the convictions.[441]

***Balancing***.—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis*, and it virtually disappeared from the Court's language over the next twenty years.[442] Its replacement for part of this period was the much disputed "balancing" test, which made its appearance in the year prior to *Dennis* in *American Communications Ass'n v. Douds*.[443] There the Court sustained a law barring from access to the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.[444] Chief Justice Vinson, for the Court, rejected reliance on the clear and present danger test. "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial

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[440] 341 U.S. at 510. Justice Frankfurter, concurring, adopted a balancing test, id. at 517, discussed in the next topic. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id. at 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id. at 579, 581. Note the recurrence to the Learned Hand formulation in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

[441] In Yates v. United States, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan wrote: "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' id. at 511–12, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." Id. at 321.

[442] *Cf.* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965). *See* Garner v. Louisiana, 368 U.S. 157, 185–207 (1961) (Justice Harlan concurring).

[443] 339 U.S. 382 (1950). *See also* Osman v. Douds, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in Martin v. City of Struthers, 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in Schneider v. Irvington, 308 U.S. 147, 161–62 (1939), Justice Roberts used balancing language that he apparently did not apply.

[444] The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504. It was held unconstitutional in United States v. Brown, 381 U.S. 437 (1965).

evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes . . . are the present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so without advocacy."[445]

The test, rather, must be one of balancing of interests. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[446] Inasmuch as the interest in the restriction, the government's right to prevent political strikes and the disruption of commerce, is much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.[447]

Justice Frankfurter in *Dennis*[448] rejected the applicability of clear and present danger and adopted a balancing test. "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[449] But the "careful weighing of conflicting interests"[450] not only placed in the scale the disparately-weighed interest of government in self-preservation and the interest of defendants in advocating illegal action, which alone would have determined the balance, it also involved the Justice's philosophy of the "confines of the judicial process" within which the role of courts, in First Amendment litigation as in other, is severely limited. Thus, "[f]ull responsibility" may not be placed in the courts "to balance the relevant factors and ascertain which interest in the circumstances [is] to prevail." "Courts are not representative bodies. They are not designed to be a good reflex of a democratic soci-

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[445] American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950).
[446] 339 U.S. at 399.
[447] 339 U.S. at 400-06.
[448] Dennis v. United States, 341 U.S. 494, 517 (1951) (concurring opinion).
[449] 341 U.S. at 524-25.
[450] 341 U.S. at 542.

ety." Rather, "[p]rimary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress."[451] Therefore, after considering at some length the factors to be balanced, Justice Frankfurter concluded: "It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends."[452] Only if the balance struck by the legislature is "outside the pale of fair judgment"[453] could the Court hold that Congress was deprived by the Constitution of the power it had exercised.[454]

Thereafter, during the 1950s and the early 1960s, the Court used the balancing test in a series of decisions in which the issues were not, as they were not in *Douds* and *Dennis*, matters of expression or advocacy as a threat but rather were governmental inquiries into associations and beliefs of persons or governmental regulation of associations of persons, based on the idea that beliefs and associations provided adequate standards for predicting future or intended conduct that was within the power of government to regulate or to prohibit. Thus, in the leading case on balancing, *Konigsberg v. State Bar of California*,[455] the Court upheld the refusal of the State to certify an applicant for admission to the bar. Required to satisfy the Committee of Bar Examiners that he was of "good moral character," Konigsberg testified that he did not believe in the violent overthrow of the government and that he had never knowingly been a member of any organization which advocated such action, but he declined to answer any question pertaining to membership in the Communist Party.

For the Court, Justice Harlan began by asserting that freedom of speech and association were not absolutes but were subject to various limitations. Among the limitations, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitu-

[451] 341 U.S. at 525.
[452] 341 U.S. at 550-51.
[453] 341 U.S. at 540.
[454] 341 U.S. at 551.
[455] 366 U.S. 36 (1961).

tionality which has necessarily involved a weighing of the governmental interest involved."[456] The governmental interest involved was the assurance that those admitted to the practice of law were committed to lawful change in society and it was proper for the State to believe that one possessed of "a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form" of government did not meet the standard of fitness.[457] On the other hand, the First Amendment interest was limited because there was "minimal effect upon free association occasioned by compulsory disclosure" under the circumstances. "There is here no likelihood that deterrence of association may result from foreseeable private action . . . for bar committee interrogations such as this are conducted in private. . . . Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association . . . for a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution."[458]

Balancing was used to sustain congressional and state inquiries into the associations and activities of individuals in connection with allegations of subversion[459] and to sustain proceedings against the Communist Party and its members.[460] In certain other cases, involving state attempts to compel the production of membership lists of the National Association for the Advancement of Colored People and to investigate that organization, use of the balancing test resulted in a finding that speech and associational rights outweighed the governmental interest claimed.[461] The Court used a balancing test in the late 1960s to protect the speech rights of a public employee who had criticized his employers.[462] Balancing, however, was not used when the Court struck down restric-

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[456] 366 U.S. at 50-51.

[457] 366 U.S. at 51-52.

[458] 366 U.S. at 52-53. *See also* In re Anastaplo, 366 U.S. 82 (1961). The status of these two cases is in doubt after Baird v. State Bar, 401 U.S. 1 (1971), and In re Stolar, 401 U.S. 23 (1971), in which neither the plurality nor the concurring Justice making up the majority used a balancing test.

[459] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[460] Communist Party v. SACB, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961).

[461] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963).

[462] Pickering v. Board of Education, 391 U.S. 563 (1968).

tions on receipt of materials mailed from Communist countries,[463] and it was not used in cases involving picketing, pamphleteering, and demonstrating in public places.[464] But the only case in which it was specifically rejected involved a statutory regulation like those that had given rise to the test in the first place. *United States v. Robel*[465] held invalid under the First Amendment a statute which made it unlawful for any member of an organization which the Subversive Activities Control Board had ordered to register to work in a defense establishment.[466] Although Chief Justice Warren for the Court asserted that the vice of the law was that its proscription operated *per se* "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it,"[467] the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished.[468] In a concluding footnote, the Court said: "It has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict."[469]

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[463] Lamont v. Postmaster General, 381 U.S. 301 (1965).

[464] *E.g.*, Cox v. Louisiana, 379 U.S. 536 and 559 (1965) (2 cases); Edwards v. South Carolina, 372 U.S. 229 (1963); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where balancing reappears and in which other considerations overbalance the First Amendment claims.

[465] 389 U.S. 258 (1967).

[466] Subversive Activities Control Act of 1950, § 5(a)(1)(D), 64 Stat. 992, 50 U.S.C. § 784(a)(1)(D).

[467] United States v. Robel, 389 U.S. 258, 265 (1967).

[468] 389 U.S. at 265-68.

[469] 389 U.S. at 268 n.20.

***The "Absolutist" View of the First Amendment, With a Note on "Preferred Position"***.—During much of this period, the opposition to the balancing test was led by Justices Black and Douglas, who espoused what may be called an "absolutist" position, denying the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous *Carolene Products* "footnote 4" suggested that the ordinary presumption of constitutionality that prevailed when economic regulation was in issue might very well be reversed when legislation that restricted "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" is called into question.[470] Then in *Murdock v. Pennsylvania*,[471] in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate . . . [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[472] The "preferred-position" language was sharply attacked by Justice Frankfurter in *Kovacs v. Cooper*,[473] and it dropped from the opinions, although its philosophy did not.

Justice Black expressed his position in many cases but his *Konigsberg* dissent contains one of the lengthiest and clearest expositions of it.[474] That a particular governmental regulation abridged speech or deterred it was to him "sufficient to render the action of the State unconstitutional" because he did not subscribe "to the

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[470] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[471] 319 U.S. 105, 115 (1943). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[472] Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

[473] 336 U.S. 77, 89 (1949) (collecting cases with critical analysis).

[474] Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (dissenting opinion). *See also* Braden v. United States, 365 U.S. 431, 441 (1961) (dissenting); Wilkinson v. United States, 365 U.S. 399, 422 (1961) (dissenting); Uphaus v. Wyman, 364 U.S. 388, 392 (1960) (dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950); Communist Party v. SACB, 367 U.S. 1, 137 (1961) (dissenting); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (concurring). For Justice Douglas' position, *see* New York Times Co. v. United States, 403 U.S. at 720 (concurring); Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (concurring).

doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms . . . I believe that the First Amendment's unequivocal command that there shall be no abridgment 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."[475] As he elsewhere wrote: "First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government."[476] But the "First and Fourteenth Amendments . . . take away from government, state and federal, all power to restrict freedom of speech, press and assembly where people have a right to be for such purpose. This does not mean however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling whether on publicly owned streets or on privately owned property."[477] Thus, in his last years on the Court, the Justice, while maintaining an "absolutist" position, increasingly drew a line between "speech" and "conduct which involved communication."[478]

***Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, and Others***.—In addition to the foregoing tests, the Court has developed certain standards that are exclusively or primarily applicable in First Amendment litigation. Some of these, such as the doctrines prevalent in the libel and obscenity areas, are very specialized, but others are not. Vagueness is a due process vice which can be brought into play with regard to any criminal and many civil statutes,[479] but as applied in areas respecting expression it also encompasses concern that protected conduct will be deterred out of fear that the statute is capable of application to it. Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths,[480] obscen-

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[475] Konigsberg v. State Bar of California, 366 U.S. 36, 60–61 (1961).

[476] Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (concurring).

[477] Cox v. Louisiana, 379 U.S. 559, 578, 581 (1965) (dissenting).

[478] These cases involving important First Amendment issues are dealt with infra, under "Speech Plus." *See* Brown v. Louisiana, 383 U.S. 131 (1966); Adderley v. Florida, 385 U.S. 39 (1966).

[479] The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. *See, e.g.*, Connally v. General Construction Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Colautti v. Franklin, 439 U.S. 379 (1979); Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982).

[480] *E.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

ity,[481] and restrictions on public demonstrations.[482] It is usually combined with the overbreadth doctrine, which focuses on the need for precision in drafting a statute that may affect First Amendment rights;[483] an overbroad statute that sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct.[484] Similarly, and closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to the given end, it must choose the measure that least interferes with rights of expression.[485] Also, the Court has insisted that regulatory measures that bear on expression must relate to the achievement of the purpose asserted as

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*See also* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (attorney discipline, extrajudicial statements).

[481] *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968).

[482] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Gregory v. City of Chicago, 394 U.S. 111 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See also* Smith v. Goguen, 415 U.S. 566 (1974) (flag desecration law); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (punishment of opprobrious words); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (door-to-door canvassing). For an evident narrowing of standing to assert vagueness, *see* Young v. American Mini Theatres, 427 U.S. 50, 60 (1976).

[483] NAACP v. Button, 371 U.S. 415, 432–33 (1963).

[484] *E.g.*, Kunz v. New York, 340 U.S. 290 (1951); Aptheker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967); Zwickler v. Koota, 389 U.S. 241 (1967); Lewis v. City of New Orleans, 415 U.S. 130 (1974). However, the Court's dissatisfaction with the reach of the doctrine, *see, e.g.*, Younger v. Harris, 401 U.S. 37 (1971), resulted in a curbing of it in Broadrick v. Oklahoma, 413 U.S. 601 (1973), a 5–to–4 decision, in which the Court emphasized "that facial overbreadth adjudication is an exception to our traditional overbreadth adjudication," and held that where conduct and not merely speech is concerned "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," Id. at 615. The opinion of the Court and Justice Brennan's dissent, id. at 621, contain extensive discussion of the doctrine. Other restrictive decisions are Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815–18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport).

[485] Shelton v. Tucker, 364 U.S. 479 (1960); United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 565, 569–71 (1980).

their justification.[486] The prevalence of these standards and tests in this area appear to indicate that, while "preferred position" may have disappeared from the Court's language, it has not disappeared from its philosophy.

***Is There a Present Test?***.—Complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard. For certain forms of expression for which protection is claimed, the Court engages in "definitional balancing" to determine that those forms are outside the range of protection.[487] Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises.[488] Use of vagueness, overbreadth, and less intrusive means may very well operate to reduce the occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the reemergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg v. Ohio*,[489] a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terrorist means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected associa-

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[486] Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961). *See also* Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 565, 569 (1980).

[487] Thus, obscenity, by definition, is outside the coverage of the First Amendment, Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), as are malicious defamation, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression, as a matter of definition, falls within one of these or another category. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

[488] *E.g.*, the multifaceted test for determining when commercial speech is protected, Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566 (1980); the standard for determining when expressive conduct is protected, United States v. O'Brien, 391 U.S. 367, 377 (1968); the elements going into decision with respect to access at trials, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–10 (1982); and the test for reviewing press "gag orders" in criminal trials, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–67 (1976), are but a few examples.

[489] 395 U.S. 444 (1969).

tion, regardless of the probability of success.[490] In *Brandenburg*, however, the Court reformulated these and other rulings to mean "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[491] The Court has not revisited these issues since *Brandenburg*, so the long-term significance of the decision is yet to be determined.[492]

**Freedom of Belief**

The First Amendment does not expressly speak in terms of liberty to hold such beliefs as one chooses, but in both the religion and the expression clauses, it is clear, liberty of belief is the foundation of the liberty to practice what religion one chooses and to express oneself as one chooses.[493] "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."[494] Speaking in the context of religious freedom, the Court at one point said that, while the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute."[495] But matters are not so simple.

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[490] Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). *And see* Bond v. Floyd, 385 U.S. 116 (1966); Watts v. United States, 394 U.S. 705 (1969).

[491] 395 U.S. at 447. Subsequent cases relying on Brandenburg indicate the standard has considerable bite, but do not elaborate sufficiently enough to begin filling in the outlines of the test. Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). *But see* Haig v. Agee, 453 U.S. 280, 308–09 (1981).

[492] In Stewart v. McCoy, 123 S. Ct. 468 (2002), Justice Stevens, in a statement accompanying a denial of certiorari, wrote that, while *Brandenburg*'s "requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. . . . Long range planning of criminal enterprises – which may include oral advice, training exercises, and perhaps the preparation of written materials – involve speech that should not be glibly characterized as mere 'advocacy' and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."

[493] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); United States v. Ballard, 322 U.S. 78 (1944); Torcaso v. Watkins, 367 U.S. 488 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 408 (1950); Bond v. Floyd, 385 U.S. 116, 132 (1966); Speiser v. Randall, 357 U.S. 513 (1958); Baird v. State Bar of Arizona, 401 U.S. 1, 5–6 (1971), and id. at 9–10 (Justice Stewart concurring).

[494] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[495] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

***Flag Salute Cases***.—That government generally may not compel a person to affirm a belief is the principle of the second *Flag Salute Case*.[496] In *Minersville School District v. Gobitis*,[497] the Court upheld the power of the State to expel from its schools certain children, Jehovah's Witnesses, who refused upon religious grounds to join in a flag salute ceremony and recitation of the pledge of allegiance. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[498] But three years later, a six-to-three majority of the Court reversed itself.[499] Justice Jackson for the Court chose to ignore the religious argument and to ground the decision upon freedom of speech. The state policy, he said, constituted "a compulsion of students to declare a belief. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks."[500] But the power of a State to follow a policy that "requires affirmation of a belief and an attitude of mind" is limited by the First Amendment, which, under the standard then prevailing, required the State to prove that the act of the students in remaining passive during the ritual "creates a clear and present danger that would justify an effort even to muffle expression."[501]

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[496] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[497] 310 U.S. 586 (1940).

[498] 310 U.S. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of "these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." Id. at 601.

[499] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justices Roberts and Reed simply noted their continued adherence to *Gobitis*. Id. at 642. Justice Frankfurter dissented at some length, denying that the First Amendment authorized the Court "to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen." Id. at 646, 647.

[500] 319 U.S. at 631, 633.

[501] 319 U.S. at 633-34. *Barnette* was the focus of the Court's decision in Wooley v. Maynard, 430 U.S. 705 (1977), voiding the state's requirement that motorists display auto license plates bearing the motto "Live Free or Die." Acting on the complaint of a Jehovah's Witness, the Court held that one may not be compelled to display on his private property a message making an ideological statement. *Compare* PruneYard Shopping Center v. Robins, 447 U.S. 74, 85–88 (1980), *and* id. at 96 (Justice Powell concurring), in which the Court upheld a state requirement that privately owned shopping centers permit others to engage in speech or petitioning on their property. The First Amendment does not preclude a public university from charging its students an activity fee that is used to support student organizations that engage in extracurricular speech, provided the money is allocated to those groups by use of viewpoint-neutral criteria. Board of Regents of the Univ. of Wisconsin System v. Southworth, 529 U.S. 217 (2000) (upholding fee except to the extent a student referendum substituted majority determinations for viewpoint neutrality in allocating funds). Nor does the First Amendment preclude the Government from "compel[ling] financial contributions that are used to fund advertising," pro-

However, the principle of *Barnette* does not extend so far as to bar government from requiring of its employees or of persons seeking professional licensing or other benefits an oath generally but not precisely based on the oath required of federal officers, which is set out in the Constitution, that the taker of the oath will uphold and defend the Constitution.[502] It is not at all clear, however, to what degree the government is limited in probing the sincerity of the person taking the oath.[503]

***Imposition of Consequences for Holding Certain Beliefs***.—Despite the *Cantwell* dictum that freedom of belief is absolute,[504] government has been permitted to inquire into the holding of certain beliefs and to impose consequences on the believers, primarily with regard to its own employees and to licensing certain professions.[505] It is not clear what precise limitations the Court has placed on these practices.

In its disposition of one of the first cases concerning the federal loyalty-security program, the Court of Appeals for the District of Columbia asserted broadly that "so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affili-

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vided such contributions do not finance "political or ideological" views. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471, 472 (1997) (upholding Secretary of Agriculture's marketing orders that assessed fruit producers to cover the expenses of generic advertising of California fruit). But for compelled financial contributions to be constitutional, the advertising they fund must be, as in *Glickman*, "ancillary to a more comprehensive program restricting marketing autonomy" and not "the principal object of the regulatory scheme." United States v. United Foods, Inc., 533 U.S. 405, 411, 412 (2001) (striking down Secretary of Agriculture's mandatory assessments, used for advertising, upon handlers of fresh mushrooms).

[502] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bond v. Floyd, 385 U.S. 116 (1966); Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967) (three-judge court), *aff'd*, 390 U.S. 36 (1968); Hosack v. Smiley, 276 F. Supp. 876 (C.D. Colo. 1967) (three-judge court), *aff'd*, 390 U.S. 744 (1968); Ohlson v. Phillips, 304 F. Supp. 1152 (C.D. Colo. 1969) (three-judge court), *aff'd*, 397 U.S. 317 (1970); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 161 (1971); Fields v. Askew, 279 So. 2d 822 (Fla. 1973), *aff'd per curiam*, 414 U.S. 1148 (1974).

[503] *Compare* Bond v. Floyd, 385 U.S. 116 (1966), *with* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[504] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[505] The issue has also arisen in the context of criminal sentencing. Evidence that racial hatred was a motivation for a crime may be taken into account, Barclay v. Florida, 463 U.S. 939, 949 (1983); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (criminal sentence may be enhanced because the defendant intentionally selected his victim on account of the victim's race), but evidence of the defendant's membership in a racist group is inadmissible where race was not a factor and no connection had been established between the defendant's crime and the group's objectives. Dawson v. Delaware, 503 U.S. 159 (1992). *See also* United States v. Abel, 469 U.S. 45 (1984) (defense witness could be impeached by evidence that both witness and defendant belonged to group whose members were sworn to lie on each other's behalf).

ations."[506] On appeal, this decision was affirmed by an equally divided Court, it being impossible to determine whether this issue was one treated by the Justices.[507] Thereafter, the Court dealt with the loyalty-security program in several narrow decisions not confronting the issue of denial or termination of employment because of beliefs or "beliefs plus." But the same issue was also before the Court in related fields. In *American Communications Ass'n v. Douds*,[508] the Court was again evenly divided over a requirement that, in order for a union to have access to the NLRB, each of its officers must file an affidavit that he neither believed in, nor belonged to an organization that believed in, the overthrow of government by force or by illegal means. Chief Justice Vinson thought the requirement reasonable because it did not prevent anyone from believing what he chose but only prevented certain people from being officers of unions, and because Congress could reasonably conclude that a person with such beliefs was likely to engage in political strikes and other conduct that Congress could prevent.[509] Dissenting, Justice Frankfurter thought the provision too vague,[510] Justice Jackson thought that Congress could impose no disqualification upon anyone for an opinion or belief that had not manifested itself in any overt act,[511] and Justice Black thought that government had no power to penalize beliefs in any way.[512] Finally, in *Konigsberg v. State Bar of California*,[513] a majority of the Court supported dictum in Justice Harlan's opinion in which he justified some inquiry into beliefs, saying that "[i]t would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the

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[506] Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950). The premise of the decision was that government employment is a privilege rather than a right and that access thereto may be conditioned as the Government pleases. But this basis, as the Court has said, "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). For the vitiation of the right-privilege distinction, *see* discussion under "Government as Employer: Free Speech Generally," infra.

[507] Bailey v. Richardson, 341 U.S. 918 (1951). *See also* Washington v. McGrath, 341 U.S. 923 (1951), aff'g by an equally divided Court, 182 F. 2d 375 (D.C. Cir. 1950). While no opinions were written in these cases, several Justices expressed themselves on the issues in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), decided the same day.

[508] 339 U.S. 382 (1950). In a later case raising the same point, the Court was again equally divided. Osman v. Douds, 339 U.S. 846 (1950).

[509] 339 U.S. at 408-09, 412.

[510] 339 U.S. at 415.

[511] 339 U.S. at 422.

[512] 339 U.S. at 445.

[513] 336 U.S. 36, 51–52 (1961). *See also* In re Anastaplo, 336 U.S. 82, 89 (1961). Justice Black, joined by Justice Douglas and Chief Justice Warren, dissented on the ground that the refusal to admit the two to the state bars was impermissibly based upon their beliefs. Id. at 56, 97.

State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

When the same issue returned to the Court years later, three five-to-four decisions left the principles involved unclear.[514] Four Justices endorsed the view that beliefs could not be inquired into as a basis for determining qualifications for admission to the bar;[515] four Justices endorsed the view that while mere beliefs might not be sufficient grounds to debar one from admission, the States were not precluded from inquiring into them for purposes of determining whether one was prepared to advocate violent overthrow of the government and to act on his beliefs.[516] The decisive vote in each case was cast by a single Justice who would not permit denial of admission based on beliefs alone but would permit inquiry into those beliefs to an unspecified extent for purposes of determining that the required oath to uphold and defend the Constitution could be taken in good faith.[517] Changes in Court personnel following this decision would seem to leave the questions presented open to further litigation.

**Right of Association**

"It is beyond debate that freedom 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, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[518] It would appear from the Court's opinions that the right of association is derivative from the First Amendment guarantees of speech, assembly,

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[514] Baird v. State Bar of Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[515] 401 U.S. at 5-8; 401 U.S. at 28-29 (plurality opinions of Justices Black, Douglas, Brennan, and Marshall in *Baird* and *Stolar*, respectively); 401 U.S. at 174–76, 178–80 (Justices Black and Douglas dissenting in *Wadmond*), 186–90 (Justices Marshall and Brennan dissenting in *Wadmond*).

[516] 401 U.S. at 17–19, 21–22 (Justices Blackmun, Harlan, and White, and Chief Justice Burger dissenting in Baird).

[517] 401 U.S. at 9-10; 401 U.S. at 31 (Justice Stewart concurring in Baird and Stolar, respectively). How far Justice Stewart would permit government to go is not made clear by his majority opinion in *Wadmond*. 401 U.S. at 161-66.

[518] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–61 (1958).

and petition,[519] although it has at times seemingly been referred to as a separate, independent freedom protected by the First Amendment.[520] The doctrine is a fairly recent construction, the problems associated with it having previously arisen primarily in the context of loyalty-security investigations of Communist Party membership, and these cases having been resolved without giving rise to any separate theory of association.[521]

Freedom of association as a concept thus grew out of a series of cases in the 1950s and 1960s in which certain States were attempting to curb the activities of the National Association for the Advancement of Colored People. In the first case, the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the State. "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."[522] "[T]hese indispensable liberties, whether of speech, press, or association,"[523] may be abridged by governmental action either directly or indirectly, wrote Justice Harlan, and the State had failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce.

Applying the concept in subsequent cases, the Court again held in *Bates v. City of Little Rock*,[524] that the disclosure of membership lists, because of the harm to be caused to "the right of association," could only be compelled upon a showing of a subordinating interest; ruled in *Shelton v. Tucker*,[525] that while a State had a broad interest to inquire into the fitness of its school teachers, that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years; again struck down an effort to compel membership lists from the NAACP;[526] and overturned a state court order barring the NAACP from doing any business within the State because of alleged impro-

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[519] 357 U.S. at 460; Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 578–79 (1971); Healy v. James, 408 U.S. 169, 181 (1972).

[520] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 463 (1958); NAACP v. Button, 371 U.S. 415, 429–30 (1963); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); In re Primus, 436 U.S. 412, 426 (1978); Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1981).

[521] *See* "Maintenance of National Security and the First Amendment," infra.

[522] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[523] 357 U.S. at 461.

[524] 361 U.S. 516 (1960).

[525] 364 U.S. 479 (1960).

[526] Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).

prieties.[527] Certain of the activities condemned in the latter case, the Court said, were protected by the First Amendment and, while other actions might not have been, the State could not so infringe on the "right of association" by ousting the organization altogether.[528]

A state order prohibiting the NAACP from urging persons to seek legal redress for alleged wrongs and from assisting and representing such persons in litigation opened up new avenues when the Court struck the order down as violating the First Amendment.[529] "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.... In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression...."

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity."[530] This decision was followed in three cases in which the Court held that labor unions enjoyed First Amendment protection in assisting their members in pursuing their legal remedies to recover for injuries and other actions. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular at-

[527] NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964).
[528] 377 U.S. at 308, 309.
[529] NAACP v. Button, 371 U.S. 415 (1963).
[530] 371 U.S. at 429-30. Button was applied in In re Primus, 436 U.S. 412 (1978), in which the Court found foreclosed by the First and Fourteenth Amendments the discipline visited upon a volunteer lawyer for the American Civil Liberties Union who had solicited someone to utilize the ACLU to bring suit to contest the sterilization of Medicaid recipients. Both the NAACP and the ACLU were organizations that engaged in extensive litigation as well as lobbying and educational activities, all of which were means of political expression. "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." Id. at 431. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Id. at 426. However, ordinary law practice for commercial ends is not given special protection. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977).

torneys;[531] in the second the union retained attorneys on a salaried basis to represent members;[532] in the third, the union recommended certain attorneys whose fee would not exceed a specified percentage of the recovery.[533] Wrote Justice Black: "[T]he First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights. . . ."[534]

Thus, a right to associate together to further political and social views is protected against unreasonable burdening,[535] but the evolution of this right in recent years has passed far beyond the relatively narrow contexts in which it was given birth.

Social contacts that fall short of organization or association to "engage in speech" may be unprotected, however. In holding that a state may restrict admission to certain licensed dance halls to persons between the ages of 14 and 18, the Court declared that there is no "generalized right of 'social association' that includes chance encounters in dance halls."[536]

In a series of three decisions, the Court explored the extent to which associational rights may be burdened by nondiscrimination requirements. First, *Roberts v. United States Jaycees*[537] upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Three years later in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*,[538] the Court applied *Roberts* in upholding application of a similar California law to prevent Rotary International from excluding women from membership. Then, in *New York State*

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[531] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

[532] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[533] United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[534] 401 U.S. at 578-79. These cases do not, however, stand for the proposition that individuals are always entitled to representation of counsel in administrative proceedings. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding limitation to $10 of fee that may be paid attorney in representing veterans' death or disability claims before VA).

[535] *E.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–15 (1982) (concerted activities of group protesting racial bias); Healy v. James, 408 U.S. 169 (1972) (denial of official recognition to student organization by public college without justification abridged right of association). The right does not, however, protect the decision of entities not truly private to exclude minorities. Runyon v. McCrary, 427 U.S. 160, 175–76 (1976); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945). Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[536] City of Dallas v. Stanglin, 490 U.S. 19 (1989). The narrow factual setting—a restriction on adults dancing with teenagers in public—may be contrasted with the Court's broad assertion that "coming together to engage in recreational dancing . . . is not protected by the First Amendment." Id. at 25.

[537] 468 U.S. 609 (1984).

[538] 481 U.S. 537 (1987).

*Club Ass'n v. New York City*,[539] the Court upheld against facial challenge New York City's Human Rights Law, which prohibits race, creed, sex, and other discrimination in places "of public accommodation, resort, or amusement," and applies to clubs of more than 400 members providing regular meal service and supported by nonmembers for trade or business purposes. In *Roberts*, both the Jaycees' nearly indiscriminate membership requirements and the State's compelling interest in prohibiting discrimination against women were important to the Court's analysis. On the one hand, the Court found, "the local chapters of the Jaycees are large and basically unselective groups," age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, "lack the distinctive characteristics [e.g., small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women."[540] Similarly, the Court determined in *Rotary International* that Rotary Clubs, designed as community service organizations representing a cross section of business and professional occupations, also do not represent "the kind of intimate or private relation that warrants constitutional protection."[541] And in the *New York City* case, the fact that the ordinance certainly could be constitutionally applied at least to some of the large clubs, under [the] decisions in *Rotary* and *Roberts*, the applicability criteria "pinpointing organizations which are 'commercial' in nature," helped to defeat the facial challenge.[542]

Some amount of First Amendment protection is still due such organizations; the Jaycees and its members had taken public positions on a number of issues, and had engaged in "a variety of civic, charitable, lobbying, fundraising and other activities worthy of constitutional protection." However, the *Roberts* Court could find "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."[543] Moreover, the State had a "compelling interest to prevent . . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages."[544]

Because of the near-public nature of the Jaycees and Rotary Clubs—the Court in *Roberts* likening the situation to a large busi-

[539] 487 U.S. 1 (1988).
[540] 468 U.S. at 621.
[541] 481 U.S. at 546.
[542] 487 U.S. at 12.
[543] 468 U.S. at 626-27.
[544] 468 U.S. at 628.

ness attempting to discriminate in hiring or in selection of customers—the cases may be limited in application, and should not be read as governing membership discrimination by private social clubs.[545] In *New York City*, the Court noted that "opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts."[546]

When application of a public accommodations law was viewed as impinging on an organization's ability to present its message, the Court found a First Amendment violation. Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow a group of gays and lesbians to march as a unit proclaiming its members' gay and lesbian identity, the Court held in *Hurley v. Irish-American Gay Group*.[547] To do so would require parade organizers to promote a message they did not wish to promote. The *Roberts* and *New York City* cases were distinguished as not involving "a trespass on the organization's message itself."[548] Those cases stood for the proposition that the state could require equal access for individuals to what was considered the public benefit of organization membership. But even if individual access to the parade might similarly be mandated, the Court reasoned, the gay group "could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[549]

In *Boy Scouts of America v. Dale*,[550] the Court held that application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as an adult member violated the organization's "First Amendment right of expressive association."[551] Citing *Hurley*, the Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[552] The Boy Scouts, the Court found,

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[545] The Court in Rotary rejected an assertion that Roberts had recognized that Kiwanis Clubs are constitutionally distinguishable, and suggested that a case-by-case approach is necessary to determine whether "the 'zone of privacy' extends to a particular club or entity." 481 U.S. at 547 n.6.

[546] 487 U.S. at 15.

[547] 515 U.S. 557 (1995).

[548] 515 U.S. at 580.

[549] 515 U.S. at 580-81.

[550] 530 U.S. 640 (2000).

[551] 530 U.S. at 644.

[552] 530 U.S. at 648.

engages in expressive activity in seeking to transmit a system of values, which include being "morally straight" and "clean."[553] The Court "accept[ed] the Boy Scouts' assertion" that the organization teaches that homosexual conduct is not morally straight.[554] The Court also gave "deference to [the] association's view of what would impair its expression."[555] Allowing a gay rights activist to serve in the Scouts would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[556]

***Political Association***.—The major expansion of the right of association has occurred in the area of political rights. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[557] Usually in combination with an equal protection analysis, the Court since *Williams v. Rhodes*[558] has passed on numerous state restrictions that have an impact upon the ability of individuals or groups to join one or the other of the major parties or to form and join an independent political party to further political, social and economic goals.[559] Of course, the right is not absolute. The Court has recognized that there must be substantial state regulation of the election process which necessarily will work a diminution of the individual's right to vote and to join with others for political purposes. The validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and necessity of the governmental interests and the means of implementing those inter-

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[553] 530 U.S. at 650.

[554] 530 U.S. at 651.

[555] 530 U.S. at 653.

[556] 530 U.S. at 653. One commentator argues that this decision subverts all civil rights laws by implying that any entity can claim "that the very act of discrimination shows an expressive purpose." Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1822 (2002).

[557] Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973).

[558] 393 U.S. 23 (1968).

[559] *E.g.*, Rosario v. Rockefeller, 410 U.S. 752 (1973) (time deadline for enrollment in party in order to vote in next primary); Kusper v. Pontikes, 414 U.S. 51 (1973) (barring voter from party primary if he voted in another party's primary within preceding 23 months); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access restriction); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (number of signatures to get party on ballot); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1982) (limit on contributions to associations formed to support or oppose referendum measure); Clements v. Fashing, 457 U.S. 957 (1982) (resign-to-run law).

ests.[560] Many restrictions upon political association have survived this sometimes exacting standard of review, in large measure upon the basis of some of the governmental interests found compelling.[561]

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicy-making, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,[562] the Court subsequently held that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[563] The concept of policymaking, confidential positions was abandoned, the Court noting that some such positions would nonetheless be protected whereas some people filling positions not reached by the

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[560] Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); Bullock v. Carter, 405 U.S. 134, 142–143 (1972); Storer v. Brown, 415 U.S. 724, 730 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183 (1979).

[561] Thus, in Storer v. Brown, 415 U.S. 724, 736 (1974), the Court found "compelling" the state interest in achieving stability through promotion of the two-party system, and upheld a bar on any independent candidate who had been affiliated with any other party within one year. *Compare* Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (casting doubt on state interest in promoting Republican and Democratic voters). The state interest in protecting the integrity of political parties was held to justify requiring enrollment of a person in the party up to eleven months before a primary election, Rosario v. Rockefeller, 410 U.S. 752 (1973), but not to justify requiring one to forgo one election before changing parties. Kusper v. Pontikes, 414 U.S. 51 (1973). *See also* Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (efficient operation of government justifies limits on employee political activity); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (permitting political party to designate replacement in office vacated by elected incumbent of that party serves valid governmental interests). Storer v. Brown was distinguished in Anderson v. Celebrezze, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters. *See also* Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) (state interests are insubstantial in imposing "closed primary" under which a political party is prohibited from allowing independents to vote in its primaries).

[562] Elrod v. Burns, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id. at 374.

[563] Branti v. Finkel, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which "party membership was *essential* to a discharge of the employee's governmental responsibilities." (emphasis supplied). A great gulf separates "appropriate" from "essential," so that much depends on whether the Court was using the two words interchangeably or whether the stronger word was meant to characterize the position noted and not to particularize the standard.

description would not be.[564] The opinion of the Court makes difficult an evaluation of the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political freedom that will have substantial implications for governmental employment. Refusing to confine *Elrod* and *Branti* to their facts, the court in *Rutan v. Republican Party of Illinois*[565] held that restrictions on patronage apply not only to dismissal or its substantial equivalent, but also to promotion, transfer, recall after layoffs, and hiring of low-level public employees. In 1996 the Court extended *Elrod* and *Branti* to protect independent government contractors.[566]

The protected right of association extends as well to coverage of party principles, enabling a political party to assert against some state regulation an overriding interest sufficient to overcome the legitimate interests of the governing body. Thus, a Wisconsin law that mandated an open primary election, with party delegates bound to support at the national convention the wishes of the voters expressed in that primary election, while legitimate and valid in and of itself, had to yield to a national party rule providing for the acceptance of delegates chosen only in an election limited to those voters who affiliated with the party.[567]

Provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained.[568] "[C]ompelled disclosure, in

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[564] Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. 445 U.S. at 520.

[565] 497 U.S. 62 (1990). *Rutan* was a 5–4 decision, with Justice Brennan writing the Court's opinion. The four dissenters indicated, in an opinion by Justice Scalia, that they would not only rule differently in *Rutan*, but that they would also overrule *Elrod* and *Branti*.

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

[567] Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981). *See also* Cousins v. Wigoda, 419 U.S. 477 (1975) (party rules, not state law, governed which delegation from State would be seated at national convention; national party had protected associational right to sit delegates it chose).

[568] Buckley v. Valeo, 424 U.S. 1, 60–84 (1976).

itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . We long have recognized the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . We have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[569] The governmental interests effectuated by these requirements – providing the electorate with information, deterring corruption and the appearance of corruption, and gathering data necessary to detect violations—were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing.[570] A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inasmuch as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors' names would subject them to threats or reprisals could obtain an exemption from the courts.[571] The *Buckley* Court also narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constitutional problems.[572]

***Conflict Between Organization and Members***.—It is to be expected that disputes will arise between an organization and some of its members, and that First Amendment principles may be implicated. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy.[573] But at least in some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may well be constitutional limitations. Disputes implicating such limitations can arise in connection with union shop labor agreements permissible under the National Labor Relations Act and the Railway Labor Act.[574]

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[569] 424 U.S. at 64 (footnote citations omitted).

[570] 424 U.S. at 66-68.

[571] 424 U.S. at 68-74. Such a showing, based on past governmental and private hostility and harassment, was made in Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

[572] 424 U.S. at 74-84.

[573] The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, inter alia, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.

[574] § 8(a)(3) of the Labor-Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits the negotiation of union shop but not closed shop agreements, which, however, may be outlawed by contrary state laws. § 14(b), 61 Stat.

Initially, the Court avoided constitutional issues in resolving a challenge by union shop employees to use of their dues money for political causes. Acknowledging "the utmost gravity" of the constitutional issues, the Court determined that Congress had intended that dues money obtained through union shop agreements should be used only to support collective bargaining and not in support of other causes.[575] Justices Black and Douglas, in separate opinions, would have held that Congress could not constitutionally provide for compulsory membership in an organization which could exact from members money which the organization would then spend on causes which the members opposed; Justices Frankfurter and Harlan, also reaching the constitutional issue, would have held that the First Amendment was not violated when government did not compel membership but merely permitted private parties to enter into such agreements and that in any event so long as members were free to espouse their own political views the use by a union of dues money to support political causes which some members opposed did not violate the First Amendment.[576]

In *Abood v. Detroit Bd. of Education*,[577] the Court applied *Hanson* and *Street* to the public employment context. Recognizing that employee associational rights were clearly restricted by any system of compelled support, because the employees had a right not to associate, not to support, the Court nonetheless found the governmental interests served by the agency shop provision—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact

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151, 29 U.S.C. § 164(b). *See* Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). In industries covered by the Railway Labor Act, union shop agreements may be negotiated regardless of contrary state laws. 64 Stat. 1238, 45 U.S.C. § 152, Eleventh; Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956).

[575] International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). The quoted phrase is at 749.

[576] 367 U.S. at 775 (Justice Douglas concurring), 780 (Justice Black dissenting), 797 (Justices Frankfurter and Harlan dissenting). On the same day, a majority of the Court declined, in Lathrop v. Donohue, 367 U.S. 820 (1961), to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an "integrated bar." These issues were faced squarely in Keller v. State Bar of California, 496 U.S. 1 (1990). An integrated state bar may not, against a members' wishes, devote compulsory dues to ideological or other political activities not "necessarily or reasonably related to the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State." Id. at 14.

[577] 431 U.S. 209 (1977). That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, id. at 226–32, but Justice Powell found the distinction between public and private employment crucial. Id. at 244.

upon employee freedom.[578] But a different balance was drawn when the Court considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collective-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as much as if government prohibited him from acting to further his own beliefs.[579] However, the remedy was not to restrain the union from making non-collective bargaining related expenditures but to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system whereby employees could object generally to such use of union funds and could obtain either a proportionate refund or reduction of future exactions.[580] Later, the Court further tightened the requirements. A proportionate refund is inadequate because "even then the union obtains an involuntary loan for purposes to which the employee objects;"[581] an advance reduction of dues corrects the problem only if accompanied by sufficient information by which employees may gauge the propriety of the union's fee.[582] Therefore, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker."[583]

On a related matter, the Court held that a labor relations body could not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[584]

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[578] 431 U.S. at 217-23. The compelled support was through the agency shop device. Id. at 211, 217 n.10. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, would have held that compelled support by public employees of unions violated their First Amendment rights. Id. at 244. For an argument over the issue of corporate political contributions and shareholder rights, *see* First National Bank v. Bellotti, 435 U.S. 765, 792–95 (1978), and id. at 802, 812–21 (Justice White dissenting).

[579] 431 U.S. at 232-37.

[580] 431 U.S. at 237-42. On the other hand, nonmembers may be charged for such general union expenses as contributions to state and national affiliates, expenses of sending delegates to state and national union conventions, and costs of a union newsletter. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).

[581] Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984).

[582] Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[583] 475 U.S. at 309.

[584] Madison School Dist. v. WERC, 429 U.S. 167 (1977).

**Maintenance of National Security and the First Amendment**

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may lead government officials at times to trespass in areas protected by the guarantees of speech and press and may require the balancing away of rights which might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court. In this section, we consider a number of areas in which the necessity to draw lines has arisen.

***Punishment of Advocacy***.—Criminal punishment for the advocacy of illegal or of merely unpopular goals and of ideas did not originate in the United States in the post-World War II concern with Communism. Enactment of and prosecutions under the Sedition Act of 1798[585] and prosecutions under the federal espionage laws[586] and state sedition and criminal syndicalism laws[587] in the 1920s and early 1930s have been alluded to earlier.[588] But it was in the 1950s and the 1960s that the Supreme Court confronted First Amendment concepts fully in determining the degree to which government could proceed against persons and organizations which it believed were plotting and conspiring both to advocate the overthrow of government and to accomplish that goal.

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[585] Ch. 74, 1 Stat. 596 (1798).

[586] The cases included Schenck v. United States, 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); Debs v. United States, 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); Abrams v. United States, 250 U.S. 616 (1919) (affirming convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).

[587] The cases included Gitlow v. New York, 268 U.S. 652 (1925) (affirming conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); Whitney v. California, 274 U.S. 357 (1927) (affirming conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).

[588] *See* discussion under "Adoption and the Common Law Background," and "Clear and Present Danger," supra. *See also* Taylor v. Mississippi, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute that prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.

The Smith Act of 1940[589] made it a criminal offense for anyone to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises, or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association. No case involving prosecution under this law was reviewed by the Supreme Court until in *Dennis v. United States*[590] it considered the convictions of eleven Communist Party leaders on charges of conspiracy to violate the advocacy and organizing sections of the statute. Chief Justice Vinson's plurality opinion for the Court applied a revised clear and present danger test[591] and concluded that the evil sought to be prevented was serious enough to justify suppression of speech. "If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."[592] "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."[593]

Justice Frankfurter in concurrence developed a balancing test, which, however, he deferred to the congressional judgment in applying, concluding that "there is ample justification for a legislative

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[589] 54 Stat. 670, 18 U.S.C. § 2385.
[590] 341 U.S. 494 (1951).
[591] 341 U.S. at 510.
[592] 341 U.S. at 509.
[593] 341 U.S. at 510-11.

judgment that the conspiracy now before us is a substantial threat to national order and security."[594] Justice Jackson's concurrence was based on his reading of the case as involving "a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." Here the Government was dealing with "permanently organized, well-financed, semi-secret, and highly disciplined organizations" plotting to overthrow the Government; under the First Amendment "it is not forbidden to put down force and violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[595] Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger, the latter applying the Holmes-Brandeis formula of clear and present danger to conclude that "[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible."[596]

In *Yates v. United States*,[597] the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial. The decision was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited "advocacy of action," not merely "advocacy in the realm of ideas." "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."[598] Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found the evidence insuffi-

[594] 341 U.S. at 517, 542.
[595] 341 U.S. at 561, 572, 575.
[596] 341 U.S. at 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).
[597] 354 U.S. 298 (1957).
[598] 354 U.S. at 314, 315–16, 320, 324–25.

cient to link five of the defendants to advocacy of action, but sufficient with regard to the other nine.[599]

***Compelled Registration of Communist Party***.—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which "Communist-action organizations" and "Communist-front organizations" could be curbed.[600] Organizations found to fall within one or the other of these designations were required to register and to provide for public inspection membership lists, accountings of all money received and expended, and listings of all printing presses and duplicating machines; members of organizations which failed to register were required to register and members were subject to comprehensive restrictions and criminal sanctions. After a lengthy series of proceedings, a challenge to the registration provisions reached the Supreme Court, which sustained the constitutionality of the section under the First Amendment, only Justice Black dissenting on this ground.[601] Employing the balancing test, Justice Frankfurter for himself and four other Justices concluded that the threat to national security posed by the Communist conspiracy outweighed considerations of individual liberty, the impact of the registration provision in this area in any event being limited to whatever "public opprobrium and obloquy" might attach.[602] Three Justices based their conclusion on the premise that the Communist Party was an anti-democratic, secret organization, subservient to a foreign power, and utilizing speech-plus in attempting to achieve its ends and was therefore subject to extensive governmental regulation.[603]

***Punishment for Membership in an Organization That Engages in Proscribed Advocacy***.—The Smith Act provision making it a crime to organize or become a member of an organization that teaches, advocates, or encourages the overthrow of gov-

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[599] 354 U.S. at 330-31, 332. Justices Black and Douglas would have held the Smith Act unconstitutional. Id. at 339. Justice Harlan's formulation of the standard by which certain advocacy could be punished was noticeably stiffened in Brandenburg v. Ohio, 395 U.S. 444 (1969).

[600] Ch. 1024, 64 Stat. 987. Sections of the Act requiring registration of Communist-action and Communist-front organizations and their members were repealed in 1968. Pub. L. 90–237, § 5, 81 Stat. 766.

[601] Communist Party v. SACB, 367 U.S. 1 (1961). The Court reserved decision on the self-incrimination claims raised by the Party. The registration provisions ultimately floundered on this claim. Albertson v. SACB, 382 U.S. 70 (1965).

[602] 367 U.S. at 88-105. The quoted phrase appears at 102.

[603] 367 U.S. at 170-75 (Justice Douglas dissenting on other grounds), 191 (Justice Brennan and Chief Justice Warren dissenting on other grounds). Justice Black's dissent on First Amendment grounds argued that "Congress has [no] power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country." Id. at 147.

ernment by force or violence was used by the Government against Communist Party members. In *Scales v. United States*,[604] the Court affirmed a conviction under this section and held it constitutional against First Amendment attack. Advocacy such as the Communist Party engaged in, Justice Harlan wrote for the Court, was unprotected under *Dennis*, and he could see no reason why membership that constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but ... [t]he clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy." Only an "active" member of the Party—one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a "nominal, passive, inactive or purely technical" member.[605]

***Disabilities Attaching to Membership in Proscribed Organizations***.—The consequences of being or becoming a member of a proscribed organization can be severe. Aliens are subject to deportation for such membership.[606] Congress made it unlawful for any member of an organization required to register as a "Communist-action" or a "Communist-front" organization to apply for a passport or to use a passport.[607] A now-repealed statute required

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[604] 367 U.S. 203 (1961). Justices Black and Douglas dissented on First Amendment grounds, id. at 259, 262, while Justice Brennan and Chief Justice Warren dissented on statutory grounds. Id. at 278

[605] 367 U.S. at 228-30. In Noto v. United States, 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." Id. at 297–98.

[606] *See* 66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6). "Innocent" membership in an organization which advocates violent overthrow of the government is apparently insufficient to save an alien from deportation. Galvan v. Press, 347 U.S. 522 (1954). More recent cases, however, seem to impose a high standard of proof on the Government to show a "meaningful association," as a matter of statutory interpretation. Rowoldt v. Perfetto, 355 U.S. 115 (1957); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

[607] Subversive Activities Control Act of 1950, § 6, 64 Stat. 993, 50 U.S.C. § 785. The section was declared unconstitutional in Aptheker v. Secretary of State, 378 U.S. 500 (1964), as an infringement of the right to travel, a liberty protected by the due process clause of the Fifth Amendment. But the Court considered the case as

as a condition of access to NLRB processes by any union that each of its officers must file affidavits that he was not a member of the Communist Party or affiliated with it.[608] The Court has sustained state bar associations in their efforts to probe into applicants' membership in the Communist Party in order to determine whether there was knowing membership on the part of one sharing a specific intent to further the illegal goals of the organization.[609] A section of the Communist Control Act of 1954 was designed to keep the Communist Party off the ballot in all elections.[610] The most recent interpretation of this type of disability is *United States v. Robel*,[611] in which the Court held unconstitutional under the First Amendment a section of the Internal Security Act that made it unlawful for any member of an organization compelled to register as a "Communist-action" or "Communist-front" organization to work thereafter in any defense facility. For the Court, Chief Justice Warren wrote that a statute that so infringed upon freedom of association must be much more narrowly drawn to take precise account of the evils at which it permissibly could be aimed. One could be disqualified from holding sensitive positions on the basis of active, knowing membership with a specific intent to further the unlawful goals of an organization, but that membership that was passive or inactive, or by a person unaware of the organization's unlawful aims, or by one who disagreed with those aims, could not be grounds for disqualification, certainly not for a non-sensitive position.[612]

A somewhat different matter is disqualifying a person for public benefits of some sort because of membership in a proscribed or-

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well in terms of its restrictions on "freedom of association," emphasizing that the statute reached membership whether it was with knowledge of the organization's illegal aims or not, whether it was active or not, and whether the member intended to further the organization's illegal aims. Id. at 507–14. *But see* Zemel v. Rusk, 381 U.S. 1, 16–17 (1965), in which the Court denied that State Department area restrictions in its passport policies violated the First Amendment, because the policy inhibited action rather than expression, a distinction the Court continued in Haig v. Agee, 453 U.S. 280, 304–10 (1981).

[608] This part of the oath was sustained in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and Osman v. Douds, 339 U.S. 846 (1950).

[609] Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). Membership alone, however, appears to be an inadequate basis on which to deny admission. Id. at 165–66; Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[610] Ch. 886, § 3, 68 Stat. 775, 50 U.S.C. § 842. The section was at issue without a ruling on the merits in Mitchell v. Donovan, 290 F. Supp. 642 (D. Minn. 1968) (ordering names of Communist Party candidates put on ballot); 300 F. Supp. 1145 (D. Minn. 1969) (dismissing action as moot); 398 U.S. 427 (1970) (dismissing appeal for lack of jurisdiction).

[611] 389 U.S. 258 (1967).

[612] 389 U.S. at 265-66. *See also* Schneider v. Smith, 390 U.S. 17 (1968).

ganization or because of some other basis ascribable to doubts about his loyalty. The First Amendment was raised only in dissent when in *Flemming v. Nestor*[613] the Court sustained a statute that required the termination of Social Security old-age benefits to an alien who was deported on grounds of membership in the Communist Party. Proceeding on the basis that no one was "entitled" to Social Security benefits, Justice Harlan for the Court concluded that a rational justification for the law might be the deportee's inability to aid the domestic economy by spending the benefits locally, although a passage in the opinion could be read to suggest that termination was permissible because alien Communists are undeserving of benefits.[614] Of considerable significance in First Amendment jurisprudence is *Speiser v. Randall*,[615] in which the Court struck down a state scheme for denying veterans' property tax exemptions to "disloyal" persons. The system, as interpreted by the state courts, denied the exemption only to persons who engaged in speech that could be criminally punished consistently with the First Amendment, but the Court found the vice of the provision to be that after each claimant had executed an oath disclaiming his engagement in unlawful speech, the tax assessor could disbelieve the oath taker and deny the exemption, thus placing on the claimant the burden of proving that he was loyal. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens .... In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free."[616]

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[613] 363 U.S. 603 (1960). Justice Black argued the applicability of the First Amendment. Id. at 628 (dissenting). Chief Justice Warren and Justices Douglas and Brennan also dissented. Id. at 628, 634.

[614] 363 U.S. at 612. The suggestive passage reads: "Nor ... can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute." Id. *But see* Sherbert v. Verner, 374 U.S. 398, 404–05, 409 n.9 (1963). While the right-privilege distinction is all but moribund, *Flemming* has been strongly reaffirmed in recent cases by emphasis on the noncontractual nature of such benefits. Richardson v. Belcher, 404 U.S. 78, 80–81 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980).

[615] 357 U.S. 513 (1958).

[616] 357 U.S. at 526. For a possible limiting application of the principle, *see* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 162–64 (1971),

***Employment Restrictions and Loyalty Oaths***.—An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may combine the two. First, government may establish a system investigating employees or prospective employees under standards relating to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization that stands for or advocates, unlawful or disloyal action. The Federal Government's security investigation program has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues, and it has not dealt with the loyalty oath features of the federal program.[617] The Court has, however, had a long running encounter with state loyalty oath programs.[618]

First encountered[619] was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the provision in a one-paragraph *per curiam* opinion.[620] Less than two

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and id. at 176–78 (Justices Black and Douglas dissenting), id. at 189 n.5 (Justices Marshall and Brennan dissenting).

[617] The federal program is primarily grounded in two Executive Orders by President Truman and President Eisenhower, E.O. 9835, 12 Fed. Reg. 1935 (1947), and E.O. 10450, 18 Fed. Reg. 2489 (1953), and a significant amendatory Order issued by President Nixon, E.O. 11605, 36 Fed. Reg. 12831 (1971). Statutory bases include 5 U.S.C. §§ 7311, 7531–32. Cases involving the program were decided either on lack of authority for the action being reviewed, *e.g.*, Cole v. Young, 351 U.S. 536 (1956); and Peters v. Hobby, 349 U.S. 331 (1955), or on procedural due process grounds, Greene v. McElroy, 360 U.S. 474 (1959); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). *But cf.* United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968). A series of three-judge district court decisions, however, invalidated federal loyalty oaths and inquiries. Soltar v. Postmaster General, 277 F. Supp. 579 (N.D. Calif. 1967); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969) (no-strike oath).

[618] So-called negative oaths or test oaths are dealt with in this section; for the positive oaths, *see* discussion supra.

[619] Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as ex post facto laws and bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).

[620] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (emphasis original). In Indiana Communist Party v. Whitcomb, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy stand-

months later, the Court upheld a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means, nor been a member of an organization with similar objectives; every employee was also required to swear that he was not and had not been a member of the Communist Party.[621] For the Court, Justice Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue had been raised whether an employee who was or had been a member could be discharged merely for that reason.[622] With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization's purpose during their affiliation, or persons who had severed their associations upon knowledge of an organization's purposes, or persons who had been members of an organization at a time when it was not unlawfully engaged.[623] Otherwise, the oath requirement was valid as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service."[624]

In the following Term, the Court sustained a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations that so advocated; the statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations that advocated violent overthrow and making membership in any listed organization prima facie evidence of disqualification.[625] Justice Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but had no right to work for the State in its public school

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ards of Brandenburg v. Ohio, 395 U.S. 444 (1969). Four Justices concurred more narrowly. 414 U.S. at 452 n.3. *See also* Whitcomb v. Communist Party of Indiana, 410 U.S. 976 (1973).

[621] Garner v. Board of Public Works, 341 U.S. 716 (1951). Justice Frankfurter dissented in part on First Amendment grounds, id. at 724, Justice Burton dissented in part, id. at 729, and Justices Black and Douglas dissented completely, on bill of attainder grounds, id. at 731.

[622] 341 U.S. at 720. Justices Frankfurter and Burton agreed with this ruling. Id. at 725–26, 729–30.

[623] 341 U.S. at 723-24.

[624] 341 U.S. at 720-21. Justice Frankfurter objected that the oath placed upon the takers the burden of assuring themselves that every organization to which they belonged or had been affiliated with for a substantial period of time had not engaged in forbidden advocacy.

[625] Adler v. Board of Education, 342 U.S. 485 (1952). Justice Frankfurter dissented because he thought no party had standing. Id. at 497. Justices Black and Douglas dissented on First Amendment grounds. Id. at 508.

system except upon compliance with the State's reasonable terms. "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[626] A State could deny employment based on a person's advocacy of overthrow of the government by force or violence or based on unexplained membership in an organization so advocating with knowledge of the advocacy.[627] With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.[628]

Invalidated the same year was an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment "solely on the basis of organizational membership." Stressing that membership might be innocent, that one might be unaware of an organization's aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.[629] But subsequent cases firmly reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.[630] In *Shelton v. Tucker*,[631] however, a five-to-four majority held that, while a State could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous five years was invalid because it was too broad, bore no rational relationship to the State's interests, and had a considerable potential for abuse.

Vagueness was then employed by the Court when loyalty oaths aimed at "subversives" next came before it. *Cramp v. Board of Pub-*

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[626] 342 U.S. at 492.

[627] 342 U.S. at 492.

[628] 342 U.S. at 494-96.

[629] Wieman v. Updegraff, 344 U.S. 183 (1952).

[630] Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 458 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960). *Compare* Slochower v. Board of Higher Education, 350 U.S. 551 (1956). The self-incrimination aspects of these cases are considered infra, under analysis of the Fifth Amendment.

[631] 364 U.S. 479 (1960). "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Id. at 485–86. Justices Frankfurter, Clark, Harlan, and Whittaker dissented. Id. at 490, 496.

*lic Instruction* [632] unanimously held too vague an oath that required one to swear, *inter alia*, that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Similarly, in *Baggett v. Bullitt*, [633] the Court struck down two oaths, one requiring teachers to swear that they "will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government," and the other requiring all state employees to swear, *inter alia*, that they would not "aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of government. Although couched in vagueness terms, the Court's opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the State could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow. [634]

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt v. Russell* [635] involved an oath that as supplemented would have been violated by one who "knowingly and willfully becomes or remains a member of the communist party . . . or any other organization having for its purposes the overthrow by force or violence of the government" with "knowledge of said unlawful purpose of said organization." The law's blanketing in of "knowing but guiltless" membership was invalid, wrote Justice Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must also have participated in the unlawful activities of the organization before public employment could be denied. [636] Next, in *Keyishian v. Board of Regents*, [637] the oath provisions sustained in *Adler* [638] were declared unconstitutional. A number of pro-

[632] 368 U.S. 278 (1961). For further proceedings on this oath, *see* Connell v. Higginbotham, 305 F. Supp. 445 (M.D. Fla. 1970), *aff'd in part and rev'd in part*, 403 U.S. 207 (1971).

[633] 377 U.S. 360 (1964). Justices Clark and Harlan dissented. Id. at 380

[634] 377 U.S. at 369-70.

[635] 384 U.S. 11 (1966). Justices White, Clark, Harlan, and Stewart dissented. Id. at 20.

[636] 384 U.S. at 16, 17, 19. "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." Id. at 17.

[637] 385 U.S. 589 (1967). Justices Clark, Harlan, Stewart, and White dissented. Id. at 620.

[638] Adler v. Board of Education, 342 U.S. 485 (1952).

visions were voided as vague,[639] but the Court held invalid a new provision making Communist Party membership prima facie evidence of disqualification for employment because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow, or denying that the organization advocates illegal overthrow. But "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[640] Similarly, in *Whitehill v. Elkins*,[641] an oath was voided because the Court thought it might include within its proscription innocent membership in an organization that advocated illegal overthrow of government.

More recent cases do not illuminate whether membership changes in the Court presage a change in view with regard to the loyalty-oath question. In *Connell v. Higginbotham*[642] an oath provision reading "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" was invalidated because the statute provided for summary dismissal of an employee refusing to take the oath, with no opportunity to explain that refusal. *Cole v. Richardson*[643] upheld a clause in an oath "that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method" upon the construction that this clause was mere "repetition, whether for emphasis or cadence," of the first part of the oath, which was a valid "uphold and defend" positive oath.

***Legislative Investigations and the First Amendment***.— The power of inquiry by congressional and state legislative committees in order to develop information as a basis for legislation[644] is subject to some uncertain limitation when the power as exercised results in deterrence or penalization of protected beliefs, associations, and conduct. While the Court initially indicated that it would scrutinize closely such inquiries in order to curb First Amendment infringement,[645] later cases balanced the interests of the legislative

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[639] Keyishian v. Board of Regents, 385 U.S. 589, 597–604 (1967).

[640] 385 U.S. at 608. Note that the statement here makes specific intent or active membership alternatives in addition to knowledge while Elfbrandt v. Russell, 384 U.S. 11, 19 (1966), requires both in addition to knowledge.

[641] 389 U.S. 54 (1967). Justices Harlan, Stewart, and White dissented. Id. at 62.

[642] 403 U.S. 207 (1971).

[643] 405 U.S. 676, 683–84 (1972).

[644] *See* subtopics under "Investigations in Aid of Legislation," supra.

[645] *See* United States v. Rumely, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178, 197–98 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 249–51

bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses, and upheld wide-ranging committee investigations.[646] More recently, the Court has placed the balance somewhat differently and required that the investigating agency show "a subordinating interest which is compelling" to justify the restraint on First Amendment rights that the Court found would result from the inquiry.[647] The issues in this field, thus, remain unsettled.

***Interference With War Effort***.—Unlike the dissent to United States participation in World War I, which provoked several prosecutions, the dissent to United States action in Vietnam was subjected to little legal attack. Possibly the most celebrated governmental action, the prosecution of Dr. Spock and four others for conspiring to counsel, aid, and abet persons to evade or to refuse obligations under the Selective Service System, failed to reach the Supreme Court.[648] Aside from a comparatively minor case,[649] the Court's sole encounter with a Vietnam War protest allegedly involving protected "symbolic conduct" was *United States v. O'Brien*.[650] That case affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O'Brien had publicly burned his card. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course

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(1957). Concurring in the last case, Justices Frankfurter and Harlan would have ruled that the inquiry there was precluded by the First Amendment. Id. at 255.

[646] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). Chief Justice Warren and Justices Black, Douglas, and Brennan dissented in each case.

[647] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Justices Harlan, Clark, Stewart, and White dissented. Id. at 576, 583. *See also* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966).

[648] United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

[649] In Schacht v. United States, 398 U.S. 58 (1970), the Court reversed a conviction under 18 U.S.C. § 702 for wearing a military uniform without authority. The defendant had worn the uniform in a skit in an on-the-street anti-war demonstration, and 10 U.S.C. § 772(f) authorized the wearing of a military uniform in a "theatrical production" so long as the performance did not "tend to discredit" the military. This last clause the Court held unconstitutional as an invalid limitation of freedom of speech.

[650] 391 U.S. 367 (1968).

of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[651] Finding that the Government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than that needed to serve the interest, the Court upheld the statute. More recently, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.[652]

***Suppression of Communist Propaganda in the Mails***.—A 1962 statute authorizing the Post Office Department to retain all mail from abroad which was determined to be "communist political propaganda" and to forward it to an addressee only upon his request was held unconstitutional in *Lamont v. Postmaster General*.[653] The Court held that to require anyone to request receipt of mail determined to be undesirable by the Government was certain to deter and inhibit the exercise of First Amendment rights to receive information.[654] Distinguishing *Lamont*, the Court in 1987 upheld statutory classification as "political propaganda" of communications or expressions by or on behalf of foreign governments, foreign "principals," or their agents, and reasonably adapted or intended to influence United States foreign policy.[655] "The physical detention of materials, not their mere designation as 'communist political propaganda,' was the offending element of the statutory scheme [in *Lamont*]."[656]

***Exclusion of Certain Aliens as a First Amendment Problem***.—While a nonresident alien might be able to present no claim, based on the First Amendment or on any other constitutional pro-

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[651] 391 U.S. at 376-77. For recent cases with suggestive language, *see* Snepp v. United States, 444 U.S. 507 (1980); Haig v. Agee, 453 U.S. 280 (1981).

[652] Wayte v. United States, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also* United States v. Albertini, 472 U.S. 675 (1985) (order banning a civilian from entering military base valid as applied to attendance at base open house by individual previously convicted of destroying military property).

[653] 381 U.S. 301 (1965). The statute, 76 Stat. 840, was the first federal law ever struck down by the Court as an abridgment of the First Amendment speech and press clauses.

[654] 381 U.S. at 307. Justices Brennan, Harlan, and Goldberg concurred, spelling out in some detail the rationale of the protected right to receive information as the basis for the decision.

[655] Meese v. Keene, 481 U.S. 465 (1987).

[656] 481 U.S. at 480.

vision, to overcome a governmental decision to exclude him from the country, it was arguable that United States citizens who could assert a First Amendment interest in hearing the alien and receiving information from him, such as the right recognized in *Lamont*, could be able to contest such exclusion.[657] But the Court declined to reach the First Amendment issue and to place it in balance when it found that a governmental refusal to waive a statutory exclusion[658] was on facially legitimate and neutral grounds; the Court's emphasis, however, upon the "plenary" power of Congress over admission or exclusion of aliens seemed to indicate where such a balance might be drawn.[659]

### Particular Governmental Regulations That Restrict Expression

Government adopts and enforces many measures that are designed to further a valid interest but that may restrict freedom of expression. As an employer, government is interested in attaining and maintaining full production from its employees in a harmonious environment. As enforcer of the democratic method of selecting public officials, it is interested in outlawing "corrupt practices" and promoting a fair and smoothly-functioning electoral process. As regulator of economic affairs, its interests are extensive. As educator, it desires to impart knowledge and training to the young with as little distraction as possible. All of these interests may be achieved with some restriction upon expression, but if the regulation goes too far expression may be abridged and the regulation will fail.[660]

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[657] The right to receive information has been prominent in the rationale of several cases, *e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Stanley v. Georgia, 394 U.S. 557 (1969).

[658] By §§ 212(a)(28)(D) and (G) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(a)(28)(D) and (G), aliens who advocate or write and publish "the economic, international, and governmental doctrines of world communism" are made ineligible to receive visas and are thus excluded from the United States. Upon the recommendation of the Secretary of State, however, the Attorney General is authorized to waive these provisions and to admit such an alien temporarily into the country. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

[659] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[660] Highly relevant in this and subsequent sections dealing with governmental incidental restraints upon expression is the distinction the Court has drawn between content-based and content-neutral regulations, a distinction designed to ferret out those regulations that indeed serve other valid governmental interests from those that in fact are imposed because of the content of the expression reached. *Compare* Police Department v. Mosley, 408 U.S. 92 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); *and* Schacht v. United States, 398 U.S. 58 (1970), *with* Greer v. Spock, 424 U.S. 828 (1976); Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); and United States v. O'Brien, 391 U.S. 367 (1968). Content-based regulations are subjected to strict scrutiny, while content-neutral regulations are not.

***Government as Employer: Political and Other Outside Activities***.—Abolition of the "spoils system" in federal employment brought with it consequent restrictions upon political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with elections.[661] By the Hatch Act, federal employees, and many state employees as well, are forbidden to "take any active part in political management or in political campaigns."[662] As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.[663] The question is whether government, which may not prohibit citizens in general from engaging in these activities, may nonetheless so control the off-duty activities of its own employees.

In *United Public Workers v. Mitchell*,[664] the Court answered in the affirmative. While the Court refused to consider the claims of persons who had not yet engaged in forbidden political activities, it ruled against a mechanical employee of the Mint who had done so. The Court's opinion, by Justice Reed, recognized that the restrictions of political activities imposed by the Act did in some measure impair First Amendment and other constitutional rights,[665] but it placed its decision upon the established principle that no right is absolute. The standard by which the Court judged the validity of the permissible impairment of First Amendment

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[661] 19 Stat. 143, § 6, 18 U.S.C. §§ 602–03, sustained in Ex parte Curtis, 106 U.S. 371 (1882); 22 Stat. 403, as amended, 5 U.S.C. § 7323.

[662] 53 Stat. 1147 § 9(a), (1939), as amended, 5 U.S.C. § 7324(a)(2). By 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–08, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). All the States have adopted laws patterned on the Hatch Act. *See* Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973).

[663] The Commission on Political Activity of Government Personnel, Findings and Recommendations 11, 19–24 (Washington: 1968).

[664] 330 U.S. 75, 94–104 (1947). The decision was 4–to–3, with Justice Frankfurter joining the Court on the merits only after arguing that the Court lacked jurisdiction.

[665] 330 U.S. at 94-95.

rights, however, was a due process standard of reasonableness.[666] Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of *Mitchell*.[667] But a divided Court, reaffirming *Mitchell*, sustained the Act's limitations upon political activity against a range of First Amendment challenges.[668] It emphasized that the interest of the Government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[669] therefore, a statute that barred in plain language a long list of activities would clearly be valid.[670] The issue in *Letter Carriers*, however, was whether the language that Congress had enacted, forbidding employees to take "an active part in political management or in political campaigns,"[671] was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted, or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. With respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was to enact that the forbidden activities were the same activities that the Commission had as of 1940, and reaching back to1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules. . . ."[672] This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings it had made that were not available to employees and that were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of

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[666] 330 U.S. at 101-02.

[667] The Act was held unconstitutional by a divided three-judge district court. National Ass'n of Letter Carriers v. Civil Service Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

[668] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute clearly could constitutionally proscribe.

[669] The interests the Court recognized as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S. at 557-67.

[670] 413 U.S. at 556.

[671] 413 U.S. at 554, 570 n.17.

[672] 413 U.S. at 570 n.17.

1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. That the Commission had done. It had regularly summarized in understandable terms the rules which it applied, and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and manageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests."[673] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[674] More recently, in *Bush v. Lucas*[675] the Court held that the civil service laws and regulations are sufficiently "elaborate [and] comprehensive" to afford federal employees an adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

The Hatch Act cases were distinguished in *United States v. National Treasury Employees Union*,[676] in which the Court struck down an honoraria ban as applied to lower-level employees of the Federal Government. The honoraria ban suppressed employees' right to free expression while the Hatch Act sought to protect that right, and also there was no evidence of improprieties in acceptance of honoraria by members of the plaintiff class of federal employees.[677] The Court emphasized further difficulties with the "crudely crafted" honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee's job responsibilities, and it exempted a "series" of speeches or arti-

[673] 413 U.S. at 578-79.
[674] 413 U.S. at 580-81.
[675] 462 U.S. 367 (1983).
[676] 513 U.S. 454 (1995).
[677] The plaintiff class consisted of all Executive Branch employees below grade GS–16. Also covered by the ban were senior executives, Members of Congress, and other federal officers, but the possibility of improprieties by these groups did not justify application of the ban to "the vast rank and file of federal employees below grade GS–16."

cles without also exempting individual articles and speeches. These "anomalies" led the Court to conclude that the "speculative benefits" of the ban were insufficient to justify the burdens it imposed on expressive activities.[678]

***Government as Employer: Free Expression Generally***.— Change has occurred in many contexts, in the main with regard to state and local employees and with regard to varying restrictions placed upon such employees. Foremost among the changes has been the general disregarding of the "right-privilege" distinction. Application of that distinction to the public employment context was epitomized in the famous sentence of Justice Holmes': "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[679] The Supreme Court embraced this application in the early 1950s, first affirming a lower court decision by equally divided vote,[680] and soon after applying the distinction itself. Upholding a prohibition on employment as teachers of persons who advocated the desirability of overthrowing the government, the Court declared that "[i]t is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[681]

The same year, however, saw the express rejection of the right-privilege doctrine in another loyalty case. Voiding a loyalty oath re-

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[678] 513 U.S. at 477.

[679] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

[680] Bailey v. Richardson, 182 F. 2d 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The appeals court majority, upholding the dismissal of a government employee against due process and First Amendment claims, asserted that "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." Although the Supreme Court issued no opinion in *Bailey*, several Justices touched on the issues in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Justices Douglas and Jackson in separate opinions rejected the privilege doctrine as applied by the lower court in Bailey. Id. at 180, 185. Justice Black had previously rejected the doctrine in United Public Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion).

[681] Adler v. Board of Education, 342 U.S. 458, 492–93 (1952). Justices Douglas and Black dissented, again rejecting the privilege doctrine. Id. at 508. Justice Frankfurter, who dissented on other grounds, had previously rejected the doctrine in another case, Garner v. Board of Public Works, 341 U.S. 716, 725 (1951) (concurring in part and dissenting in part).

quirement conditioned on mere membership in suspect organizations, the Court reasoned that the interest of public employees in being free of such an imposition was substantial. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.... [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[682] The premise here – that, if removal or rejection injures one in some fashion, he is therefore entitled to raise constitutional claims against the dismissal or rejection – has faded in subsequent cases; the rationale now is that, while government may deny employment, or any benefit for that matter, for any number of reasons, it may not deny employment or other benefits on a basis that infringes that person's constitutionally protected interests. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible."[683]

However, the fact that government does not have carte blanche in dealing with the constitutional rights of its employees does not mean it has no power at all. "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[684] *Pick-*

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[682] Wieman v. Updegraff, 344 U.S. 183, 190–91, 192 (1952). Some earlier cases had used a somewhat qualified statement of the privilege. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947); Garner v. Board of Public Works, 341 U.S. 716, 722 (1951).

[683] Perry v. Sindermann, 408 U.S. 593, 597 (1972). In a companion case, the Court noted that the privilege basis for the appeals court's due process holding in Bailey "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). The test now in due process and other such cases is whether government has conferred a property right in employment which it must respect, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979). *See* discussion infra under "The Interests Protected: Entitlements and Positivist Recognition."

[684] Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

*ering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Marshall wrote for the Court, "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."[685] The Court laid down no general standard, but undertook a suggestive analysis. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or of harmony among coworkers, or problems of personal loyalty and confidence, would arise.[686] The school board had not shown that any harm had resulted from the false statements in the letter, and it could not proceed on the assumption that the false statements were per se harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds. Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions that the community should be aware of. "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[687]

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in *Arnett v. Kennedy*,[688] sustained the constitutionality of a provision of federal law authorizing removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by

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[685] 391 U.S. at 568.

[686] 391 U.S. at 568-70. *Contrast* Connick v. Myers, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony was important. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Id. at 151–52.

[687] 391 U.S. at 570-73. *Pickering* was extended to private communications of an employee's views to the employer in Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), although the Court recognized that different considerations might arise in context. That is, with respect to public speech, *content* may be determinative in weighing impairment of the government's interests, whereas with private speech, *manner*, *time*, and *place of delivery* may be as or more important. Id. at 415 n.4.

[688] 416 U.S. 134 (1974). The quoted language is from 5 U.S.C. § 7501(a).

the employee. He had charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct." But, recurring to its *Letter Carriers* analysis,[689] it noted that the authority conferred was not impermissibly vague, inasmuch as it is not possible to encompass within a statutory enactment all the myriad situations that arise in the course of employment, and inasmuch as the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[690] Neither was the language overbroad, continued the Court, because it "proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad."[691]

*Pickering* was distinguished in *Connick v. Myers*,[692] involving what the Court characterized in the main as an employee grievance rather than an effort to inform the public on a matter of public concern. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale. This firing the Court found permissible. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[693] Whether an employee's speech addresses a matter

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[689] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973).

[690] Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974).

[691] 416 U.S. at 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id. at 229.

[692] 461 U.S. 138 (1983).

[693] 461 U.S. at 146. *Connick* was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer's judgment as to disruptive effect. Id. at 163–65.

of public concern, the Court indicated, must be determined not only by its content, but also by its form and context.[694] Because one aspect of the employee's speech did raise matters of public concern, *Connick* also applied *Pickering's* balancing test, holding that "a wide degree of deference is appropriate" when "close working relationships" between employer and employee are involved.[695] The issue of public concern is not only a threshold inquiry, but under *Connick* still figures in the balancing of interests: "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public.[696]

On the other hand, the Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public.[697] In *Rankin v. McPherson*[698] the Court held protected an employee's comment, made to a coworker upon hearing of an unsuccessful attempt to assassinate the President, and in a context critical of the President's policies, "If they go for him again, I hope they get him." Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights.[699]

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection."[700]

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[694] 461 U.S. at 147-48. Justice Brennan objected to this introduction of context, admittedly of interest in balancing interests, into the threshold issue of public concern.

[695] 461 U.S. at 151-52.

[696] 461 U.S. at 150. The Court explained that "a stronger showing [of interference with governmental interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." Id. at 152.

[697] This conclusion was implicit in *Givhan*, 439 U.S. 410 (1979), characterized by the Court in Connick as involving "an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but [speaking] privately." 461 U.S. at 148, n.8.

[698] 483 U.S. 378 (1987). This was a 5–4 decision, with Justice Marshall's opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia's dissent being joined by Chief Justice Rehnquist, and by Justices White and O'Connor. Justice Powell added a separate concurring opinion.

[699] "Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." 483 U.S. at 390-91.

[700] Board of County Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996).

Thus, although the public employer cannot muzzle its employees or penalize them for their expressions and associations to the same extent that a private employer can (the First Amendment, inapplicable to the private employer, is applicable to the public employer),[701] the public employer nonetheless has broad leeway in restricting employee speech. If the employee speech does not relate to a matter of "public concern," then *Connick* applies and the employer is largely free of constitutional restraint. If the speech does relate to a matter of public concern, then *Pickering*'s balancing test (as modified by *Connick*) is employed, the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties[702] being balanced against the employee's First Amendment rights. While the general approach is relatively easy to describe, it has proven difficult to apply.[703] The First Amendment, however, does not stand alone in protecting the speech of public employees; statutory protections for "whistleblowers" add to the mix.[704]

***Government as Educator***.—While the Court had previously made clear that students in public schools are entitled to some con-

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[701] *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe protected belief and associational rights of employees); Madison School Dist. v. WERC, 429 U.S. 167 (1977) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights). The public employer may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223–32 (1977), but the fact that its employees may speak does not compel government to listen to them. *See* Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but employer not constitutionally required to engage in collective bargaining). *See also* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative). Government may also inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1969).

[702] In some contexts, the governmental interest is more far-reaching. *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

[703] For analysis of the efforts of lower courts to apply Pickering and Connick, *see* Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); and Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988). In Waters v. Churchill, 511 U.S. 661 (1994), the Court grappled with what procedural protections may be required by the First Amendment when public employees are dismissed on speech-related grounds, but reached no consensus.

[704] The principal federal law is the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16, 5 U.S.C. §§ 1201 *et seq.*

stitutional protection[705] and that minors generally are not outside the range of constitutional protection,[706] its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in *Tinker v. Des Moines Independent Community School District*.[707] There, high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States actions in Vietnam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.... On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[708] Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[709]

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[705] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (flag salute); Meyer v. Nebraska, 262 U.S. 390 (1923) (limitation of language curriculum to English); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (compulsory school attendance in public rather than choice of public or private schools).

[706] In re Gault, 387 U.S. 1 (1967). Of course, children are in a number of respects subject to restrictions which would be impermissible were adults involved. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (access to objectionable and perhaps obscene materials).

[707] 393 U.S. 503 (1969).

[708] 393 U.S. at 506, 507.

[709] 393 U.S. at 509. The internal quotation is from Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (state university could not expel a student for using "indecent speech" in campus newspaper). However, offensive "indecent" speech in the context of a high school assembly is punishable by school authorities. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding 2–day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).

*Tinker* was reaffirmed by the Court in *Healy v. James*,[710] in which it held that the withholding of recognition by a public college administration from a student organization violated the students' right of association, which is a construct of First Amendment liberties. Denial of recognition, the Court held, was impermissible if it had been based on the local organization's affiliation with the national SDS, or on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support. "First Amendment rights must always be applied 'in light of the special characteristics of the ... environment' in the particular case.... And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' ... Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' ... The college classroom with its surrounding environs is peculiarly the 'market place of ideas' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[711] But a college may impose reasonable regulations to maintain order and preserve an atmosphere in which learning may take place, and it may impose as a condition of recognition that each organization affirm in advance its willingness to adhere to reasonable campus law.[712]

While a public college may not be required to open its facilities generally for use by student groups, once it has done so it must justify any discriminations and exclusions under applicable constitutional norms, such as those developed under the public forum doctrine. Thus, it was constitutionally impermissible for a college to

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[710] 408 U.S. 169 (1972).

[711] 408 U.S. at 180. The internal quotations are from Tinker, 393 U.S. 503, 506, 507 (1969), and from Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[712] Healy v. James, 408 U.S. at 193. Because a First Amendment right was in issue, the burden was on the college to justify its rejection of a request for recognition rather than upon the requesters to justify affirmatively their right to be recognized. Id. at 184. Justice Rehnquist concurred in the result, because in his view a school administration could impose upon students reasonable regulations that would be impermissible if imposed by the government upon all citizens; consequently, cases cited by the Court which had arisen in the latter situation he did not think controlling. Id. at 201. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Court upheld an anti-noise ordinance that forbade persons on grounds adjacent to a school to willfully make noise or to create any other diversion during school hours that "disturbs or tends to disturb" normal school activities.

close off its facilities, otherwise open, to students wishing to engage in religious speech.[713] To be sure, a decision to permit access by religious groups had to be evaluated under First Amendment religion standards, but equal access did not violate the religion clauses. Compliance with stricter state constitutional provisions on church-state was a substantial interest, but it could not justify a content-based discrimination in violation of the First Amendment speech clause.[714] By enactment of the Equal Access Act in 1984,[715] Congress applied the same "limited open [public] forum" principles to public high schools, and the Court upheld the Act against First Amendment challenge.[716]

When faced with another conflict between a school system's obligation to inculcate community values in students and the expression rights of those students, the Court splintered badly, remanding for full trial a case challenging the authority of a school board to remove certain books from high school and junior high school libraries.[717] In dispute were the school board's reasons for removing the books—whether, as the board alleged, because of vulgarity and other content-neutral reasons, or whether also because of political disagreement with contents. The plurality conceded that school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." At the same time, the plurality thought that students retained substantial free expression protections and that among these was the right to receive information and ideas. Carefully limiting its discussion to the removal of books from a school library, thereby excluding acquisition of books as well as questions of school curricula, the plurality would hold a school board constitutionally disabled from removing library books in order to deny ac-

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[713] Widmar v. Vincent, 454 U.S. 263 (1981).

[714] 454 U.S. at 270-76. Whether the holding extends beyond the college level to students in high school or below who are more "impressionable" and perhaps less able to appreciate that equal access does not compromise the school's neutrality toward religion, id. at 274 n.14, is unclear. *See* Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[715] Pub. L. No. 98–377, title VII, 98 Stat. 1302, 20 U.S.C. §§ 4071–74.

[716] Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990). There was no opinion of the Court on the Establishment Clause holding. A plurality opinion, id. at 247–53, rejected Justice Marshall's contention, id. at 263, that compulsory attendance and other structured aspects of the particular high school setting in Mergens differed so significantly from the relatively robust, open college setting in Widmar as to suggest state endorsement of religion.

[717] Board of Education v. Pico, 457 U.S. 853 (1982).

cess to ideas with which it disagrees for political reasons.[718] The four dissenters basically rejected the contention that school children have a protected right to receive information and ideas and thought that the proper role of education was to inculcate the community's values, a function into which the federal courts could rarely intrude.[719] The decision provides little guidance to school officials and to the lower courts and assures a revisiting of the controversy by the Supreme Court.

*Tinker* was distinguished in *Hazelwood School Dist. v. Kuhlmeier*,[720] the Court relying on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need only be "reasonably related to legitimate pedagogical concerns."[721] "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[722] The student newspaper had been created by school officials as a part of the school curriculum, and served "as a supervised learning experience for journalism students." Because no public forum had been created, school officials could maintain editorial control subject only to a reasonableness standard. Thus, a principal's decisions to excise from the publication an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, were upheld.

The category of school-sponsored speech subject to *Kuhlmeier* analysis appears to be far broader than the category of student expression still governed by *Tinker*. School-sponsored activities, the Court indicated, can include "publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or

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[718] 457 U.S. at 862, 864–69, 870–72. Only Justices Marshall and Stevens joined fully Justice Brennan's opinion. Justice Blackmun joined it for the most part with differing emphases. Id. at 875. Justice White refrained from joining any of the opinions but concurred in the result solely because he thought there were unresolved issues of fact that required a trial. Id. at 883.

[719] The principal dissent was by Justice Rehnquist. 457 U.S. at 904. *See also* id. at 885 (Chief Justice Burger), 893 (Justice Powell), 921 (Justice O'Connor).

[720] 484 U.S. 260 (1988).

[721] 484 U.S. at 273.

[722] 484 U.S. at 270-71.

skills to student participants and audiences."[723] Because most primary, intermediate, and secondary school environments are tightly structured, with few opportunities for unsupervised student expression,[724] *Tinker* apparently has limited applicability. It may be, for example, that students are protected for off-premises production of "underground" newspapers (but not necessarily for attempted distribution on school grounds) as well as for non-disruptive symbolic speech. For most student speech at public schools, however, *Tinker*'s tilt in favor of student expression, requiring school administrators to premise censorship on likely disruptive effects, has been replaced by *Kuhlmeier*'s tilt in favor of school administrators' pedagogical discretion.[725]

Governmental regulation of school and college administration can also implicate the First Amendment. But the Court dismissed as too attenuated a claim to a First Amendment-based academic freedom privilege to withhold peer review materials from EEOC subpoena in an investigation of a charge of sex discrimination in a faculty tenure decision.[726]

***Government as Regulator of the Electoral Process: Elections***.—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and expenditures, limiting contributions and expenditures, and imposing other regulations.[727] These regulations restrict freedom of expression, which comprehends the rights to join together for political purposes, to promote candidates and

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[723] 484 U.S. at 271. Selection of materials for school libraries may fall within this broad category, depending upon what is meant by "designed to impart *particular* knowledge or skills." *See generally* Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J. LAW & EDUC. 23 (1989).

[724] The Court in *Kuhlmeier* declined to decide "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 274, n.7.

[725] One exception may exist for student religious groups covered by the Equal Access Act; in this context the Court seemed to step back from *Kuhlmeier's* broad concept of curriculum-relatedness, seeing no constitutionally significant danger of perceived school sponsorship of religion arising from application of the Act's requirement that high schools provide meeting space for student religious groups on the same basis that they provide such space for student clubs. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[726] University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) .

[727] The basic federal legislation regulating campaign finances is spread over several titles of the United States Code. The relevant, principal modern laws are the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, and the Federal Election Campaign Act Amendments of 1979, 93 Stat. 1339, 2 U.S.C. 431 et seq., and sections of Titles 18 and 26. The Federal Corrupt Practices Act of 1925, 43 Stat. 1074, was upheld in Burroughs v. United States, 290 U.S. 534 (1934), but there was no First Amendment challenge. All States, of course, extensively regulate elections.

issues, and to participate in the political process.[728] The Court is divided with respect to many of these federal and state restrictions, but has not permitted the government to bar or penalize political speech directly. Thus, it held that the Minnesota Supreme Court could not prohibit candidates for judicial election from announcing their views on disputed legal and political issues.[729] And, when Kentucky attempted to void an election on the ground that the winner's campaign promise to serve at a lower salary than that affixed to the office violated a law prohibiting candidates from offering material benefits to voters in consideration for their votes, the Court ruled unanimously that the state's action violated the First Amendment.[730] Similarly, California could not prohibit official governing bodies of political parties from endorsing or opposing candidates in primary elections.[731] Minnesota, however, could prohibit a candidate from appearing on the ballot as the candidate of more than one party.[732] The Court wrote that election "[r]egulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions."[733] Minnesota's ban on "fusion" candidates was not severe, as it left a party that could not place another party's candidate on the ballot free to communicate its preference for that candidate by other means, and the ban was justified by "valid state interests in ballot integrity and political stability."[734]

In 1971 and 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by po-

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[728] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Buckley v. Valeo, 424 U.S. 1, 14, 19 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–78 (1978); Brown v. Hartlage, 456 U.S. 45, 52–54 (1982).

[729] Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002). Four Justices, however, dissented from this decision.

[730] Brown v. Hartlage, 456 U.S. 45 (1982). *See also* Mills v. Alabama, 384 U.S. 214 (1966) (setting aside a conviction and voiding a statute which punished electioneering or solicitation of votes for or against any proposition on the day of the election, applied to publication of a newspaper editorial on election day supporting an issue on the ballot); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), *aff'd*, 423 U.S. 1041 (1976) (statute barring malicious, scurrilous, and false and misleading campaign literature is unconstitutionally overbroad).

[731] Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). *Cf.* Burson v. Freeman, 504 U.S. 191 (1992) (upholding Tennessee law prohibiting solicitation of votes and distribution of campaign literature within 100 feet of the entrance to a polling place; plurality found a "compelling" interest in preventing voter intimidation and election fraud).

[732] Timmons v. Twin City Area New Party, 520 U.S. 351 (1997).

[733] 520 U.S. at 538 (internal quotation marks omitted).

[734] 520 U.S. at 369–70.

litical campaigns, as well as disclosure of most contributions and expenditures, setting the stage for the landmark *Buckley v. Valeo* decision probing the scope of protection afforded political activities by the First Amendment.[735] In basic unanimity, but with several Justices feeling that the sustained provisions trenched on protected expression, the Court sustained the contribution and disclosure sections of the statute but voided the limitations on expenditures.[736]

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[737] The expenditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication, and when governmental regulation is aimed directly at suppressing communication it matters not how that communication is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests. When this process was engaged in, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not.

The contribution limitation was sustained as imposing only a marginal restriction upon the contributor's ability to engage in free communication, inasmuch as the contribution is a generalized expression of support for a candidate but it is not a communication of reasons for the support; "the size of the contribution provides a very rough index of the intensity of the contributors' support for the candidate."[738] The political expression really occurs when the funds are spent by a candidate; only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress' purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.[739]

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[735] 424 U.S. 1 (1976).

[736] The Court's lengthy opinion was denominated *per curiam*, but five Justices filed separate opinions.

[737] 424 U.S. at 14, 19.

[738] 424 U.S. at 21.

[739] 424 U.S. at 14-38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id. at 235, 241–46, 290. *See also* California Medical Ass'n v. FEC, 453 U.S. 182 (1981), sustaining a provision barring individ-

Of considerable importance to the analysis of the validity of the limitations on contributions was the Court's conclusion voiding a section restricting to $1,000 a year the aggregate expenditure anyone could make to advocate the election or defeat of a "clearly identified candidate." Though the Court treated the restricted spending as purely an expenditure it seems to partake equally of the nature of a contribution on behalf of a candidate that is not given to the candidate but that is spent on his behalf. "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."[740] The Court found that none of the justifications offered in support of a restriction on such expression was adequate; independent expenditures did not appear to pose the dangers of corruption that contributions did and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups.[741]

Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a

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uals and unincorporated associations from contributing more than $5,000 per year to any multicandidate political action committee, on the basis of the standards applied to contributions in *Buckley*; and FEC v. National Right to Work Comm., 459 U.S. 197 (1982), sustaining a provision barring nonstock corporations from soliciting contributions from persons other than their members when the corporation uses the funds for designated federal election purposes.

[740] 424 U.S. at 48.

[741] 424 U.S. at 39-51. Justice White dissented. Id. at 257. In an oblique return to the right-privilege distinction, the Court agreed that Congress could condition receipt of public financing funds upon acceptance of expenditure limitations. Id. at 108–09. In Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982), a provision was invalidated which limited independent political committees to expenditures of no more than $1,000 to further the election of any presidential candidate who received public funding. An equally divided affirmance is of limited precedential value. When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making independent expenditures on behalf of a candidate, since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." Id. at 498. *See also* Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (the First Amendment bars application of the Party Expenditure Provision of the Federal Election Campaign Act, 2 U.S.C. § 441a(d)(3), to expenditures that the political party makes independently, without coordination with the candidate).

First Amendment right to advocate.[742] The limitations upon total expenditures by candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources was impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.[743]

Although the Court in *Buckley* upheld the Act's reporting and disclosure requirements, it indicated that under some circumstances the First Amendment might require exemption for minor parties able to show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[744] This standard was applied both to disclosure of contributors' names and to disclosure of recipients of campaign expenditures in *Brown v. Socialist Workers '74 Campaign Committee*,[745] in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby "cripple a minor party's ability to operate effectively."[746]

In *Nixon v. Shrink Missouri Government PAC*,[747] the Court held that *Buckley v. Valeo* "is authority for state limits on contributions to state political candidates," but state limits "need not be pegged to *Buckley's* dollars."[748] The Court in *Nixon* justified the limits on contributions on the same grounds that it had in *Buckley*: "preventing corruption and the appearance of it that flows from munificent campaign contributions."[749] Further, *Nixon* did "not present a close call requiring further definition of whatever the State's evidentiary obligation may be" to justify the contribution limits, as "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and

[742] 424 U.S. at 51-54. Justices Marshall and White disagreed with this part of the decision. Id. at 286.
[743] 424 U.S. at 54-59. The reporting and disclosure requirements were sustained. Id. at 60–84.
[744] 424 U.S. at 74.
[745] 459 U.S. 87 (1982).
[746] 459 U.S. at 97-98.
[747] 528 U.S. 377 (2000).
[748] 528 U.S. at 381-82.
[749] 528 U.S. at 390.

no reason to question the existence of a corresponding suspicion among voters." [750] As for the amount of the contribution limits, Missouri's fluctuated in accordance with the consumer price index, and, when suit was filed, ranged from $275 to $1,075, depending on the state office or size of constituency. The Court upheld these limits, writing that, in *Buckley*, it had "rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate." [751] The relevant inquiry, rather, was "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." [752]

Outside the context of contributions to candidates, however, the Court has not been convinced of the justifications for limiting such uses of money for political purposes. Thus, a municipal ordinance regulating the maximum amount that could be contributed to or accepted by an association formed to take part in a city referendum was invalidated. [753] While *Buckley* had sustained limits on contributions as a prophylactic measure to prevent corruption or its appearance, no risk of corruption was found in giving or receiving funds in connection with a referendum. Similarly, the Court invalidated a criminal prohibition on payment of persons to circulate petitions for a ballot initiative. [754]

Venturing into the area of the constitutional validity of governmental limits upon political spending or contributions by corporations, a closely divided Court struck down a state law that prohibited corporations from expending funds in order to influence referendum votes on any measure save proposals that materially af-

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[750] 528 U.S. at 393, 395.

[751] 528 U.S. at 397.

[752] 528 U.S. at 397.

[753] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1980). It is not clear from the opinion whether the Court was applying a contribution or an expenditure analysis to the ordinance, *see* id. at 301 (Justice Marshall concurring), or whether in this context it makes any difference.

[754] Meyer v. Grant, 486 U.S. 414 (1988). The Court subsequently struck down a Colorado statute that required ballot-initiative proponents, if they pay circulators, to file reports disclosing circulators' names and addresses and the total amount paid to each circulator. Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999). Although the Court upheld a requirement that *proponents'* names and the total amount they have spent to collect signatures be disclosed, as this served "as a control or check on domination of the initiative process by affluent special interest groups" (id. at 202), it found that "[t]he added benefit of revealing the names of paid circulators and the amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." Id. at 203. The Court also struck down a requirement that circulators be registered voters, as the state's interest in ensuring that circulators would be amenable to subpoenas was served by the requirement that they be residents a requirement on which the Court had no occasion to rule.

fected corporate business, property, or assets. The free discussion of governmental affairs "is the type of speech indispensable to decisionmaking in a democracy," the Court said, "and this is no less true because the speech comes from a corporation rather than an individual"[755] It is the nature of the speech, not the status of the speaker, that is relevant for First Amendment analysis, thus allowing the Court to pass by the question of the rights a corporate person may have. The "materially affecting" requirement was found to be an impermissible proscription of speech based on content and identity of interests. The "exacting scrutiny" that restrictions on speech must pass was not satisfied by any of the justifications offered and the Court in any event found some of them impermissible.

*Bellotti* called into some question the constitutionality of the federal law that makes it unlawful for any corporation or labor union "to make a contribution or expenditure in connection with any election" for federal office or "in connection with any primary election or political convention or caucus held to select candidates" for such office.[756] Three times the opportunity has arisen for the Court to assess the validity of the statute and each time it has passed it by.[757] One of the dissents in *Bellotti* suggested its application to the federal law, but the Court saw several distinctions.[758]

Other aspects of the federal provision have been interpreted by the Court. First, in *FEC v. National Right to Work Committee*,[759] the Court unanimously upheld section 441b's prohibition on corporate solicitation of money from corporate nonmembers for use in

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[755] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection, they were subject to more regulation than were individuals, and substantial state interests supported the restrictions. Id. at 802. Justice Rehnquist went further in dissent, finding no corporate constitutional protection. Id. at 822.

[756] 2 U.S.C. § 441b. The provision began as § 313 of the Federal Corrupt Practices Act of 1925, 43 Stat. 1074, prohibiting contributions by corporations. It was made temporarily applicable to labor unions in the War Labor Disputes Act of 1943, 57 Stat. 167, and became permanently applicable in § 304 of the Taft-Hartley Act. 61 Stat. 159.

[757] All three cases involved labor unions and were decided on the basis of statutory interpretation, apparently informed with some constitutional doubts. United States v. CIO, 335 U.S. 106 (1948); United States v. United Automobile Workers, 352 U.S. 567 (1957); Pipefitters v. United States, 407 U.S. 385 (1972).

[758] First National Bank of Boston v. Bellotti, 435 U.S. 765, 811–12 (1978) (Justice White dissenting). The Court emphasized that *Bellotti* was a referendum case, not a case involving corporate expenditures in the context of partisan candidate elections, in which the problem of corruption of elected representatives was a weighty problem. "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." Id. at 787–88 & n.26.

[759] 459 U.S. 197 (1982).

federal elections. Relying on *Bellotti* for the proposition that government may act to prevent "both actual corruption and the appearance of corruption of elected representatives," the Court concluded that "there is no reason why . . . unions, corporations, and similar organizations [may not be] treated differently from individuals."[760] However, an exception to this general principle was recognized by a divided Court in *FEC v. Massachusetts Citizens for Life, Inc.*,[761] holding the section's independent expenditure limitations (not limiting expenditures but requiring only that such expenditures be financed by voluntary contributions to a separate segregated fund) unconstitutional as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a "business corporation" or union. One of the rationales for the special rules on corporate participation in elections—elimination of "the potential for unfair deployment of [corporate] wealth for political purposes"—has no applicability to such a corporation "formed to disseminate political ideas, not to amass capital."[762] The other principal rationale—protection of corporate shareholders and other contributors from having their money used to support political candidates to whom they may be opposed—was also deemed inapplicable. The Court distinguished *National Right to Work Committee* because "restrictions on contributions require less compelling justification than restrictions on independent spending," and also explained that, "given a contributor's awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on . . . independent spending."[763] What the Court did not address directly was whether the same analysis could have led to a different result in *National Right to Work Committee*.[764]

Clarification of *Massachusetts Citizens for Life* was afforded by *Austin v. Michigan State Chamber of Commerce,*[765] in which the Court upheld application to a nonprofit corporation of Michigan's restrictions on independent expenditures by corporations. The Michigan law, like federal law, prohibited such expenditures from

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[760] 459 U.S. at 210-11.

[761] 479 U.S. 238 (1986). Justice Brennan's opinion for the Court was joined by Justices Marshall, Powell, O'Connor, and Scalia; Chief Justice Rehnquist, author of the Court's opinion in *National Right to Work Comm.*, dissented from the constitutional ruling, and was joined by Justices White, Blackmun, and Stevens.

[762] 479 U.S. at 259.

[763] 479 U.S. at 259-60, 262.

[764] The Court did not spell out whether there was any significant distinction between the two organizations, NRWC and MCFL; Chief Justice Rehnquist's dissent suggested that there was not. *See* 479 U.S. at 266.

[765] 494 U.S. 652 (1990).

corporate treasury funds, but allowed them to be made from separate "segregated" funds. This arrangement, the Court decided, serves the state's compelling interest in assuring that corporate wealth, accumulated with the help of special advantages conferred by state law, does not unfairly influence elections. The law was sufficiently "narrowly tailored" because it permits corporations to make independent political expenditures through segregated funds that "accurately reflect contributors' support for the corporation's political views."[766] Also, the Court concluded that the Chamber of Commerce was unlike the MCFL in each of the three distinguishing features that had justified an exemption from operation of the federal law. Unlike MCFL, the Chamber was not organized solely to promote political ideas; although it had no stockholders, the Chamber's members had similar disincentives to forego benefits of membership in order to protest the Chamber's political expression; and, by accepting corporate contributions, the Chamber could serve as a conduit for corporations to circumvent prohibitions on direct corporate contributions and expenditures.[767]

***Government as Regulator of the Electoral Process: Lobbying***.—Legislators may be greatly dependent upon representations made to them and information supplied to them by interested parties, and therefore may desire to know what the real interests of those parties are, what groups or persons they represent, and other such information. But everyone is constitutionally entitled to write his congressman or his state legislator, to cause others to write or otherwise contact legislators, and to make speeches and publish articles designed to influence legislators. Conflict is inherent. In the Federal Regulation of Lobbying Act,[768] Congress by broadly phrased and ambiguous language seemed to require detailed reporting and registration by all persons who solicited, received, or expended funds for purposes of lobbying, that is to influence congressional action directly or indirectly. In *United States v. Harriss*,[769] the Court, stating that it was construing the Act to avoid constitutional doubts,[770] interpreted covered lobbying as meaning only direct attempts to influence legislation through direct communication with members of Congress.[771] So construed, the Act was constitutional; Congress had "merely provided for a modicum of information from those who for hire attempt to influence legisla-

[766] 494 U.S. at 660-61.
[767] 494 U.S. at 661-65.
[768] 60 Stat. 812, 839 (1946), 2 U.S.C. §§ 261–70.
[769] 347 U.S. 612 (1954).
[770] 347 U.S. at 623.
[771] 347 U.S. at 617-24.

tion or who collect or spend funds for that purpose," and this was simply a measure of "self-protection." [772]

Other statutes and governmental programs affect lobbying and lobbying activities. It is not impermissible for the Federal Government to deny a business expense tax deduction for money spent to defeat legislation which would adversely affect one's business. [773] But the antitrust laws may not be applied to a concert of business enterprises that have joined to lobby the legislative branch to pass and the executive branch to enforce laws which would have a detrimental effect upon competitors, even if the lobbying was conducted unethically. [774] On the other hand, allegations that competitors combined to harass and deter others from having free and unlimited access to agencies and courts by resisting before those bodies all petitions of competitors for purposes of injury to competition are sufficient to implicate antitrust principles. [775]

***Government as Regulator of Labor Relations***.—Numerous problems may arise in this area, [776] but the issue here considered is the balance to be drawn between the free speech rights of an employer and the statutory rights of his employees to engage or not engage in concerted activities free of employer coercion, which may well include threats or promises or other oral or written communications. The Court has upheld prohibitions against employer interference with union activity through speech so long as the speech is coercive, [777] and that holding has been reduced to statutory form. [778] Nonetheless, there is a First Amendment tension in this area, with its myriad variations of speech forms that may be de-

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[772] 347 U.S. at 625. Justices Douglas, Black, and Jackson dissented. Id. at 628, 633. They thought the Court's interpretation too narrow and would have struck the statute down as being too broad and too vague, but would not have denied Congress the power to enact narrow legislation to get at the substantial evils of the situation. *See also* United States v. Rumely, 345 U.S. 41 (1953).

[773] Cammarano v. United States, 358 U.S. 498 (1959).

[774] Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961). *See also* UMW v. Pennington, 381 U.S. 657, 669–71 (1965).

[775] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Justices Stewart and Brennan thought that joining to induce administrative and judicial action was as protected as the concert in *Noerr* but concurred in the result because the complaint could be read as alleging that defendants sought to forestall access to agencies and courts by plaintiffs. Id. at 516.

[776] *E.g.*, the speech and associational rights of persons required to join a union, Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); *and see* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employees), restrictions on picketing and publicity campaigns, Babbitt v. United Farm Workers, 442 U.S. 289 (1979), and application of collective bargaining laws in sensitive areas, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (faculty collective bargaining in private universities); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (collective bargaining in religious schools).

[777] NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

[778] 61 Stat. 142, § 8(c) (1947), 29 U.S.C. § 158(c).

nominated "predictions," especially since determination whether particular utterances have an impermissible impact on workers is vested with an agency with no particular expertise in the protection of freedom of expression.[779]

***Government as Investigator: Reporter's Privilege***.—News organizations have claimed that the First Amendment status of the press compels a recognition by government of an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving.[780] The argument for a limited exemption to permit reporters to conceal their sources and to keep confidential certain information they obtain and choose at least for the moment not to publish was rejected in *Branzburg v. Hayes*[781] by a closely divided Court. "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[782] Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, but the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of reporters in avoiding the

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[779] *Cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969).

[780] 8 J. WIGMORE, EVIDENCE 2192 (3d ed. 1940). *See* Blair v. United States, 250 U.S. 273, 281 (1919); United States v. Bryan, 339 U.S. 323, 331 (1950).

[781] 408 U.S. 665 (1972). "The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." Id. at 682.

[782] 408 U.S. at 690-91.

incidental burden on their newsgathering activities occasioned by such governmental inquiries.[783]

The Court observed that Congress and the States were free to develop by statute privileges for reporters as narrowly or as broadly as they chose; while efforts in Congress failed, many States have enacted such laws.[784] The assertion of a privilege in civil cases has met with mixed success in the lower courts, the Supreme Court having not yet confronted the issue.[785]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.[786] The press had argued that to permit searches of newsrooms would threaten the abil-

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[783] Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell also submitted a concurring opinion in which he suggested that reporters might be able to assert a privilege of confidentiality if in each individual case they demonstrated that responding to the governmental inquiry at hand would result in a deterrence of First Amendment rights and privilege and that the governmental interest asserted was entitled to less weight than their interest. 408 U.S. at 709. Justice Stewart dissented, joined by Justices Brennan and Marshall, and argued that the First Amendment required a privilege that could only be overcome by a governmental showing that the information sought is clearly relevant to a precisely defined subject of inquiry, that it is reasonable to think that the witness has that information, and that there is not any means of obtaining the information less destructive of First Amendment liberties. Id. at 725. Justice Douglas also dissented. Id. at 711.

The courts have construed *Branzburg* as recognizing a limited privilege that must be balanced against other interests. *See* In re Pennington, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 440 U.S. 929 (1979); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); *cf.* United States v. Criden, 633 F.2d 346 (3d Cir. 1980).

[784] At least 26 States have enacted some form of journalists' shield law. *E.g.*, Cal. Evid. Code § 1070; N.J. Rev. Stat. 2A:84A–21, -21a, -29. The reported cases evince judicial hesitancy to give effect to these statutes. *See, e.g.*, Farr v. Pitchess, 522 F. 2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See* Matter of Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.* New York Times v. New Jersey, 439 U.S. 997 (1978). *See also* New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[785] *E.g.*, Baker v. F. & F. Investment Co., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Democratic National Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973).

[786] Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id. at 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object, id. at 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id. at 577.

ity to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, but it seemed to doubt that the consequences alleged would occur, and it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms by requiring particularizations of the type, scope, and intrusiveness that would be permitted in the searches.[787]

***Government and the Conduct of Trials***.—Conflict between constitutionally protected rights is not uncommon. One of the most difficult to resolve is the conflict between a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity[788] and during trials that were media "spectaculars"[789] have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of "gag orders" on press publication of information directly confronts the First Amendment's bar on prior restraints,[790] although the courts have a good deal more discretion in preventing the information from becoming public in the first place.[791] Perhaps the most profound debate that has arisen in recent years concerns the right of access of the public and the press to trial and pre-trial proceedings, and in those cases the Court has enunciated several important theorems of First Amendment interpretation.

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to

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[787] Congress has enacted the Privacy Protection Act of 1980, Pub. L. No. 96–440, 94 Stat. 1879, 42 U.S.C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances, and creating damage remedies for violations.

[788] Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

[789] Sheppard v. Maxwell, 384 U.S. 333 (1966); *compare* Estes v. Texas, 381 U.S. 532 (1965), *with* Chandler v. Florida, 449 U.S. 560 (1981).

[790] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[791] *See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (disciplinary rules restricting extrajudicial comments by attorneys are void for vagueness, but such attorney speech may be regulated if it creates a "substantial likelihood of material prejudice" to the trial of a client); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

pre-trial suppression hearings,[792] a major debate flowered concerning the extent to which, if at all, the speech and press clauses protected the public and the press in seeking to attend trials.[793] The right of access to criminal trials against the wishes of the defendant was held protected in *Richmond Newspapers v. Virginia*,[794] but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion).[795] Basic to the Chief Justice's view was an historical treatment that demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed from the public interest in seeing fairness and proper conduct in the administration of criminal trials; the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt at the commission of many crimes, convincingly demonstrated why the tradition had developed and been maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[796]

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but the ante-

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[792] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[793] *DePasquale* rested solely on the Sixth Amendment, the Court reserving judgment on whether there is a First Amendment right of public access. 443 U.S. at 392.

[794] 448 U.S. 555 (1980). The decision was 7 to 1, Justice Rehnquist dissenting, id. at 604, and Justice Powell not participating. Justice Powell, however, had taken the view in Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

[795] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 582 (1980) (Justice Stevens concurring).

[796] 448 U.S. at 564-69. The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).

cedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself but also for the indispensable conditions of meaningful communication."[797]

The trial court in *Richmond Newspapers* had made no findings of necessity for closure, and neither Chief Justice Burger nor Justice Brennan found the need to articulate a standard for determining when the government's or the defendant's interests could outweigh the public right of access. That standard was developed two years later. *Globe Newspaper Co. v. Superior Court*[798] involved a statute, unique to one State, that mandated the exclusion of the public and the press from trials during the testimony of a sex-crime victim under the age of 18. For the Court, Justice Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness[799] and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right is not absolute, but in order to close all or part of a trial government must show that "the denial is necessitated by a compelling governmental interest, and [that it] is narrowly tailored to serve that interest."[800] The Court was explicit that the right of access was to *criminal* trials,[801] so that the question of the openness of civil trials remains.

The Court next applied and extended the right of access in several other areas, striking down state efforts to exclude the public

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[797] 448 U.S. at 587-88 (emphasis in original, citations omitted).

[798] 457 U.S. 596 (1982). Joining Justice Brennan's opinion of the Court were Justices White, Marshall, Blackmun, and Powell. Justice O'Connor concurred in the judgment. Chief Justice Burger, with Justice Rehnquist, dissented, arguing that the tradition of openness that underlay *Richmond Newspapers*, was absent with respect to sex crimes and youthful victims and that *Richmond Newspapers* was unjustifiably extended. Id. at 612. Justice Stevens dissented on mootness grounds. Id. at 620.

[799] That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. 457 U.S. at 605 n.13.

[800] 457 U.S. at 606-07. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest, encouraging minors to come forward and report sex crimes, was not well served by the statute.

[801] The Court throughout the opinion identifies the right as access to *criminal trials*, even italicizing the words at one point. 457 U.S. at 605.

from *voir dire* proceedings, from a suppression hearing, and from a preliminary hearing. The Court determined in *Press-Enterprise I*[802] that historically *voir dire* had been open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[803] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of *voir dire* in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, *e.g.*, *in camera* consideration of jurors' requests for protection from publicity. In *Waller v. Georgia*,[804] the Court held that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*,"[805] and noted that the need for openness at suppression hearings "may be particularly strong" because the conduct of police and prosecutor is often at issue.[806] And in *Press Enterprise II*,[807] the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[808] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be "the sole occasion for public observation of the criminal justice system," and also because the safeguard of a jury is unavailable at preliminary hearings.[809]

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[802] Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

[803] 464 U.S. at 510.

[804] 467 U.S. 39 (1984).

[805] Gannett Co. v. DePasquale, 443 U.S. 368 (1979), did not involve assertion *by the accused* of his 6th Amendment right to a public trial; instead, the accused in that case had requested closure. "[T]he constitutional guarantee of a public trial is for the benefit of the defendant." Id. at 381.

[806] 467 U.S. at 47.

[807] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

[808] 478 U.S. at 14.

[809] 478 U.S. at 12.

***Government as Administrator of Prisons***.—A prison inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[810] The identifiable governmental interests at stake in administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[811] In applying these general standards, the Court at first arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between newsmen and prisoners. The Court's more recent deferential approach to regulation of prisoners' mail has lessened the differences.

First, in *Procunier v. Martinez*,[812] the Court invalidated mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought that the letters "unduly complain," "express inflammatory . . . views or beliefs," or were "defamatory" or "otherwise inappropriate." The Court based this ruling not on the rights of the prisoner, but instead on the outsider's right to communicate with the prisoner either by sending or by receiving mail. Under this framework, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation, and it must not be used simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary or essential to the protection of the particular government interest involved.

However, in *Turner v. Safley*,[813] the Court made clear that a more deferential standard is applicable when only the communicative rights of inmates are at stake. In upholding a Missouri rule barring inmate-to-inmate correspondence, while striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child, the Court announced the appropriate standard. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legiti-

[810] Pell v. Procunier, 417 U.S. 817, 822 (1974).
[811] Procunier v. Martinez, 416 U.S. 396, 412 (1974).
[812] 416 U.S. 396 (1974). *But see* Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), in which the Court sustained, while recognizing the First Amendment implications, prison regulations barring solicitation of prisoners by other prisoners to join a union, banning union meetings, and denying bulk mailings concerning the union from outside sources. The reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified the regulations.
[813] 482 U.S. 78 (1987).

mate penological interests."[814] Several considerations are appropriate in determining reasonableness of a regulation. First, there must be a rational relation to a legitimate, content-neutral objective. Prison security, broadly defined, is one such objective.[815] Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests unreasonableness.[816] Two years after *Safley*, the Court directly limited *Martinez*, restricting it to regulation of *outgoing* correspondence. In the Court's current view the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[817]

Neither prisoners nor reporters have any affirmative First Amendment right to face-to-face interviews, when general public access to prisons is restricted and when there are alternatives by which the news media can obtain information respecting prison policies and conditions.[818] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but the justification for the restraint lay in the implementation of security arrangements, affected by the entry of persons into prisons, and the carrying out of rehabilitation objectives, affected by the phenomenon of the "big wheel," the exploitation of access to the news media by certain prisoners; alternatives to face-to-face interviews existed, such as mail and visitation with family, attorneys, clergy, and friends. The existence of alternatives and the presence of justifications for the restraint served to weigh the balance against the asserted First Amendment right, the Court held.[819]

While agreeing with a previous affirmation that "newsgathering is not without some First Amendment protec-

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[814] 482 U.S. at 89.

[815] All that is required is that the underlying governmental objective be content neutral; the regulation itself may discriminate on the basis of content. *See* Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding Federal Bureau of Prisons regulation allowing prison authorities to reject incoming publications found to be detrimental to prison security).

[816] 482 U.S. at 91.

[817] Thornburgh v. Abbott, 490 U.S. 401, 411–14 (1989).

[818] Pell v. Procunier, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id. at 836.

[819] 417 U.S. at 829-35.

tion,"[820] the Court denied that the First Amendment accorded the press any affirmative obligation on the part of government. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."[821] Government has an obligation not to impair the freedom of journalists to seek out newsworthy information, and not to restrain the publication of news. But it cannot be argued, the Court continued, "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[822]

*Pell* and *Saxbe* did not delineate whether the "equal access" rule applied only in cases in which there was public access, so that a different rule for the press might follow when general access was denied, nor did they purport to begin defining what the rules of equal access are. No greater specificity emerged from *Houchins v. KQED*,[823] in which the broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy over conditions of incarceration. Following initiation of the suit, the administrator of the prison authorized limited public tours. The tours were open to the press, but cameras and recording devices were not permitted, there was no opportunity to talk to inmates, and the tours did not include the maximum security area about which much of the controversy centered. The Supreme Court overturned the injunction obtained in the lower courts, the plurality reiterating that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.... [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than

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[820] Branzburg v. Hayes, 408 U.S. 665, 707 (1972), *quoted in* Pell v. Procunier, 417 U.S. 817, 833 (1974).

[821] 417 U.S. at 834.

[822] 417 U.S. at 834. The holding was applied to federal prisons in Saxbe v. Washington Post, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that an important societal function of the First Amendment is to preserve free public discussion of governmental affairs, that the press' role was to make this discussion informed through providing the requisite information, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. at 850.

[823] 438 U.S. 1 (1978). The decision's imprecision of meaning is partly attributable to the fact that there was no opinion of the Court. A plurality opinion represented the views of only three Justices; two Justices did not participate, three Justices dissented, and one Justice concurred with views that departed somewhat from the plurality.

that accorded the public generally."[824] Justice Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press' right to use cameras and recorders so as to enlarge public access to the information.[825] Thus, any question of special press access appears settled by the decision; yet there still remain the questions raised above. May everyone be barred from access and, once access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators?[826]

***Government and Power of the Purse***.—In exercise of the spending power, Congress may refuse to subsidize the exercise of First Amendment rights, but may not deny benefits solely on the basis of the exercise of such rights. The distinction between these two closely related principles seemed, initially at least, to hinge on the severity and pervasiveness of the restriction placed on exercise of First Amendment rights. What has emerged is the principle that Congress may condition the receipt of federal funds on acceptance of speech limitations on persons working for the project receiving the federal funding—even if the project also receives non-federal funds—provided that the speech limitations do not extend to the use of non-federal funds outside of the federally funded project. In *Regan v. Taxation With Representation*,[827] the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded.[828] The effect of the ruling on the organization's lobbying activities was

[824] 438 U.S. at 15-16.

[825] 438 U.S. at 16.

[826] The dissenters, Justices Stevens, Brennan, and Powell, believed that the Constitution protects the public's right to be informed about conditions within the prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. 438 U.S. at 19. It is clear that Justice Stewart did not believe the Constitution affords any relief. Id. at 16. While the plurality opinion of the Chief Justice Burger and Justices White and Rehnquist may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualifiedly in the direction of constitutional constraints upon the nature of access limitation once access is granted.

[827] 461 U.S. 540 (1983).

[828] 461 U.S. at 545. *See also* Cammarano v. United States, 358 U.S. 498, 512–13 (1959) (exclusion of lobbying expenses from income tax deduction for ordinary and necessary business expenses is not a regulation aimed at the suppression of dangerous ideas, and does not violate the First Amendment).

minimal, however, since it could continue to receive tax-deductible contributions by creating a separate affiliate to conduct the lobbying. In *FCC v. League of Women Voters*,[829] by contrast, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in *Taxation With Representation*, by which the stations could continue to receive public funding and create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist's argument that the general principles of *Taxation With Representation* and *Oklahoma v. Civil Service Comm'n*[830] should be controlling.[831] In *Rust v. Sullivan*, however, Chief Justice Rehnquist asserted for the Court that restrictions on abortion counseling and referral imposed on recipients of family planning funding under the Public Health Service Act did not constitute discrimination on the basis of viewpoint, but instead represented government's decision "to fund one activity to the exclusion of the other."[832] In addition, the Court noted, the "regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. . . . The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities."[833] It remains to be seen what application this decision will have outside the contentious area of abortion regulation.[834]

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[829] 468 U.S. 364 (1984).

[830] 330 U.S. 127 (1947).

[831] 468 U.S. at 399–401, & n.27.

[832] 500 U.S. 173, 193 (1991). Dissenting Justice Blackmun contended that *Taxation With Representation* was easily distinguishable because its restriction was on all lobbying activity regardless of content or viewpoint. Id. at 208-09.

[833] 500 U.S. at 196 (emphasis in original). Dissenting Justice Blackmun wrote: "Under the majority's reasoning, the First Amendment could be read to tolerate *any*governmental restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past." Id. at 213 (emphasis in original).

[834] The Court attempted to minimize the potential sweep of its ruling in *Rust*. "This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipient to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression." 500 U.S. at 199. The Court noted several possible exceptions to the general principle: government ownership of a public forum does not justify restrictions on speech; the university setting requires heightened protections through application of vagueness and overbreadth principles; and the doctor-patient relationship may also be subject to special First Amendment protection. (The Court denied, however, that the doctor-patient relationship was significantly impaired by the regulatory restrictions at issue.) Lower courts were quick to pick up on these suggestions. *See, e.g.*, Stanford Univ. v Sullivan, 773 F. Supp. 472, 477–78 (D.D.C.

In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[835] The Court acknowledged that, if the statute were "applied in a manner that raises concern about the suppression of disfavored viewpoints,"[836] then such application might be unconstitutional. The statute on its face, however, is constitutional because it "imposes no categorical requirement," being merely "advisory."[837] "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.... The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and absolute neutrality is simply 'inconceivable.'"[838] The Court also found that the terms of the statute, "if they appeared in a criminal statute or regulatory scheme, . . . could raise substantial vagueness concerns.... But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[839]

In *Legal Services Corporation v. Velazquez*,[840] the Court struck down a provision of the Legal Services Corporation Act that prohibited recipients of Legal Services Corporation (LSC) funds (*i.e.*, legal-aid organizations that provide lawyers to the poor in civil matters) from representing a client who seeks "to amend or otherwise challenge existing [welfare] law." This meant that, even with non-federal funds, a recipient of federal funds could not argue that a state welfare statute violated a federal statute or that a state or federal welfare law violated the Constitution. If a case was underway when such a challenge became apparent, the attorney had to withdraw. The Court distinguished this situation from that in *Rust v. Sullivan* on the ground "that the counseling activities of the doctors under Title X amounted to governmental speech," whereas "an

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1991) (confidentiality clause in federal grant research contract is invalid because, inter alia, of application of vagueness principles in a university setting); Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278 (S.D.N.Y. 1992) ("offensiveness" guidelines restricting Center for Disease Control grants for preparation of AIDS-related educational materials are unconstitutionally vague).

[835] 524 U.S. 569, 572 (1998).

[836] 524 U.S. at 587.

[837] 524 U.S. at 581. Justice Scalia, in a concurring opinion joined by Justice Thomas, claimed that this interpretation of the statute "gutt[ed] it." Id. at 590. He believed that the statute "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional." Id.

[838] 524 U.S. at 585.

[839] 524 U.S. at 588–89.

[840] 531 U.S. 533 (2001).

LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits."[841] Furthermore, the restriction in this case "distorts the legal system" by prohibiting "speech and expression upon which courts must depend for the proper exercise of the judicial power," and thereby is "inconsistent with accepted separation-of-powers principles."[842]

**Governmental Regulation of Communications Industries**

As in the previous section, the governmental regulations here considered may have only the most indirect relation to freedom of expression, or may clearly implicate that freedom even though the purpose of the particular regulation is not to reach the content of the message. First, however, the judicially formulated doctrine distinguishing commercial expression from other forms is briefly considered.

***Commercial Speech***.—In recent years, the Court's treatment of "commercial speech" has undergone a transformation, from total nonprotection under the First Amendment to qualified protection. The conclusion that expression proposing a commercial transaction is a different order of speech was arrived at almost casually in *Valentine v. Chrestensen*,[843] in which the Court upheld a city ordinance prohibiting distribution on the street of "commercial and business advertising matter," as applied to an exhibitor of a submarine who distributed leaflets describing his submarine on one side and on the other side protesting the city's refusal of certain docking facilities. The doctrine was in any event limited to promotion of commercial activities; the fact that expression was disseminated for profit or through commercial channels did not expose it to any greater regulation than if it were offered for free.[844] The doctrine lasted in this form for more than twenty years.

"Commercial speech," the Court has held, is protected "from unwarranted governmental regulation," although its nature makes

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[841] 531 U.S. at 541, 542.

[842] 531 U.S. at 544, 546.

[843] 316 U.S. 52 (1942). *See also* Breard v. City of Alexandria, 341 U.S. 622 (1951). The doctrine was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd per curiam*, 405 U.S. 1000 (1972).

[844] Books that are sold for profit, Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474–75 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964), and motion pictures that are exhibited for an admission fee, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.

such communication subject to greater limitations than may be imposed on expression not solely related to the economic interests of the speaker and its audience.[845] Overturning of this exception in free expression doctrine was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Reasserting the doctrine at first in a narrow five-to-four decision, the Court sustained the application of a city's ban on employment discrimination to bar sex-designated employment advertising in a newspaper.[846] Granting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell, for the Court, found the placing of want-ads in newspapers to be "classic examples of commercial speech," devoid of expressions of opinions with respect to issues of social policy; the ad "did no more than propose a commercial transaction." But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.[847]

Next, the Court overturned a conviction under a state statute making it illegal, by sale or circulation of any publication, to encourage or prompt the obtaining of an abortion, as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another State and detailing the assistance that would be provided state residents in going to and obtaining abortions in the other State.[848] The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the State could not prevent its residents from obtaining abortions in the other State or punish them for doing so.

Then, all these distinctions were swept away as the Court voided a statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[849] Accepting a suit brought by consumers to protect their right to receive information, the Court held that speech that does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers' interests in receiving factual information about prices may even be of greater value than polit-

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[845] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980).

[846] Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376 (1973).

[847] 413 U.S. at 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563–64 (1980).

[848] Bigelow v. Virginia, 421 U.S. 809 (1975).

[849] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Justice Rehnquist dissented. Id. at 781.

ical debate, but in any event price competition and access to information about it is in the public interest. State interests asserted in support of the ban, protection of professionalism and the quality of prescription goods, were found either badly served or not served by the statute.[850]

Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. The Court voided a municipal ordinance that barred the display of "For sale" and "Sold" signs on residential lawns, purportedly so as to limit "white flight" resulting from a "fear psychology" that developed among white residents following sale of homes to nonwhites. The right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected, the Court determined; the community interest could have been achieved by less restrictive means and in any event may not be achieved by restricting the free flow of truthful information.[851] Similarly, deciding a question it had reserved in the *Virginia Pharmacy* case, the Court held that a State could not forbid lawyers from advertising the prices they charged for the performance of routine legal services.[852] None of the proffered state justifications for the ban was deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech.[853] Nor may a state categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems,[854] or prohibit an attorney from holding himself out as a certified civil trial specialist,[855] or prohibit a

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[850] 425 U.S. at 763-64 (consumers' interests), 764–65 (social interest), 766–70 (justifications for the ban).

[851] Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977).

[852] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented. Id. at 386, 389, 404.

[853] 433 U.S. at 368-79. *See also* In re R.M.J., 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the State could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).

[854] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). *Shapero* was distinguished in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), a 5–4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30–day period following an accident or disaster. "*Shapero* dealt with a broad ban on *all* direct mail solicitations" (id. at 629), the Court explained, and was not supported, as Florida's more limited ban was, by findings describing the harms to be prevented by the ban. Dissenting Justice Kennedy disagreed that there was a valid distinction, pointing out that in Shapero the Court had said that "the mode of communication [mailings versus potentially more abusive in-person solicitation] makes all the difference," and that mailings were at issue in both *Shapero* and *Florida Bar*. 515 U.S. at 637 (quoting *Shapero*, 486 U.S. at 475).

[855] Peel v. Illinois Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990).

certified public accountant from holding herself out as a certified financial planner.[856] However, a State has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys; therefore, especially since in-person solicitation is "a business transaction in which speech is an essential but subordinate component," the state interest need only be important rather than compelling.[857] The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally "trained in the art of persuasion," and that the typical business executive client of a CPA is "far less susceptible to manipulation" than was the accident victim in *Ohralik*.[858] To allow enforcement of such a broad prophylactic rule absent identification of a serious problem such as ambulance chasing, the Court explained, would dilute commercial speech protection "almost to nothing."[859]

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was "a significant possibility" that the public might be misled through deceptive utilization of the same or similar trade names.[860] But a state regulatory commission prohibition of utility advertisements "intended to stimulate the purchase of utility services" was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.[861]

While commercial speech is entitled to First Amendment protection, the Court has clearly held that it is different from other forms of expression; it has remarked on the commonsense differences between speech that does no more than propose a commercial transaction and other varieties.[862] The Court has developed

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

[857] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *But compare* In re Primus, 426 U.S. 412 (1978). The distinction between in-person and other attorney advertising was continued in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) ("print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

[858] Edenfield v. Fane, 507 U.S. 761, 775 (1993).

[859] 507 U.S. at 777.

[860] Friedman v. Rogers, 440 U.S. 1 (1979).

[861] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). *See also* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (voiding a ban on utility's inclusion in monthly bills of inserts discussing controversial issues of public policy). However, the linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).

[862] Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the *sine qua non* of commercial profits, it is less likely

the four-pronged *Central Hudson* test to measure the validity of restraints upon commercial expression. [863]

Under the first prong of the test, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if an advertisement does not accurately inform the public about lawful activity, it can be suppressed. [864]

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. [865]

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to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). It is, of course, important to develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court's definitional statements have been general, referring to commercial speech as that "proposing a commercial transaction," Ohralik v. Ohio State Bar Ass'n, supra, or as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial the advertising of views on public policy that would inhere to the economic benefit of the speaker. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980). So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as "inextricably intertwined with otherwise fully protected speech." Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). By contrast, a mixing of home economics information with a sales pitch at a "Tupperware" party did not remove the transaction from commercial speech. Board of Trustees v. Fox, 492 U.S. 469 (1989).

[863] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557 (1980). In one case, the Court referred to the test as having three prongs, referring to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court in that case did, however, apply *Central Hudson*'s first prong as well. Florida Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

[864] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 563, 564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, Friedman v. Rogers, 440 U.S. 1 (1979), and solicitation of business by lawyers, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, Pittsburgh Press Co. v. Commission on Human Relations, 413 U.S. 376 (1973).

[865] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 564, 568–69 (1980). The Court deemed the State's interests to be clear and substantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (governmental interest in protecting USOC's exclusive use of word "Olympic" is substantial); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (government's interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). *Contrast* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries. "Unlike the situation in *Edge Broadcasting*," the Coors Court explained, "the policies of some states do not prevent neighboring states from pursuing their own

Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[866] Instead, the regulation must "directly advance" the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.[867]

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[868] The Court has rejected the idea that a "least restrictive means" test is required. Instead, what is now required is a "reasonable fit" between means and ends, with the means "narrowly tailored to achieve the desired objective."[869] The

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alcohol-related policies within their respective borders." 514 U.S. at 486. However, in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (Puerto Rico's "substantial" interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted).

[866] 447 U.S. at 569. The ban here was found to directly advance one of the proffered interests. *Contrast* this holding *with* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government's interest in curbing strength wars among brewers, given the inconsistencies and "overall irrationality" of the regulatory scheme); and Edenfield v. Fane, 507 U.S. 761 (1993) (Florida's ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients), where the restraints were deemed indirect or ineffectual.

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

[868] Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 565, 569–71 (1980). This test is, of course, the "least restrictive means" standard. Shelton v. Tucker, 364 U.S. 479, 488 (1960). In *Central Hudson*, the Court found the ban more extensive than was necessary to effectuate the governmental purpose. *And see* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products; "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Id. at 74. *See also* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives— *e.g.*, direct limitations on alcohol content of beer—to prohibition on display of alcohol content on beer label). Note, however, that in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), the Court applied the test in a manner deferential to Congress: "the restrictions [at issue] are not broader than Congress reasonably could have determined to be necessary to further these interests."

[869] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). In a 1993 opinion the Court elaborated on the difference between "reasonable fit" and least restrictive alternative. "A regulation need not be 'absolutely the least severe that will achieve

Court, however, does "not equate this test with the less rigorous obstacles of rational basis review; ... the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech ... is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.'" [870]

The "reasonable fit" standard has some teeth, the Court made clear in *City of Cincinnati v. Discovery Network, Inc.*, [871] striking down a city's prohibition on distribution of "commercial handbills" through freestanding newsracks located on city property. The city's aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited "commercial" publications and permitted "newspapers" bore "no relationship *whatsoever*" to this legitimate interest. [872] The city could not, the Court ruled, single out commercial speech to bear the full onus when "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault." [873] By contrast, the Court upheld a federal law that prohibited broadcast of lottery advertisements by a broadcaster in a state that prohibits lotteries, while allowing broadcast of such ads by stations in states that sponsor lotteries. There was a "reasonable fit" between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries. [874] The prohibition "directly served" the congressional interest, and could be applied to a broadcaster whose principal audience was in an adjoining lottery state, and who sought to run ads for that state's lottery. [875]

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the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction ... , that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993). *But see*, Thompson v. Western States Medical Center, 122 S. Ct. 1497, 1504 (2002), in which the Court quoted the fourth prong of the *Central Hudson* test without mentioning its reformulation by Fox, and added, again without reference to *Fox*: "In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." Id. at 1506.

[870] Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995).

[871] 507 U.S. 410 (1993). *See also* Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the "directly advance" third prong of Central Hudson to strike down a ban on in-person solicitation by certified public accountants.

[872] 507 U.S. at 424.

[873] 507 U.S. at 426. The Court also noted the "minute" effect of removing 62 "commercial" newsracks while 1,500 to 2,000 other newsracks remained in place. Id. at 418.

[874] United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

[875] 507 U.S. at 428.

In 1999 the Court struck down a provision of the same statute as applied to advertisements for private casino gambling that are broadcast by radio and television stations located in a state where such gambling is legal.[876] The Court emphasized the interrelatedness of the four parts of the *Central Hudson* test; *e.g.*, though the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable "fit." In this case, "[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."[877] . . [T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all.[878]

In a 1986 decision the Court had asserted that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[879] Subsequently, however, the Court has eschewed reliance on *Posadas*,[880] and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to prohibit. Indeed, the Court's very holding in *44 Liquormart, Inc. v. Rhode Island*,[881] striking down the State's ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in *44 Liquormart* squarely rejected *Posadas*, calling it "erroneous," declining to give force to its "highly deferential approach," and proclaiming that a state "does not have the broad discretion to suppress truthful, nonmisleading information

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

[877] 527 U.S. at 190

[878] 527 U.S. at 195

[879] Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986). For discussion of the case, *see* P. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful"*, 1986 SUP. CT. REV. 1.

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

[881] 517 U. S. 484 (1996).

for paternalistic purposes that the *Posadas* majority was willing to tolerate."[882] Four other Justices concluded that *Posadas* was inconsistent with the "closer look" that the Court has since required in applying the principles of *Central Hudson*.[883]

The "different degree of protection" accorded commercial speech has a number of consequences. Somewhat broader times, places, and manner regulations are to be tolerated.[884] The rule against prior restraints may be inapplicable,[885] and disseminators of commercial speech are not protected by the overbreadth doctrine.[886]

Different degrees of protection may also be discerned among different categories of commercial speech. The first prong of the *Central Hudson* test means that false, deceptive, or misleading advertisements need not be permitted; government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.[887] But even truthful, non-misleading commercial speech may be regulated, and the validity of such regulation is tested by application of the remaining prongs of the *Central Hudson* test. The test itself does not make further distinctions based on the content of the commercial message or the nature of the governmental interest (that interest need only be "substan-

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[882] 517 U. S. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). The Stevens opinion also dismissed the *Posadas* "greater-includes-the-lesser argument" as "inconsistent with both logic and well-settled doctrine," pointing out that the First Amendment "presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." Id. at 511–512.

[883] 517 U. S. at 531-32 (concurring opinion of O'Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).

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

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

[886] Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 565 n.8 (1980).

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

tial"). Recent decisions suggest, however, that further distinctions may exist. Measures aimed at preserving "a fair bargaining process" between consumer and advertiser[888] may be more likely to pass the test[889] than regulations designed to implement general health, safety, or moral concerns.[890] As the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a "reasonable fit" between the commercial speech restriction and the governmental interest.[891]

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[888] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (opinion of Justice Stevens, joined by Justices Kennedy and Ginsburg).

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

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

[891] "[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases." Thompson v. Western States Medical Center, 122 S. Ct. 1497, 1504 (2002). Justice Stevens has criticized the *Central Hudson* test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech. "[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (concurring opinion). The Justice repeated these views in 1996: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (a portion of the opinion joined by Justices Kennedy and Ginsburg). Justice Thomas, similarly, wrote that, in cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because such an interest is *per se* illegitimate. . . ." Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotation marks omitted). Other decisions in which the Court majority acknowledged that some Justices would grant commercial speech greater protection than it has under the *Central Hudson* test include United States v. United Foods, Inc., 533 U.S. 405, 409-410 (2001) (mandated assessments, used for advertising, on handlers of fresh mushrooms struck down as compelled speech, rather than under *Central Hudson*), and Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (various state restrictions on tobacco advertising struck down under *Central Hudson* as overly burdensome).

***Taxation***.—Disclaiming any intimation "that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government," the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week.[892] In the Court's view, the tax was analogous to the Eighteenth Century English practice of imposing advertising and stamp taxes on newspapers for the express purpose of pricing the opposition penny press beyond the means of the mass of the population.[893] The tax at issue focused exclusively upon newspapers, it imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration.[894] Combined with the standard that government may not impose a tax directly upon the exercise of a constitutional right itself,[895] these tests seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.[896]

Ordinarily, a tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state. This is so, the Court explained in 1983, because such "a powerful weapon" to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression."[897] The state's interest in raising revenue is not suffi-

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[892] Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[893] 297 U.S. at 245-48.

[894] 297 U.S. at 250-51. *Grosjean* was distinguished on this latter basis in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

[895] Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944) (license taxes upon Jehovah's Witnesses selling religious literature invalid).

[896] *Cf.* City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P.2d 56 (1953), *cert. denied*, 346 U.S. 833 (1953) (Justices Black and Douglas dissenting). *And see* Cammarano v. United States, 358 U.S. 498 (1959) (no First Amendment violation to deny business expense tax deduction for expenses incurred in lobbying about measure affecting one's business); Leathers v. Medlock, 499 U.S. 439 (1991) (no First Amendment violation in applying general gross receipts tax to cable television services while exempting other communications media).

[897] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating a Minnesota use tax on the cost of paper and ink products used in a publication, and exempting the first $100,000 of such costs each calendar year; Star & Tribune paid roughly two-thirds of all revenues the state raised by the tax). The Court seemed less concerned, however, when the affected group within the press was not so small, upholding application of a gross receipts tax to cable television services even though other segments of the communications media were exempted. Leathers v. Medlock, 499 U.S. 439 (1991).

cient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation."[898]

Also difficult to justify is taxation that targets specific subgroups within a segment of the press for differential treatment. An Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.[899] Entirely as a result of content, some magazines were treated less favorably than others. The general interest in raising revenue was again rejected as a "compelling" justification for such treatment, and the measure was viewed as not narrowly tailored to achieve other asserted state interests in encouraging "fledgling" publishers and in fostering communications.

The Court seemed to change course somewhat in 1991, upholding a state tax that discriminated among different components of the communications media, and proclaiming that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[900]

The general principle that government may not impose a financial burden based on the content of speech underlay the Court's invalidation of New York's "Son of Sam" law, which provided that a criminal's income from publications describing his crime was to be placed in escrow and made available to victims of the crime.[901] While the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes, and in compensating crime victims, the law was not narrowly tailored to those ends. It applied only to income derived from speech, not to income from other sources, and it was significantly overinclusive because it reached a wide range of literature (*e.g.*, the *Confessions of Saint Augustine* and Thoreau's *Civil Disobedience*) "that did not enable a criminal to profit from his crime while a victim remains uncompensated."[902]

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[898] 460 U.S. at 588, 589.

[899] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

[900] Leathers v. Medlock, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media).

[901] Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991).

[902] 502 U.S. at 122.

***Labor Relations***.—Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In *Associated Press v. NLRB*,[903] the application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . The regulation here in question has no relation whatever to the impartial distribution of news." Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.[904]

***Antitrust Laws***.—Resort to the antitrust laws to break up restraints on competition in the newsgathering and publishing field was found not only to present no First Amendment problem but to comport with government's obligation under that Amendment. Said Justice Black: "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[905]

Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of possibility of antitrust law attack,[906] even

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[903] 301 U.S. 103, 132 (1937).

[904] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[905] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[906] Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (refusal of newspaper publisher who enjoyed a substantial monopoly to sell advertising to persons also advertising over a competing radio station violates antitrust laws); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (FCC approval no bar to antitrust suit); United States v. Greater Buffalo Press, 402 U.S. 549 (1971) (monopolization of color comic supplements). *See also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding FCC rules prospectively barring, and

though it may be contended that freedom of the press may thereby be preserved.[907]

***Radio and Television***.—Because there are a limited number of broadcast frequencies for radio and non-cable television use, the Federal Government licenses access to these frequencies, permitting some applicants to utilize them and denying the greater number of applicants such permission. Even though this licensing system is in form a variety of prior restraint, the Court has held that it does not present a First Amendment issue because of the unique characteristic of scarcity.[908] Thus, the Federal Communications Commission has broad authority to determine the right of access to broadcasting,[909] although, of course, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast.[910]

In certain respects, however, governmental regulation does implicate First Amendment values to a great degree; insistence that broadcasters afford persons attacked on the air an opportunity to reply and that they afford a right to reply from opposing points of view when they editorialize on the air was unanimously found to be constitutional.[911] In *Red Lion*, Justice White explained that differences in the characteristics of various media justify differences in First Amendment standards applied to them.[912] Thus, while

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in some instances requiring divesting to prevent, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community).

[907] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (pooling arrangement between two newspapers violates antitrust laws; First Amendment argument that one paper will fail if arrangement is outlawed rejected). In response to this decision, Congress enacted the Newspaper Preservation Act to sanction certain joint arrangements where one paper is in danger of failing. 84 Stat. 466 (1970), 15 U.S.C. §§ 1801–1804.

[908] NBC v. United States, 319 U.S. 190 (1943); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–79, 387–89 (1969); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 798–802 (1978).

[909] NBC v. United States, 319 U.S. 190 (1943); Federal Radio Comm. v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933); FCC v. Pottsville, 309 U.S. 134 (1940); FCC v. ABC, 347 U.S. 284 (1954); Farmers Union v. WDAY, 360 U.S. 525 (1958).

[910] "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." NBC v. United States, 319 U.S. 190, 226 (1943).

[911] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, . . . ." Id. at 369. The two issues passed on in Red Lion were integral parts of the doctrine.

[912] 395 U.S. at 386.

there is a protected right of everyone to speak, write, or publish as he will, subject to very few limitations, there is no comparable right of everyone to broadcast. The frequencies are limited and some few must be given the privilege over others. The particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. Qualification by censorship of content is impermissible, but the First Amendment does not prevent a governmental insistence that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Further, said Justice White, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[913] The broadcasters had argued that if they were required to provide equal time at their expense to persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues."[914]

In *Columbia Broadcasting System v. Democratic National Committee*,[915] the Court rejected claims of political groups that the broadcast networks were constitutionally required to sell them broadcasting time for the presentation of views on controversial issues. The ruling terminated a broad drive to obtain that result, but the fragmented nature of the Court's multiple opinions precluded a satisfactory evaluation of the constitutional implications of the case. However, in *CBS v. FCC*,[916] the Court held that Congress had conferred on candidates seeking federal elective office an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations, to be administered through FCC control

[913] 395 U.S. at 388-90.
[914] 395 U.S. at 392-93.
[915] 412 U.S. 94 (1973).
[916] 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. Id. at 397 (Justices White, Rehnquist, and Stevens).

over license revocations, and held such right of access to be within Congress' power to grant, the First Amendment notwithstanding. The constitutional analysis was brief and merely restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

In *FCC v. League of Women Voters*,[917] the Court took the same general approach to governmental regulation of broadcasting, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. "[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest."[918] However, the earlier cases were distinguished. "[I]n sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS v. FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner."[919] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints."[920] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection,"[921] and the ban was said

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[917] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

[918] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[919] 468 U.S. at 385.

[920] 468 U.S. at 384-85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." Id. at 409.

[921] 468 U.S. at 381.

to be "defined solely on the basis of . . . content," the assumption being that editorial speech is speech directed at "controversial issues of public importance."[922] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controversial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

Sustaining FCC discipline of a broadcaster who aired a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court posited a new theory to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities.[923] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting."[924] The purport of the Court's new theory is hard to divine; while its potential is broad, the Court emphasized the contextual "narrowness" of its holding, which "requires consideration of a host of variables."[925] Time of day of broadcast, the likely audience, the differences between radio, television, and perhaps closed-circuit transmissions were all relevant in the Court's view. It may be, then, that the case will be limited in the future to its particular facts; yet, the pronunciation of a new theory sets in motion a tendency the application of which may not be so easily cabined.[926]

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[922] 468 U.S. at 383.

[923] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[924] 438 U.S. at 748-51. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. Justice Stevens' opinion was joined by Chief Justice Burger and Justices Rehnquist, Powell, and Blackmun. Justices Powell and Blackmun, id. at 755, concurred also in a separate opinion, which reiterated the points made in the text. Justices Brennan and Marshall dissented with respect to the constitutional arguments made by Justices Stevens and Powell. Id. at 762. Justices Stewart and White dissented on statutory grounds, not reaching the constitutional arguments. Id. at 777.

[925] 438 U.S. at 750. *See also* id. at 742–43 (plurality opinion), and id. at 755–56 (Justice Powell concurring) ("Court reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[926] Subsequent decisions regarding legislation to ban "indecent" broadcasting are noted below under "Non-obscene But Sexually Explicit and Indecent Expression".

***Governmentally Compelled Right of Reply to Newspapers***.—However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[927] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, while desirable, "is not mandated by the Constitution," while freedom is. The compulsion exerted by government on a newspaper to print that which it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,'" runs afoul of the free press clause.[928]

**Regulation of Cable Television**

The Court has recognized that cable television "implicates First Amendment interests," since a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.[929] Moreover, "settled principles of . . . First Amendment jurisprudence" govern review of cable regulation; cable is not limited by "scarce" broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.[930] Cable does, however, have unique characteristics that justify regulations that single out cable for special

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[927] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[928] 418 U.S. at 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion. The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. While a plurality opinion adhered to by four Justices relied heavily on Tornillo, there was not a Court majority consensus as to rationale. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986). *See also* Hurley v. Irish-American Gay Group, 514 U.S. 334 (1995) (state may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

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

[930] Turner Broadcasting System v. FCC, 512 U.S. 622, 638–39 (1994).

treatment.[931] The Court in *Turner Broadcasting System v. FCC*[932] upheld federal statutory requirements that cable systems carry local commercial and public television stations. Although these "must-carry" requirements "distinguish between speakers in the television programming market," they do so based on the manner of transmission and not on the content the messages conveyed, and hence are content-neutral.[933] The regulations could therefore be measured by the "intermediate level of scrutiny" set forth in *United States v. O'Brien*.[934] Two years later, however, a splintered Court could not agree on what standard of review to apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a Court majority in *Denver Area Educational Telecommunications Consortium v. FCC*,[935] found it unnecessary to determine whether strict scrutiny or some lesser standard applies, since the restriction was deemed invalid under any of the alternative tests. There was no opinion of the Court on the other two holdings in the case,[936] and a plurality[937] rejected assertions that public forum analysis,[938]

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[931] 512 U.S. at 661 (referring to the "bottleneck monopoly power" exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

[932] 512 U.S. 622 (1994).

[933] 512 U.S. at 645. "Deciding whether a particular regulation is content-based or content-neutral is not always a simple task," the Court confessed. Id. at 642. Indeed, dissenting Justice O'Connor, joined by Justices Scalia, Ginsburg, and Thomas, viewed the rules as content-based. Id. at 674–82.

[934] 391 U.S. 367, 377 (1968). The Court remanded *Turner* for further factual findings relevant to the *O'Brien* test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it "cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." Turner Broadcasting System v. FCC, 520 U.S. 180, 224 (1997).

[935] 518 U.S. 727, 755 (1996) (invalidating § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992).

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

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

[938] Justice Kennedy, joined by Justice Ginsburg, advocated this approach. 518 U.S. at 791, and took the plurality to task for its "evasion of any clear legal standard." 518 U.S. at 784.

or a rule giving cable operators' editorial rights "general primacy" over the rights of programmers and viewers,[939] should govern.

Subsequently, in *United States v. Playboy Entertainment Group, Inc.*,[940] the Supreme Court made clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restrictions on cable television. The Court struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed," which refers to blurred images or sounds that come through to non-subscribers.[941] The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to scramble fully or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an F.C.C. regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court apparently assumed that the government had a compelling interest in protecting at least some children from sexually oriented signal bleed, but found that Congress had not used the least restrictive means to do so. Congress in fact had enacted another provision that was less restrictive and that served the government's purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or otherwise fully block any channel to which a subscriber does not subscribe.

**Government Restraint of Content of Expression**

The three previous sections considered primarily but not exclusively incidental restraints on expression as a result of governmental regulatory measures aimed at goals other than control of the content of expression; this section considers the permissibility of governmental measures that directly concern the content of expression.[942] As a general matter, government may not regulate speech "because of its message, its ideas, its subject matter, or its

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[939] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, advocated this approach.

[940] 529 U.S. 803, 813 (2000).

[941] 529 U.S. at 806.

[942] The distinction was sharply drawn by Justice Harlan in Konigsberg v. State Bar of California, 366 U.S. 36, 49–51 (1961): "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved."

content."[943] Invalid content regulation includes not only restrictions on particular viewpoints, but also prohibitions on public discussion of an entire topic.[944]

Originally the Court took a "two-tier" approach to content-oriented regulation of expression. Under the "definitional balancing" of this approach, some forms of expression are protected by the First Amendment and certain categories of expression are not entitled to protection. This doctrine traces to *Chaplinsky v. New Hampshire*,[945] in which the Court opined that "certain well-defined and narrowly limited classes of speech ... are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent those utterances and punish those uttering them without raising any constitutional problems. If speech fell within the *Chaplinsky* categories, it was unprotected, regardless of its effect; if it did not, it was covered by the First Amendment and it was protected unless the restraint was justified by some test relating to harm, such as clear and present danger or a balancing of presumptively protected expression against a compelling governmental interest.

For several decades, the decided cases reflected a fairly consistent and sustained march by the Court to the elimination of, or a severe narrowing of, the "two-tier" doctrine. The result was protection of much expression that hitherto would have been held absolutely unprotected (*e.g.*, seditious speech and seditious libel, fighting words, defamation, and obscenity). More recently, the march has been deflected by a shift in position with respect to obscenity and by the creation of a new category of non-obscene child pornography. But in the course of this movement, differences surfaced among the Justices on the permissibility of regulation based on content and the interrelated issue of a hierarchy of speech values, according to which some forms of expression, while protected, may be more readily subject to official regulation and perhaps suppression than other protected expression. These differences were compounded in cases in which First Amendment expression values came into conflict with other values, either constitutionally protected values such as the right to fair trials in criminal cases, or

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[943] Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Carey v. Brown, 447 U.S. 455 (1980); Metromedia v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion); Widmar v. Vincent, 454 U.S. 263 (1981); Regan v. Time, Inc., 468 U.S. 641 (1984).

[944] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (citing Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980)).

[945] 315 U.S. 568, 571–72 (1942).

societally valued interests such as those in privacy, reputation, and the protection from disclosure of certain kinds of information.

Attempts to work out these differences are elaborated in the following pages, but the effort to formulate a doctrine of permissible content regulation within categories of protected expression necessitates a brief treatment. It remains standard doctrine that it is impermissible to posit regulation of protected expression upon its content.[946] But in recent Terms, Justice Stevens has articulated a theory that would permit some governmental restraint based upon content. In Justice Stevens' view, there is a hierarchy of speech; where the category of speech at issue fits into that hierarchy determines the appropriate level of protection under the First Amendment. A category's place on the continuum is guided by *Chaplinsky*'s formulation of whether it is "an essential part of any exposition of ideas" and what its "social value as a step to truth" is.[947] Thus, offensive but nonobscene words and portrayals dealing with sex and excretion may be regulated when the expression plays no role or a minimal role in the exposition of ideas.[948] "Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[949]

While a majority of the Court has not joined in approving Justice Stevens' theory,[950] the Court has in some contexts of covered expression approved restrictions based on content,[951] and in still

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[946] *See, e.g.*, Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991).

[947] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[948] Young v. American Mini Theatres, 427 U.S. 50, 63–73 (1976) (plurality opinion); Smith v. United States, 431 U.S. 291, 317–19 (1977) (Justice Stevens dissenting); Carey v. Population Services Int., 431 U.S. 678, 716 (1977) (Justice Stevens concurring in part and concurring in the judgment); FCC v. Pacifica Found., 438 U.S. 726, 744–48 (1978) (plurality opinion); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 80, 83 (1981) (Justice Stevens concurring in judgment); New York v. Ferber, 458 U.S. 747, 781 (1982) (Justice Stevens concurring in judgment); R. A. V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Justice Stevens concurring in the judgment).

[949] Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion).

[950] In New York v. Ferber, 458 U.S. 747, 763 (1982), a majority of the Court joined an opinion quoting much of Justice Stevens' language in these cases, but the opinion rather clearly adopts the proposition that the disputed expression, child pornography, is not covered by the First Amendment, not that it is covered but subject to suppression because of its content. Id. at 764. *And see* id. at 781 (Justice Stevens concurring in judgment).

[951] *E.g.*, commercial speech, which is covered by the First Amendment but is less protected than other speech, is subject to content-based regulation. Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 568–69 (1980). *See*

other areas, such as privacy, it has implied that some content-based restraints on expression would be approved.[952] Moreover, the Court in recent years has emphasized numerous times the role of the First Amendment in facilitating, indeed making possible, political dialogue and the operation of democratic institutions.[953] While this emphasis may be read as being premised on a hierarchical theory of the worthiness of political speech and the subordinate position of less worthy forms of speech, it is more likely to be merely a celebration of the most worthy role speech plays, and not a suggestion that other roles and other kinds of discourses are relevant in determining the measure of protection enjoyed under the First Amendment.[954]

That there can be a permissible content regulation within a category of protected expression was questioned in theory, and rejected in application, in *Hustler Magazine, Inc. v. Falwell*.[955] In *Falwell* the Court refused to recognize a distinction between permissible political satire and "outrageous" parodies "doubtless gross and repugnant in the eyes of most."[956] "If it were possible by laying down a principled standard to separate the one from the other," the Court suggested, "public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one."[957] *Falwell* can also be read as consistent with the hierarchical theory of interpretation; the offensive advertisement parody was protected as within "the world of debate about public affairs," and was not "governed by any exception to . . . general First Amendment principles."[958]

So too, there can be *im*permissible content regulation within a category of otherwise *un*protected expression. In *R.A.V. v. City of*

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*also* Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (sexually-oriented, not necessarily obscene mailings); and Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nonobscene, erotic dancing).

[952] *E.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[953] *E.g.*, First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–77, 781–83 (1978); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299–300 (1982).

[954] *E.g.*, First National Bank v. Bellotti, 435 U.S. 765, 783 (1978); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S.C. 530, 534 n.2 (1980). *Compare* Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) ("nude dancing . . . falls only within the outer ambit of the First Amendment's protection") *with* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000) ("[w]e cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech ["signal bleed" of sexually oriented cable programming] is not very important").

[955] 485 U.S. 46 (1988).

[956] 485 U.S. at 55, 50.

[957] 485 U.S. at 55.

[958] 485 U.S. at 53, 56.

*St. Paul*,[959] the Court struck down a hate crimes ordinance construed by the state courts to apply only to use of "fighting words." The difficulty, the Court found, was that the ordinance made a further content discrimination, proscribing only those fighting words that would arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. This amounted to "special prohibitions on those speakers who express views on disfavored subjects."[960] The fact that government may proscribe areas of speech such as obscenity, defamation, or fighting words does not mean that these areas "may be made the vehicles for content discrimination unrelated to their distinctly proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."[961]

Content regulation of protected expression is measured by a compelling interest test derived from equal protection analysis: government "must show that its regulation is necessary to serve a compelling [governmental] interest and is narrowly drawn to achieve that end."[962] Application of this test ordinarily results in invalidation of the regulation.[963] Objecting to the balancing approach inherent in this test because it "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so," Justice Kennedy argues instead for a rule of *per se*invalidity.[964] But compelling interest analysis can still be useful, the Justice suggests, in determining whether a regulation is actually content-based or instead is content-neutral; in those cases in which the government tenders "a plausible justification unrelated to the suppression of expression," application of the compelling interest test may help to determine "whether the asserted justification is in fact an accurate description of the purpose and effect of the law."[965]

***Seditious Speech and Seditious Libel***.—Opposition to government through speech alone has been subject to punishment

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[959] 505 U.S. 377 (1992).

[960] 505 U.S. at 391.

[961] 505 U.S. at 383-84 (emphasis in original).

[962] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105, 118 (1991).

[963] *But see* Burson v. Freeman, 504 U.S. 191 (1992) (state law prohibiting the solicitation of votes and the display or distribution of campaign literature within 100 feet of a polling place upheld as applied to the traditional public forum of streets and sidewalks). The Burson plurality phrased the test not in terms of whether the law was "narrowly tailored," but instead in terms of whether the law was "necessary" to serve compelling state interests. Id. at 199, 206.

[964] Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105, 124-25 (1991) (concurring).

[965] Burson v. Freeman, 504 U.S. 191, 213 (1992) (concurring).

throughout much of history under laws proscribing "seditious" utterances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings which defamed, brought into contempt or disrepute, or excited the hatred of the people against the Government, the President, or the Congress, or which stirred people to sedition.[966] In *New York Times Co. v. Sullivan*,[967] the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate "first crystallized a national awareness of the central meaning of the First Amendment. . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [That history] reflect[s] 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." The "central meaning" discerned by the Court, quoting Madison's comment that in a republican government "the censorial power is in the people over the Government, and not in the Government over the people," is that "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

Little opportunity to apply this concept of the "central meaning" of the First Amendment in the context of sedition and criminal syndicalism laws has been presented to the Court. In *Dombrowski v. Pfister*[968] the Court, after expanding on First Amendment considerations the discretion of federal courts to enjoin state court proceedings, struck down as vague and as lacking due process procedural protections certain features of a state "Subversive Activities and Communist Control Law." In *Brandenburg v. Ohio*,[969] a state

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[966] Ch. 74, 1 Stat. 596. Note also that the 1918 amendment of the Espionage Act of 1917, ch. 75, 40 Stat. 553, reached "language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute." *Cf.* Abrams v. United States, 250 U.S. 616 (1919). For a brief history of seditious libel here and in Great Britain, *see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19–35, 497–516 (1941).

[967] 376 U.S. 254, 273–76 (1964). *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

[968] 380 U.S. 479, 492–96 (1965). A number of state laws were struck down by three-judge district courts pursuant to the latitude prescribed by this case. *E.g.*, Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967) (criminal syndicalism law); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966) (insurrection statute); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967) (criminal syndicalism). This latitude was then circumscribed in cases attacking criminal syndicalism and criminal anarchy laws. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

[969] 395 U.S. 444 (1969). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 384 U.S. 195 (1966), considered infra under "Defamation."

criminal syndicalism statute was held unconstitutional because its condemnation of advocacy of crime, violence, or unlawful methods of terrorism swept within its terms both mere advocacy as well as incitement to imminent lawless action. A seizure of books, pamphlets, and other documents under a search warrant pursuant to a state subversives suppression law was struck down under the Fourth Amendment in an opinion heavy with First Amendment overtones.[970]

***Fighting Words and Other Threats to the Peace***.—In *Chaplinsky v. New Hampshire*,[971] the Court unanimously sustained a conviction under a statute proscribing "any offensive, derisive, or annoying word" addressed to any person in a public place under the state court's interpretation of the statute as being limited to "fighting words"— *i.e.*, to "words . . . [that] have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." The statute was sustained as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[972] The case is best known for Justice Murphy's famous dictum. "[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. 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."[973]

*Chaplinsky* still remains viable for the principle that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently

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[970] Stanford v. Texas, 379 U.S. 476 (1965). In United States v. United States District Court, 407 U.S. 297 (1972), a Government claim to be free to wiretap in national security cases was rejected on Fourth Amendment grounds in an opinion which called attention to the relevance of the First Amendment.

[971] 315 U.S. 568 (1942).

[972] 315 U.S. at 573.

[973] 315 U.S. at 571-72.

likely to provoke violent reaction."[974] But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth grounds and set aside convictions as not being within the doctrine. *Chaplinsky* thus remains formally alive but of little vitality.[975]

On the obverse side, the "hostile audience" situation, the Court once sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders.[976] But this case has been significantly limited by cases that hold protected the peaceful expression of views that stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that breach of the peace and disorderly conduct statutes may not be used to curb such expression.

The cases are not clear to what extent the police must go in protecting the speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder will entitle the authorities to terminate the speech or other expressive conduct.[977] Neither, in the absence of incitement to illegal action,

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[974] Cohen v. California, 403 U.S. 15, 20 (1971). Cohen's conviction for breach of the peace, occasioned by his appearance in public with an "offensive expletive" lettered on his jacket, was reversed, in part because the words were not a personal insult and there was no evidence of audience objection.

[975] The cases hold that government may not punish profane, vulgar, or opprobrious words simply because they are offensive, but only if they are "fighting words" that do have a direct tendency to cause acts of violence by the person to whom they are directed. Gooding v. Wilson, 405 U.S. 518 (1972); Hess v. Indiana, 414 U.S. 105 (1973); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Kelly v. Ohio, 416 U.S. 923 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Rosen v. California, 416 U.S. 924 (1974); *and see* Eaton v. City of Tulsa, 416 U.S. 697 (1974).

[976] Feiner v. New York, 340 U.S. 315 (1951). *See also* Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which the Court held that a court could enjoin peaceful picketing because violence occurring at the same time against the businesses picketed could have created an atmosphere in which even peaceful, otherwise protected picketing could be illegally coercive. *But compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[977] The principle actually predates *Feiner*. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949). For subsequent application, *see* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). Significant is Justice Harlan's statement of the principle reflected by *Feiner*. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315 (1951)." Cohen v. California, 403 U.S. 15, 20 (1971).

may government punish mere expression or proscribe ideas,[978] regardless of the trifling or annoying caliber of the expression.[979]

***Threats of Violence Against Individuals***.—The Supreme Court has cited three "reasons why threats of violence are outside the First Amendment": "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[980] In *Watts v. United States*, however, the Court held that only "true" threats are outside the First Amendment.[981] The defendant in *Watts*, at a public rally at which he was expressing his opposition to the military draft, said, "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."[982] He was convicted of violating a federal statute that prohibited "any threat to take the life of or to inflict bodily harm upon the President of the United States." The Supreme Court reversed. Interpreting the statute "with the commands of the First Amendment clearly in mind,"[983] it found that the defendant had not made a "true 'threat,'" but had indulged in mere "political hyperbole."[984]

In *NAACP v. Claiborne Hardware Co.*, white merchants in Claiborne County, Mississippi, sued the NAACP to recover losses caused by a boycott by black citizens of their businesses, and to enjoin future boycott activity.[985] During the course of the boycott, NAACP Field Secretary Charles Evers had told an audience of "black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[986] The Court acknowledged that this language "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence . . . ."[987] Yet, no violence had followed directly from Evers' speeches, and the Court found that Evers' "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*. . . . An advocate must be free to stimulate his audience with spontaneous and emotional ap-

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[978] Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Schacht v. United States, 398 U.S. 58 (1970); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Stromberg v. California, 283 U.S. 359 (1931).

[979] Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, 405 U.S. 518 (1972).

[980] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[981] 394 U.S. 705, 708 (1969) (per curiam).

[982] 394 U.S. at 706.

[983] 394 U.S. at 707.

[984] 394 U.S. at 708.

[985] 458 U.S. 886 (1982). *Claiborne* is also discussed below under "Public Issue Picketing and Parading."

[986] 458 U.S. at 900, n.29. See id. at 902 for a similar remark by Evers.

[987] 458 U.S. at 927.

peals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."[988] While holding that, under *Bradenburg*, Evers' speech did not constitute unprotected incitement of lawless action,[989] the Court also cited *Watts*, thereby implying that Evers' speech also did not constitute a "true threat."[990]

In *Planned Parenthood v. American Coalition of Life Activists*, the *en banc* Ninth Circuit, by a 6-to-5 vote, upheld a damage award in favor of four physicians and two health clinics that provide medical services, including abortions, to women.[991] The plaintiffs had sued under a federal statute that gives aggrieved persons a right of action against whoever by "threat of force ... intentionally ... intimidates any person because the person is or has been ... providing reproductive health services." The defendants had published "WANTED," "unWANTED," and "GUILTY" posters with the names, photographs, addresses, and other personal information about abortion doctors, three of whom were subsequently murdered by abortion opponents. The defendants also operated a "Nuremberg Files" website that listed approximately 200 people under the label "ABORTIONIST," with the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)."[992] The posters and the website contained no language that literally constituted a threat, but, the court found, "they connote something they do not literally say," namely "You're Wanted or You're Guilty; You'll be shot or killed,"[993] and the defendants knew that the posters caused abortion doctors to "quit out of fear for their lives."[994]

The Ninth Circuit concluded that a "true threat" is "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person."[995] "It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat."[996]

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[988] 458 U.S. at 928.

[989] Brandenburg v. Ohio, 395 U.S. 444 (1969). *Brandenburg* is discussed above under "Is There a Present Test?"

[990] *Claiborne*, 458 U.S. at 928 n.71.

[991] 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert denied,* 123 S.Ct. 2637 (2003).

[992] 290 F.3d at 1065.

[993] 290 F.3d at 1085.

[994] 290 F.3d at 1085.

[995] 290 F.3d at 1077.

[996] 290 F.3d at 1075.

Judge Alex Kozinski, in one of three dissenting opinions, agreed with the majority's definition of a true threat, but believed that the majority had failed to apply it, because the speech in this case had not been "communicated as *a serious expression of intent to inflict bodily harm*. . . ." [997] "The difference between a true threat and protected expression," Judge Kozinski wrote, "is this: A true threat warns of violence or other harm that the speaker controls. . . . Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm. . . . Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment. . . ." [998] Moreover, the Court held in *Claiborne* that "[t]he mere fact the statements could be understood 'as intending to create a fear of violence' was insufficient to make them 'true threats' under *Watts*." [999]

***Group Libel, Hate Speech***.—In *Beauharnais v. Illinois*, [1000] relying on dicta in past cases, [1001] the Court upheld a state group libel law that made it unlawful to defame a race or class of people. The defendant had been convicted under this statute after he had distributed a leaflet, part of which was in the form of a petition to his city government, taking a hard-line white-supremacy position, and calling for action to keep African Americans out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every State in the Union. These laws raise no constitutional difficulty because libel is within that class of speech that is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, then no good reason appears to deny a State the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State." [1002] The Justice then reviewed the history of racial strife in Illinois to conclude that the legislature could reasonably fear substantial evils from unre-

[997] 290 F.3d at 1089 (emphasis added by Judge Kozinski).
[998] 290 F.3d at 1089, 1091, 1092 (emphasis in original).
[999] 290 F.3d at 1094.
[1000] 343 U.S. 250 (1952).
[1001] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707–08 (1931).
[1002] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

strained racial utterances. Neither did the Constitution require the State to accept a defense of truth, inasmuch as historically a defendant had to show not only truth but publication with good motives and for justifiable ends.[1003] "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'"[1004]

*Beauharnais* has little continuing vitality as precedent. Its holding, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been substantially undercut by subsequent developments, not the least of which are the Court's subjection of defamation law to First Amendment challenge and its ringing endorsement of "uninhibited, robust, and wide-open" debate on public issues in *New York Times Co. v. Sullivan*.[1005] In *R. A. V. v. City of St. Paul*, the Court, in an opinion by Justice Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," but instead "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*."[1006] Content discrimination unrelated to that "distinctively proscribable content" runs afoul of the First Amendment. Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects."[1007]

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[1003] 343 U.S. at 265-66.

[1004] 343 U.S. at 266.

[1005] 376 U.S. 254 (1964). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (ordinances prohibiting distribution of materials containing racial slurs are unconstitutional), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953 (1978), *cert. denied*, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting on basis that Court should review case that is in "some tension" with *Beauharnais*). *But see* New York v. Ferber, 458 U.S. 747, 763 (1982) (obliquely citing Beauharnais with approval).

[1006] 505 U.S. 377, 383 (1992) (emphasis in original).

[1007] 505 U.S. at 391. On the other hand, the First Amendment does permit enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. Wisconsin v. Mitchell, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. Id. at 485. *R.A.V.* was distinguished as involving a limitation on "speech" rather than conduct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias-inspired crimes (e.g., they are more likely to provoke retaliatory crimes). Id. at 487–88. *See generally* Laurence H. Tribe,

***Defamation***.—One of the most seminal shifts in constitutional jurisprudence occurred in 1964 with the Court's decision in *New York Times Co. v. Sullivan*.[1008] The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King, and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the lower court's judgment for the plaintiff. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be foreclosed by the "label" attached to something. "Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[1009] "The general proposition," the Court continued, "that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions .... [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."[1010] Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time, [it] would seem clearly to qualify for the constitutional protection . . . [unless] it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[1011]

Erroneous statement is protected, the Court asserted, there being no exception "for any test of truth." Error is inevitable in any free debate and to place liability upon that score, and especially to place on the speaker the burden of proving truth, would introduce self-censorship and stifle the free expression which the First Amendment protects.[1012] Nor would injury to official reputation af-

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*The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

[1008] 376 U.S. 254 (1964).

[1009] 376 U.S. at 269. Justices Black, Douglas, and Goldberg, concurring, would have held libel laws *per se* unconstitutional. Id. at 293, 297.

[1010] 376 U.S. at 269, 270.

[1011] 376 U.S. at 271.

[1012] 376 U.S. at 271-72, 278-79. Of course, the substantial truth of an utterance is ordinarily a defense to defamation. *See* Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991).

ford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation." [1013] That neither factual error nor defamatory content could penetrate the protective circle of the First Amendment was the "lesson" to be drawn from the great debate over the Sedition Act of 1798, which the Court reviewed in some detail to discern the "central meaning of the First Amendment." [1014] Thus, it appears, the libel law under consideration failed the test of constitutionality because of its kinship with seditious libel, which violated the "central meaning of the First Amendment." "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [1015]

In the wake of the *Times* ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Frankfurter had relied in analogy to uphold the group libel law in *Beauharnais*. [1016] In neither case did the Court apply the concept of *Times* to void them altogether. *Garrison v. Louisiana* [1017] held that a statute that did not incorporate the *Times* rule of "actual malice" was invalid, while in *Ashton v. Kentucky* [1018] a common-law definition of criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable" was too vague to be constitutional.

The teaching of *Times* and the cases following it is that expression on matters of public interest is protected by the First Amendment. Within that area of protection is commentary about the public actions of individuals. The fact that expression contains falsehoods does not deprive it of protection, because otherwise such expression in the public interest would be deterred by monetary judgments and self-censorship imposed for fear of judgments. But, over the years, the Court has developed an increasingly complex set of standards governing who is protected to what degree with respect to which matters of public and private interest.

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[1013] 376 U.S. at 272-73.

[1014] 376 U.S. at 273.

[1015] 376 U.S. at 279-80. The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. McDonald v. Smith, 472 U.S. 479 (1985).

[1016] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[1017] 379 U.S. 64 (1964).

[1018] 384 U.S. 195 (1966).

Individuals to whom the *Times* rule applies presented one of the first issues for determination. At times, the Court has keyed it to the importance of the position held. "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[1019] But this focus seems to have become diffused and the concept of "public official" has appeared to take on overtones of anyone holding public elective or appointive office.[1020] Moreover, candidates for public office were subject to the *Times* rule and comment on their character or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.[1021]

Thus, a wide range of reporting about both public officials and candidates is protected. Certainly, the conduct of official duties by public officials is subject to the widest scrutiny and criticism.[1022] But the Court has held as well that criticism that reflects generally upon an official's integrity and honesty is protected.[1023] Candidates

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[1019] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[1020] *See* Rosenblatt v. Baer, 383 U.S. 75 (1966) (supervisor of a county recreation area employed by and responsible to the county commissioners may be public official within Times rule); Garrison v. Louisiana, 379 U.S. 64 (1964) (elected municipal judges); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (state legislator who was major real estate developer in area); Time, Inc. v. Pape, 401 U.S. 279 (1971) (police captain). The categorization does not, however, include all government employees. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

[1021] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[1022] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[1023] Garrison v. Louisiana, 379 U.S. 64 (1964), involved charges that judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Court rejected an attempted distinction that these criticisms were not of the manner in which the judges conducted their courts but were personal attacks upon their integrity and honesty. "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. . . . The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." Id. at 76–77.

for public office, the Court has said, place their whole lives before the public, and it is difficult to see what criticisms could not be related to their fitness. [1024]

For a time, the Court's decisional process threatened to expand the *Times* privilege so as to obliterate the distinction between private and public figures. First, the Court created a subcategory of "public figure," which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Warren's words, those persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." [1025] More recently, the Court has curtailed the definition of "public figure" by playing down the matter of public interest and emphasizing the voluntariness of the assumption of a role in public affairs that will make of one a "public figure." [1026]

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[1024] In Monitor Patriot Co. v. Roy, 401 U.S. 265, 274–75 (1971), the Court said: "The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. . . . Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."

[1025] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Chief Justice Warren concurring in the result). *Curtis* involved a college football coach, and *Associated Press v. Walker*, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting that alleged, respectively, the fixing of a football game and the leading of a violent crowd in opposition to enforcement of a desegregation decree. The Court was extremely divided, but the rule that emerged was largely the one developed in the Chief Justice's opinion. Essentially, four Justices opposed application of the *Times* standard to "public figures," although they would have imposed a lesser but constitutionally based burden on public figure plaintiffs. Id. at 133 (plurality opinion of Justices Harlan, Clark, Stewart, and Fortas). Three Justices applied *Times*, id. at 162 (Chief Justice Warren), and 172 (Justices Brennan and White). Two Justices would have applied absolute immunity. Id. at 170 (Justices Black and Douglas). *See also* Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970).

[1026] Public figures "[f]or the most part [are] those who . . . have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.[1027] But, in *Gertz v. Robert Welch, Inc.*[1028] the Court set off on a new path of limiting recovery for defamation by private persons. Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved, and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well; the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of its access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual's right to the protection of his own good name is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public for information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[1029] Some degree of fault must be shown, then.

Generally, juries may award substantial damages in tort for presumed injury to reputation merely upon a showing of publication. But this discretion of juries had the potential to inhibit the exercise of freedom of the press, and moreover permitted juries to penalize unpopular opinion through the awarding of damages.

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[1027] Rosenbloom v. Metromedia, 403 U.S. 29 (1971). *Rosenbloom* had been prefigured by Time, Inc. v. Hill, 385 U.S. 374 (1967), a "false light" privacy case considered infra.

[1028] 418 U.S. 323 (1974).

[1029] 418 U.S. at 347.

Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages. [1030]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person, [1031] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction. [1032] Also not a public figure for purposes of allegedly defamatory comment about the value of his research was a scientist who sought and received federal grants for research, the results of which were published in scientific journals. [1033] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, and are public figures with respect to comment on those issues. [1034]

Commentary about matters of "public interest" when it defames someone is apparently, after *Firestone* [1035] and *Gertz*, to be protected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure. That there is a controversy, that there are matters that may be of "public interest," is insufficient to make a private person a "public figure" for purposes of the standard of protection in defamation actions.

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the *Gertz* situation, in other words—the burden is on the plaintiff to establish the falsity of the informa-

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[1030] 418 U.S. at 348-50. Justice Brennan would have adhered to *Rosenbloom*, id. at 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id. at 369.

[1031] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[1032] Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[1033] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[1034] 443 U.S. at 134 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[1035] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

tion. Thus, the Court held in *Philadelphia Newspapers v. Hepps*,[1036] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters pointed out, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (e.g. negligence).[1037] On the other hand, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern.[1038] What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices were in agreement on that point.[1039] But in *Philadelphia Newspapers*, the Court expressly reserved the issue of "what standards would apply if the plaintiff sues a nonmedia defendant."[1040]

Satellite considerations besides the issue of who is covered by the *Times* privilege are of considerable importance. The use of the expression "actual malice" has been confusing in many respects, because it is in fact a concept distinct from the common law meaning of malice or the meanings common understanding might give to it.[1041] Constitutional "actual malice" means that the defamation was published with knowledge that it was false or with reckless disregard of whether it was false.[1042] Reckless disregard is not simply negligent behavior, but publication with serious doubts as to

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[1036] 475 U.S. 767 (1986). Justice O'Connor's opinion of the Court was joined by Justices Brennan, Marshall, Blackmun, and Powell; Justice Stevens' dissent was joined by Chief Justice Burger and by Justices White and Rehnquist.

[1037] 475 U.S. at 780 (Stevens, J., dissenting).

[1038] 472 U.S. 749 (1985). Justice Powell wrote a plurality opinion joined by Justices Rehnquist and O'Connor, and Chief Justice Burger and Justice White, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

[1039] 472 U.S. at 753 (plurality); id. at 773 (Justice White); id. at 781–84 (dissent).

[1040] 475 U.S. at 779 n.4. Justice Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. Id. at 780.

[1041] *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 199 (1979) (Justice Stewart dissenting).

[1042] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Garrison v. Louisiana, 379 U.S. 64, 78 (1964); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251–52 (1974).

the truth of what is uttered.[1043] A defamation plaintiff under the *Times* or *Gertz* standard has the burden of proving by "clear and convincing" evidence, not merely by the preponderance of evidence standard ordinarily borne in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard.[1044] Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[1045] A plaintiff suing the press[1046] for defamation under the *Times* or *Gertz* standards is not limited to attempting to prove his case without resort to discovery of the defendant's editorial processes in the establishment of "actual malice."[1047] The state of mind of the defendant may be inquired into and the thoughts, opinions, and conclusions with respect to the material gathered and its review and handling are proper subjects of discovery. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.[1048]

There had been some indications that statements of opinion, unlike assertions of fact, are absolutely protected,[1049] but the Court

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[1043] St. Amant v. Thompson, 390 U.S. 727, 731–33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). A finding of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is alone insufficient to establish actual malice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) (nonetheless upholding the lower court's finding of actual malice based on the "entire record").

[1044] Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 281–86 (1964) ("convincing clarity"). A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

[1045] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

[1046] Because the defendants in these cases have typically been media defendants (*but see* Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965)), and because of the language in the Court's opinions, some have argued that only media defendants are protected under the press clause and individuals and others are not protected by the speech clause in defamation actions. *See* discussion supra, under "Freedom of Expression: Is There a Difference Between Speech and Press?"

[1047] Herbert v. Lando, 441 U.S. 153 (1979).

[1048] New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964). *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982). Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989) ("the reviewing court must consider the factual record in full"); Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) (the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle).

[1049] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); Greenbelt Cooperative

held in *Milkovich v. Lorain Journal Co.*[1050] that there is no constitutional distinction between fact and opinion, hence no "wholesale defamation exemption" for any statement that can be labeled "opinion."[1051] The issue instead is whether, regardless of the context in which a statement is uttered, it is sufficiently factual to be susceptible of being proved true or false. Thus, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual,"[1052] then the truthfulness of the factual assertions may be tested in a defamation action. There are sufficient protections for free public discourse already available in defamation law, the Court concluded, without creating "an artificial dichotomy between 'opinion' and fact."[1053]

Substantial meaning is also the key to determining whether inexact quotations are defamatory. Journalistic conventions allow some alterations to correct grammar and syntax, but the Court in *Masson v. New Yorker Magazine*[1054] refused to draw a distinction on that narrow basis. Instead, "a deliberate alteration of words [in a quotation] does not equate with knowledge of falsity for purposes of [*New York Times*] unless the alteration results in a material change in the meaning conveyed by the statement."[1055]

***Invasion of Privacy***.—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amendment rights. Privacy is a concept composed of several aspects.[1056] As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from pub-

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Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (holding protected the accurate reporting of a public meeting in which a particular position was characterized as "blackmail"); Letter Carriers v. Austin, 418 U.S. 264 (1974) (holding protected a union newspaper's use of epithet "scab").

[1050] 497 U.S. 1 (1990).

[1051] 497 U.S. at 18.

[1052] 497 U.S. at 20. In *Milkovich* the Court held to be actionable assertions and implications in a newspaper sports column that a high school wrestling coach had committed perjury in testifying about a fight involving his team.

[1053] 497 U.S. at 19.

[1054] 501 U.S. 496 (1991).

[1055] 501 U.S. at 517.

[1056] *See, e.g.*, WILLIAM PROSSER, LAW OF TORTS § 117 (5th ed. 1984); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (1987); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 541–61 (1970). It should be noted that we do not have here the question of the protection of one's privacy from governmental invasion.

licity which unreasonably places one in a false light before the public.[1057]

While the Court has variously recognized valid governmental interests in extending protection to privacy,[1058] it has at the same time interposed substantial free expression interests in the balance. Thus, in *Time, Inc. v. Hill*,[1059] the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. When, in *Gertz v. Robert Welch, Inc.*,[1060] the Court held that the *Times* privilege was not applicable in defamation cases unless the plaintiff is a public official or public figure, even though plaintiff may have been involved in a matter of public interest, the question arose whether *Hill* applies to all "false-light" cases or only such cases involving public officials or public figures.[1061] And, more important, *Gertz* left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press."[1062]

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged. Thus, the State could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[1063] Nevertheless, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful informa-

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[1057] Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser's 1960 article, incorporated in the Restatement, and now "routinely accept[ed]." McCarthy, § 5.8[A].

[1058] Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967); and id. at 402, 404 (Justice Harlan, concurring in part and dissenting in part), 411, 412–15 (Justice Fortas dissenting); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487–89 (1975).

[1059] 385 U.S. 374 (1967). *See also* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[1060] 418 U.S. 323 (1974).

[1061] *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250–51 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 n.19 (1975).

[1062] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

[1063] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." 420 U.S. at 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id. at 493, 494–96.

tion.[1064] But in recognition of the conflicting interests—in expression and in privacy—it is evident that the judicial process in this area will be cautious.

Continuing to adhere to "limited principles that sweep no more broadly than the appropriate context of the instant case," the Court invalidated an award of damages against a newspaper for printing the name of a sexual assault victim lawfully obtained from a sheriff's department press release. The state was unable to demonstrate that imposing liability served a "need" to further a state interest of the highest order, since the same interest could have been served by the more limited means of self regulation by the police, since the particular *per se* negligence statute precluded inquiry into the extent of privacy invasion (*e.g.*, inquiry into whether the victim's identity was already widely known), and since the statute singled out "mass communications" media for liability rather than applying evenhandedly to anyone disclosing a victim's identity.[1065]

***Emotional Distress Tort Actions***.—In *Hustler Magazine, Inc. v. Falwell*,[1066] the Court applied the *New York Times v. Sullivan* standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress. The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister active as a commentator on politics and public affairs," as engaged in "a drunken incestuous rendezvous with his mother in an outhouse."[1067] Affirming liability in this case, the Court believed,

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[1064] Thus, Justice White for the Court noted that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." 420 U.S. at 490. If truth is not a constitutionally required defense, then it would be possible for the States to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. *See* Brasco v. Reader's Digest, 4 Cal.3d 520, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970). Concurring in *Cohn*, 420 U.S. at 497, Justice Powell contended that the question of truth as a constitutionally required defense was long settled in the affirmative and that *Gertz* itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." 420 U.S. at 500.

[1065] The Florida Star v. B.J.F., 491 U.S. 524 (1989).

[1066] 485 U.S. 46 (1988).

[1067] 485 U.S. at 47-48.

would subject "political cartoonists and satirists . . . to damage awards without any showing that their work falsely defamed its subject." [1068] A proffered "outrageousness" standard for distinguishing such parodies from more traditional political cartoons was rejected. While not doubting that "the caricature of respondent . . . is at best a distant cousin of [some] political cartoons . . . and a rather poor relation at that," the Court explained that "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views." [1069] Therefore, proof of intent to cause injury, "the gravamen of the tort," is insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment." [1070]

***"Right of Publicity" Tort Actions***.—In *Zacchini v. Scripps-Howard Broadcasting Co.*, [1071] the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of the performer's suit for damages against the company for having "appropriated" his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information which would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing." [1072] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make

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[1068] 485 U.S. at 53.

[1069] 485 U.S. at 55.

[1070] 485 U.S. at 52-53.

[1071] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands, "appropriation" of one's name or likeness for commercial purposes. Id. at 569–72. Justices Powell, Brennan, and Marshall dissented, finding the broadcast protected, id. at 579, and Justice Stevens dissented on other grounds. Id. at 582.

[1072] 433 U.S. at 573-74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

the investment required to produce a performance of interest to the public.[1073]

***Publication of Legally Confidential Information***.—While a State may have numerous and important valid interests in assuring the confidentiality of certain information, it may not maintain this confidentiality through the criminal prosecution of nonparticipant third parties, including the press, who disclose or publish the information.[1074] The case arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipant divulging. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the State's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.[1075] The scope of the privilege thus conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the case.[1076] It does appear, however, that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree

[1073] 433 U.S. at 576-78. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court's emphasis is that they encourage the production of work for the public's benefit.

[1074] Landmark Communications v. Virginia, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id. at 848. *See also* Smith v. Daily Mail Pub. Co., 433 U.S. 97 (1979).

[1075] 435 U.S. at 838-42. The state court's utilization of the clear-and-present-danger test was disapproved in its application; additionally, the Court questioned the relevance of the test in this case. Id. at 842–45.

[1076] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id. at 496, but had expressly reserved the question "whether the publication of truthful information withheld by law from the public domain is similarly privileged," id. at 497 n.27, and *Landmark* on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court's similar reservation. "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment." 435 U.S. at 840.

as it would be foreclosed from obtaining prior restraint of such publication.[1077] There are also limits on the extent to which government may punish disclosures by *participants* in the criminal process, the Court having invalidated a restriction on a grand jury witness's disclosure of his own testimony after the grand jury had been discharged.[1078]

***Obscenity***.—Although public discussion of political affairs is at the core of the First Amendment, the guarantees of speech and press, it should have been noticed from the previous subsections, are broader. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right."[1079] The right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society."[1080] Indeed, it is primarily with regard to the entertaining function of expression that the law of obscenity is concerned, inasmuch as the Court has rejected any concept of "ideological" obscenity.[1081] However, this function is not the reason why obscenity is outside the protection of the First Amendment, although the Court has never really been clear about what that reason is.

Adjudication over the constitutional law of obscenity began in *Roth v. United States*,[1082] in which the Court in an opinion by Justice Brennan settled in the negative the "dispositive question"

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[1077] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[1078] Butterworth v. Smith, 494 U.S. 624 (1990).

[1079] Winters v. New York, 333 U.S. 507, 510 (1948). Illustrative of the general observation is the fact that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

[1080] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[1081] Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Id. at 688–89.

[1082] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts v. California*, involving, of course, a state obscenity law. The Court's first opinion in the obscenity field was Butler v. Michigan, 352 U.S. 380 (1957), considered infra. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).

"whether obscenity is utterance within the area of protected speech and press." [1083] The Court then undertook a brief historical survey to demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." All or practically all of the States that ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. It was this history that had caused the Court in *Beauharnais* to conclude that "libelous utterances are not within the area of constitutionally protected speech," and this history was deemed to demonstrate that "obscenity, too, was outside the protection intended for speech and press." [1084] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people .... All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." [1085] It was objected that obscenity legislation punishes because of incitation to impure thoughts and without proof that obscene materials create a clear and present danger of antisocial conduct. But since obscenity was not protected at all, such tests as clear and present danger were irrelevant. [1086]

"However," Justice Brennan continued, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press .... It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." [1087] The standard that the Court thereupon

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[1083] Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a workable standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973).

[1084] 354 U.S. at 482-83. The reference is to Beauharnais v. Illinois, 343 U.S. 250 (1952).

[1085] 354 U.S. at 484. There then followed the well-known passage from Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[1086] 354 U.S. at 486, also quoting Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

[1087] 354 U.S. at 487, 488.

adopted for the designation of material as unprotected obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." [1088] The Court defined material appealing to prurient interest as "material having a tendency to excite lustful thoughts," and defined prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." [1089]

In the years after *Roth*, the Court struggled with many obscenity cases with varying degrees of success. The cases can be grouped topically, but, with the exception of those cases dealing with protection of children, [1090] unwilling adult recipients, [1091] and procedure, [1092] these cases are best explicated chronologically.

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[1088] 354 U.S. at 489.

[1089] 354 U.S. at 487 n.20. A statute defining "prurient" as "that which incites lasciviousness or lust" covers more than obscenity, the Court later indicated in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984); obscenity consists in appeal to "a shameful or morbid" interest in sex, not in appeal to "normal, healthy sexual desires." *Brockett* involved a facial challenge to the statute, so the Court did not have to explain the difference between "normal, healthy" sexual desires and "shameful" or "morbid" sexual desires.

[1090] In Butler v. Michigan, 352 U.S. 380 (1957), the Court unanimously reversed a conviction under a statute that punished general distribution of materials unsuitable for children. Protesting that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children," the Court pronounced the statute void. Narrowly drawn proscriptions for distribution or exhibition to children of materials which would not be obscene for adults are permissible, Ginsberg v. New York, 390 U.S. 629 (1968), although the Court insists on a high degree of specificity. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Rabeck v. New York, 391 U.S. 462 (1968). Protection of children in this context is concurred in even by those Justices who would proscribe obscenity regulation for adults. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Justice Brennan dissenting). But children do have First Amendment protection and government may not bar dissemination of everything to them. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975) (in context of nudity on movie screen). *See also* FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978); Pinkus v. United States, 436 U.S. 293, 296–98 (1978).

[1091] Protection of unwilling adults was the emphasis in Rowan v. Post Office Dep't, 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, FCC v. Pacifica Found., 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. It is up to offended individuals to turn away. Erznoznik v. City of Jacksonville, 422 U.S. 205, 202–12 (1975). *But see* Pinkus v. United States, 436 U.S. 293, 298–301 (1978) (jury in passing on what community standards are must include "sensitive persons" within the community).

[1092] The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, for placing the burden of proof on government, and for hastening judicial review. Additionally, Fourth Amendment search and seizure law has been suffused with First Amendment principles, so that the law governing searches for and seizures of allegedly obscene ma-

*Manual Enterprises v. Day* [1093] upset a Post Office ban upon the mailing of certain magazines addressed to homosexual audiences, but resulted in no majority opinion of the Court. Nor did a majority opinion emerge in *Jacobellis v. Ohio*, which reversed a conviction for exhibiting a motion picture. [1094] Chief Justice Warren's concurrence in *Roth* [1095] was adopted by a majority in *Ginzburg v. United States*, [1096] in which Justice Brennan for the Court held that in "close" cases borderline materials could be determined to be obscene if the seller "pandered" them in a way that indicated he was catering to prurient interests. The same five-Justice majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the "pandering" test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it was di-

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terials is more stringent than in most other areas. Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Lo-Ji Sales v. New York, 442 U.S. 319 (1979); *and see* Walter v. United States, 447 U.S. 649 (1980). Scienter—that is, knowledge of the nature of the materials—is a prerequisite to conviction, Smith v. California, 361 U.S. 147 (1959), but the prosecution need only prove the defendant knew the contents of the material, not that he knew they were legally obscene. Hamling v. United States, 418 U.S. 87, 119–24 (1974). *See also* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (public nuisance injunction of showing future films on basis of past exhibition of obscene films constitutes prior restraint); McKinney v. Alabama, 424 U.S. 669 (1976) (criminal defendants may not be bound by a finding of obscenity of materials in prior civil proceeding to which they were not parties). None of these strictures applies, however, to forfeitures imposed as part of a criminal penalty. Alexander v. United States, 509 U.S. 544 (1993) (upholding RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses). Justice Kennedy, dissenting in Alexander, objected to the "forfeiture of expressive material that had not been adjudged to be obscene." Id. at 578.

[1093] 370 U.S. 478 (1962).

[1094] 378 U.S. 184 (1964). Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). *Jacobellis* is best known for Justice Stewart's concurrence, contending that criminal prohibitions should be limited to "hard-core pornography." The category "may be indefinable," he added, but "I know it when I see it, and the motion picture involved in this case is not that." Id. at 197. The difficulty with this visceral test is that other members of the Court did not always "see it" the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 421 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

[1095] Roth v. United States, 354 U.S. 476, 494 (1957).

[1096] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303–04 (1978).

rected.[1097] Unanimity was shattered, however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene.[1098] The prevailing opinion again restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[1099]

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup v. New York*,[1100] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles, protection of unwilling adult recipients, or proscription of pandering,[1101] the Court succinctly summarized the varying positions of the seven Justices in the majority and said: "[w]hichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . ."[1102] And so things went for several years.[1103]

Changing membership on the Court raised increasing speculation about the continuing vitality of *Roth*; it seemed unlikely the Court would long continue its *Redrup* approach.[1104] The change when it occurred strengthened the powers of government, federal, state, and local, to outlaw or restrictively regulate the sale and dissemination of materials found objectionable, and developed new

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[1097] Mishkin v. New York, 383 U.S. 502 (1966). *See* id. at 507–10 for discussion of the legal issue raised by the limited appeal of the material. The Court relied on Mishkin in Ward v. Illinois, 431 U.S. 767, 772 (1977).

[1098] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

[1099] 383 U.S. at 418. On the precedential effect of the Memoirs plurality opinion, *see* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[1100] 386 U.S. 767 (1967).

[1101] 386 U.S. at 771.

[1102] 386 U.S. at 770-71. The majority was thus composed of Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, and Fortas.

[1103] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 & n.8 (1973) (Justice Brennan dissenting) (describing *Redrup* practice and listing 31 cases decided on the basis of it).

[1104] *See* United States v. Reidel, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In Grove Press v. Maryland State Bd. of Censors, 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice Douglas not participating. And Stanley v. Georgia, 394 U.S. 557, 560–64, 568 (1969), had insisted that Roth remained the governing standard.

standards for determining which objectionable materials are legally obscene.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[1105] By a five-to-four vote the following Term, the Court in *Paris Adult Theatre I v. Slaton* adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments even if access is limited to consenting adults.[1106] Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis of unverifiable assumptions in arriving at the decision to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Nor does the Constitution embody any concept of laissez faire, or of privacy, or of Millsean "free will," that curbs governmental efforts to suppress pornography.[1107]

In *Miller v. California*,[1108] the Court then undertook to enunciate standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined to materials that

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[1105] Paris Adult Theatre I v. Slaton, 408 U.S. 921 (1972); Alexander v. Virginia, 408 U.S. 921 (1972).

[1106] 413 U.S. 49 (1973).

[1107] 413 U.S. at 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other, but more basically by deterrence of protected expression caused by the uncertainty. Id. at 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Id. at 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id. at 70.

[1108] 413 U.S. 15 (1973).

"depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."[1109] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[1110] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of fact sits.[1111] Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[1112] By contrast, the third or "value" prong of the *Miller* test is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[1113]

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[1109] Miller v. California, 413 U.S. 15, 27 (1973). The Court stands ready to read into federal statutes the standards it has formulated. United States v. 12 200–Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the Miller standards). For other cases applying *Miller* standards to federal statutes, *see* Hamling v. United States, 418 U.S. 87, 110–16 (1974) (use of the mails); United States v. Orito, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce). The Court's insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in Ward v. Illinois, 431 U.S. 767 (1977).

[1110] Miller v. California, 413 U.S. at 24.

[1111] It is the unprotected nature of obscenity that allows this inquiry; offensiveness to local community standards is, of course, a principle completely at odds with mainstream First Amendment jurisprudence. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[1112] 413 U.S. at 30-34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, id. at 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the State within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

[1113] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment, and the Court's idea of the content of "hard core" pornography was revealed in its examples: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[1114] Subsequently, the Court held that a publication was not obscene if it "provoked only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[1115] The Court has also indicated that obscenity is not be limited to pictures; books containing only descriptive language may be suppressed.[1116]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[1117] But the Court had conferred on juries as triers of fact the determination, based upon their understanding of community standards, whether material was "patently offensive." Did not this virtually immunize these questions from appellate review? In *Jenkins v. Georgia*,[1118] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hardcore materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything suffi-

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[1114] Miller v. California, 413 U.S. 15, 25 (1973). Quoting *Miller*'s language in Hamling v. United States, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring to this language in Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[1115] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984).

[1116] Kaplan v. California, 413 U.S. 115 (1973).

[1117] 413 U.S. at 25.

[1118] 418 U.S. 153 (1974).

ciently similar to such material to justify similar treatment."[1119] But in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[1120]

The decisions from the *Paris Adult Theatre* and *Miller* era were rendered by narrow majorities,[1121] but nonetheless have guided the Court since. There is no indication that the dissenting viewpoints in those cases will gain ascendancy in the foreseeable future;[1122] if anything, government authority to define and regulate obscenity may be strengthened. Also, the Court's willingness to allow substantial regulation of non-obscene but sexually explicit or indecent expression reduces the importance (outside the criminal area) of whether material is classified as obscene.

Even as to materials falling within the constitutional definition of obscene, the Court has recognized a limited private, protected interest in possession within the home,[1123] unless those materials constitute child pornography. *Stanley v. Georgia* was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. Unanimously,[1124] the Court

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[1119] 418 U.S. at 161. The film at issue was *Carnal Knowledge*.

[1120] Hamling v. United States, 418 U.S. 87 (1974). In Smith v. United States, 431 U.S. 291, 305–06 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community are not unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." The value test is not to be measured by community standards, the Court later held in Pope v. Illinois, 481 U.S. 497 (1987), but instead by a "reasonable person" standard. An erroneous instruction on this score, however, may be "harmless error." Id. at 503.

[1121] For other five-to-four decisions of the era, *see* Marks v. United States, 430 U.S. 188 (1977); Smith v. United States, 431 U.S. 291 (1977); Splawn v. California, 431 U.S. 595 (1977); and Ward v. Illinois, 431 U.S. 767 (1977).

[1122] None of the dissenters in *Miller* and *Paris Adult Theatre* (Douglas, Brennan, Stewart, and Marshall) remains on the Court. Justice Stevens agrees with Justice Brennan that "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults," Pope v. Illinois, 481 U.S. 497, 513 (Stevens, J., dissenting), but it is doubtful whether any other members of the current Court share this view. Justice White's dissenting opinion in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 587 (1991), joined by Justice Blackmun and Justice Marshall, seems to reflect similar views with respect to regulation of non-obscene nude dancing, but does not address regulation of obscenity. Both Justice White and Justice Blackmun voted with the majority in *Miller* and *Paris Adult Theatre*.

[1123] Stanley v. Georgia, 394 U.S. 557 (1969).

[1124] Justice Marshall wrote the opinion of the Court and was joined by Justices Douglas, Harlan, and Fortas, and Chief Justice Warren. Justice Black concurred.

reversed, holding that the mere private possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[1125] Despite the unqualified assertion in *Roth* that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials. *Roth* and the cases following that decision are not impaired by today's decision, the Court insisted,[1126] but in its rejection of each of the state contentions made in support of the conviction the Court appeared to be rejecting much of the basis of *Roth*. First, there is no governmental interest in protecting an individual's mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct; even if there were such evidence, enforcement of laws proscribing the offensive conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.[1127]

*Stanley*'s broad rationale has been given a restrictive reading, and the holding has been confined to its facts. Any possible implication that *Stanley* was applicable outside the home and recognized a right to obtain pornography or a right in someone to supply it was soon dispelled.[1128] The Court has consistently rejected *Stanley*'s theoretical underpinnings, upholding morality-based regula-

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394 U.S. at 568. Justice Stewart concurred and was joined by Justices Brennan and White on a search and seizure point. Justice Stewart, however, had urged the First Amendment ground in an earlier case. Mapp v. Ohio, 367 U.S. 643, 686 (1961) (concurring opinion).

[1125] 394 U.S. at 564.

[1126] 394 U.S. at 560-64, 568.

[1127] 394 U.S. at 565-68.

[1128] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–68 (1973). Transportation of unprotected material for private use may be prohibited, United States v. Orito, 413 U.S. 139 (1973), and the mails may be closed, United States v. Reidel, 402 U.S. 351 (1971), as may channels of international movement, United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); United States v. 12 200–Ft. Reels of Film, 413 U.S. 123 (1973).

tion of the behavior of consenting adults.[1129] Also, *Stanley* has been held inapplicable to possession of child pornography in the home, the Court determining that the state interest in protecting children from sexual exploitation far exceeds the interest in *Stanley* of protecting adults from themselves.[1130] Apparently for this reason, a state's conclusion that punishment of mere possession is a necessary or desirable means of reducing production of child pornography will not be closely scrutinized.[1131]

***Child Pornography***.—In *New York v. Ferber*,[1132] the Court recognized another category of expression that is outside the coverage of the First Amendment, the pictorial representation of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The basic reason such depictions could be prohibited was the governmental interest in protecting the physical and psychological well-being of children whose participation in the production of these materials would subject them to exploitation and harm. The state may go beyond a mere prohibition on the use of the children, because it is not possible to protect children adequately without prohibiting the exhibition and dissemination of the materials and advertising about them. Thus, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[1133] But, since expression is involved, government must carefully define what conduct is to be prohibited and may reach only "works that *visually* depict sexual conduct by children below a specified age."[1134]

The reach of the state may even extend to private possession of child pornography in the home. In *Osborne v. Ohio*[1135] the Court upheld a state law criminalizing the possession or viewing of child pornography as applied to someone who possessed such materials in his home. Distinguishing *Stanley v. Georgia*, the Court ruled

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[1129] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–70 (1973) (commercial showing of obscene films to consenting adults); Bowers v. Hardwick, 478 U.S. 186 (1986) (private, consensual, homosexual conduct); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (regulation of non-obscene, nude dancing restricted to adults).

[1130] Osborne v. Ohio, 495 U.S. 103 (1990).

[1131] 495 U.S. at 109-10.

[1132] 458 U.S. 747 (1982). Decision of the Court was unanimous, although there were several limiting concurrences. *Compare*, *e.g.*, 775 (Justice Brennan, arguing for exemption of "material with serious literary, scientific, or educational value"), *with* 774 (Justice O'Connor, arguing that such material need not be excepted). The Court did not pass on the question, inasmuch as the materials before it were well within the prohibitable category. Id. at 766–74.

[1133] 458 U.S. at 763-64.

[1134] 458 U.S. at 764 (emphasis original). The Court's statement of the modified *Miller* standards for child pornography is at 764–65.

[1135] 495 U.S. 103 (1990).

that Ohio's interest in preventing exploitation of children far exceeded what it characterized as Georgia's "paternalistic interest" in protecting the minds of adult viewers of pornography.[1136] Because of the greater importance of the state interest involved, the Court saw less need to require states to demonstrate a strong necessity for regulating private possession as well as commercial distribution and sale.

In *Ashcroft v. Free Speech Coalition*, the Court held unconstitutional the federal Child Pornography Prevention Act (CPPA) to the extent that it prohibited pictures that were not produced with actual minors.[1137] Prohibited pictures included computer-generated ("virtual") child pornography, and photographs of adult actors who appeared to be minors. The Court observed that statutes that prohibit child pornography that use real children are constitutional because they target "[t]he production of the work, not the content."[1138] The CPPA, by contrast, targeted the content, not the means of production. The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing . . . the sexual abuse and exploitation of actual children."[1139] The Court found these rationales inadequate because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" and "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[1140] The government also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."[1141] This rationale, the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech."[1142]

***Non-obscene But Sexually Explicit and Indecent Expression***.—There is expression, either spoken or portrayed, which is offensive to some but is not within the constitutional standards of unprotected obscenity. Nudity portrayed in films or stills cannot be

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[1136] 495 U.S. at 108.
[1137] 122 S. Ct. 1389 (2002).
[1138] 122 S. Ct. at 1401; *see also* id. at 1397.
[1139] 122 S. Ct. at 1397.
[1140] 122 S. Ct. at 1403.
[1141] 122 S. Ct. at 1397.
[1142] 122 S. Ct. at 1404.

presumed obscene [1143] nor can offensive language ordinarily be punished simply because it offends someone. [1144] Nonetheless, government may regulate sexually explicit but non-obscene expression in a variety of ways. Legitimate governmental interests may be furthered by appropriately narrow regulation, and the Court's view of how narrow regulation must be is apparently influenced not only by its view of the strength of the government's interest in regulation, but also by its view of the importance of the expression itself. In other words, sexually explicit expression does not receive the same degree of protection afforded purely political speech. [1145]

Government has a "compelling" interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect. [1146]

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[1143] Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975).

[1144] *E.g.*, Cohen v. California, 403 U.S. 15 (1971). Special rules apply to broadcast speech, which, because of its intrusion into the home and the difficulties of protecting children, is accorded "the most limited First Amendment protection" of all forms of communication; non-obscene but indecent language may be curtailed, the time of day and other circumstances determining the extent of curtailment. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). However, efforts by Congress and the FCC to extend the indecency ban to 24 hours a day were rebuffed by an appeals court. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating regulations promulgated pursuant to Pub. L. No. 100–459, § 608), *cert. denied*, 503 U.S. 913 (1992). Earlier, the same court had invalidated an FCC restriction on indecent, non-obscene broadcasts from 6 a.m. to midnight, finding that the FCC had failed to adduce sufficient evidence to support the restraint. Action for Children's Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988). In 1992, however, Congress imposed a 6 a.m.-to-midnight ban on indecent programming, with a 10 p.m.-to-midnight exception for public radio and television stations that go off the air at or before midnight. Pub. L. 102–356, § 16 (1992), 47 U.S.C. § 303 note. This time, after a three-judge panel found the statute unconstitutional, the en banc court of appeals upheld it, except for its 10 p.m.-to-midnight ban on indecent material on non-public stations. Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

[1145] Justice Scalia, concurring in Sable Communications v. FCC, 492 U.S. 115, 132 (1989), suggested that there should be a "sliding scale" taking into account the definition of obscenity: "[t]he more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." Barnes v. Glen Theatre, 501 U.S. 560 (1991), upholding regulation of nude dancing even in the absence of threat to minors, may illustrate a general willingness by the Court to apply soft rather than strict scrutiny to regulation of more sexually explicit expression.

[1146] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives— *e.g.*, credit cards or user IDs—of preventing access by children). Pacifica Foundation is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium. 492 U.S. at 127–28. Similar rules apply in regulation of cable TV. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a "compelling" governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate

In *Reno v. American Civil Liberties Union*,[1147] the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have prohibited use of an "interactive computer service" to display indecent material "in a manner available to a person under 18 years of age."[1148] This prohibition would, in effect, have banned indecent material from all Internet sites except those accessible by adults only. Although intended "to deny minors access to potentially harmful speech . . . , [the CDA's] burden on adult speech," the Court wrote, "is unacceptable if less restrictive alternatives would be at least as effective . . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[1149]

In *Reno*, the Court distinguished *FCC v. Pacifica Foundation*,[1150] in which it had upheld the FCC's restrictions on indecent

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and block indecent programming on leased access channels. The segregate and block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to 30 days' delay in blocking or unblocking a channel, were not sufficiently protective of adults' speech and viewing interests to be considered either narrowly or reasonably tailored to serve the government's compelling interest in protecting children. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), the Supreme Court, explicitly applying strict scrutiny to a content-based speech restriction on cable TV, struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed." Id. at 806.

The Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. In striking down the Communications Decency Act of 1996, the Court would "neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17–year-old – no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." Reno v. American Civil Liberties Union, 521 U.S. 844, 878 (1997). In Playboy Entertainment Group, 529 U.S. at 825, the Court wrote: "Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." The Court also would "not discount the possibility that a graphic image could have a negative impact on a young child" (id. at 826), thereby suggesting again that it may take age into account when applying strict scrutiny.

[1147] 521 U.S. 844 (1997).

[1148] The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors.

[1149] 521 U.S. at 874–75. The Court did not address whether, if less restrictive alternatives would not be as effective, the Government would then be permitted to reduce the adult population to only what is fit for children. Courts of appeals, however, have written that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." ACLU v. Reno, 217 F.3d 162, 179 (3d Cir. 2000), *vacated and remanded sub nom.*, Ashcroft v. ACLU, 122 S. Ct. 1700 (2002); Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988).

[1150] 438 U.S. 726 (1978).

radio and television broadcasts, because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet," (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) radio and television, unlike the Internet, have, "as a matter of history . . . 'received the most limited First Amendment protection,' . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." [1151]

After the Supreme Court struck down the CDA, Congress enacted the Child Online Protection Act (COPA), which banned "material that is harmful to minors" on Web sites that have the objective of earning a profit. [1152] The Third Circuit upheld a preliminary injunction against enforcement of the statute on the ground that, "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." [1153] This is because it results in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. The Supreme Court vacated and remanded, holding "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." [1154]

The government may also take notice of objective conditions attributable to the commercialization of sexually explicit but non-obscene materials. Thus, the Court recognized a municipality's authority to zone land to prevent deterioration of urban areas, upholding an ordinance providing that "adult theaters" showing motion pictures that depicted "specified sexual activities" or "specified anatomical areas" could not be located within 100 feet of any two other establishments included within the ordinance or within 500

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[1151] 521 U.S. at 867.

[1152] "Harmful to minors" statutes ban the distribution of material to minors that is not necessarily obscene under the *Miller* test. In Ginsberg v. New York, 390 U.S. 629, 641 (1968), the Supreme Court, applying a rational basis standard, upheld New York's harmful-to-minors statute.

[1153] ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

[1154] Ashcroft v. ACLU, 122 S. Ct. 1700, 1713 (2002) (emphasis in original).

feet of a residential area.[1155] Similarly, an adult bookstore is subject to closure as a public nuisance if it is being used as a place for prostitution and illegal sexual activities, since the closure "was directed at unlawful conduct having nothing to do with books or other expressive activity."[1156] However, a city was held constitutionally powerless to prohibit drive-in motion picture theaters from showing films containing nudity if the screen is visible from a public street or place.[1157] Also, the FCC was unable to justify a ban on transmission of "indecent" but not obscene telephone messages.[1158]

The Court has recently held, however, that "live" productions containing nudity can be regulated to a greater extent than had been allowed for films and publications. Whether this represents a distinction between live performances and other entertainment media, or whether instead it signals a more permissive approach overall to governmental regulation of non-obscene but sexually explicit material, remains to be seen. In *Barnes v. Glen Theatre, Inc.*,[1159] the Court upheld application of Indiana's public indecency statute to require that dancers in public performances of nude, non-obscene erotic dancing wear "pasties" and a "G-string" rather than appear totally nude. There was no opinion of the Court, three Justices viewing the statute as a permissible regulation of "societal order and morality,"[1160] one viewing it as a permissible means of regulating supposed secondary effects of prostitution and other

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[1155] Young v. American Mini Theatres, 427 U.S. 50 (1976). Four of the five majority Justices thought the speech involved deserved less First Amendment protection than other expression, id. at 63–71, while Justice Powell, concurring, thought the ordinance was sustainable as a measure that served valid governmental interests and only incidentally affected expression. Id. at 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id. at 84, 88. Young was followed in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), upholding a city ordinance prohibiting location of adult theaters within 1,000 feet of residential areas, churches, or parks, and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if "designed to serve a substantial governmental interest" and if "allow[ing] for reasonable alternative avenues of communication." Id. at 50. The city had a substantial interest in regulating the "undesirable secondary effects" of such businesses. And, while the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters "must fend for themselves in the real estate market," and are entitled only to "a reasonable opportunity to open and operate." Id. at 54. The Supreme Court also upheld zoning of sexually oriented businesses in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), and City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002).

[1156] Arcara v. Cloud Books, 478 U.S. 697 (1986).

[1157] Erznoznik v. City of Jacksonville, 422 U.S. 204 (1975).

[1158] Sable Communications of California v. FCC, 492 U.S. 115 (1989).

[1159] 501 U.S. 560 (1991).

[1160] 501 U.S. at 568 (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy).

criminal activity,[1161] and a fifth Justice seeing no need for special First Amendment protection from a law of general applicability directed at conduct rather than expression.[1162] All but one of the Justices agreed that nude dancing is entitled to some First Amendment protection,[1163] but the result of *Barnes* was a bare minimum of protection. Numerous questions remain unanswered. In addition to the uncertainty over applicability of *Barnes* to regulation of the content of films or other shows in "adult" theaters,[1164] there is also the issue of its applicability to nudity in operas or theatrical productions not normally associated with commercial exploitation of sex.[1165] But broad implications for First Amendment doctrine are probably unwarranted.[1166] The Indiana statute was not limited in

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[1161] 501 U.S. at 581 (Justice Souter).

[1162] 501 U.S. at 572 (Justice Scalia). The Justice thus favored application of the same approach recently applied to free exercise of religion in Employment Division v. Smith, 494 U.S. 872 (1990).

[1163] Earlier cases had established as much. *See* California v. LaRue, 409 U.S. 109, 118 (1972); Southeastern Promotions v. Conrad, 420 U.S. 546, 557–58 (1975); Doran v. Salem Inn, 422 U.S. 922, 932 (1975); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 716, 718 (1981). Presumably, then, the distinction between barroom erotic dancing, entitled to minimum protection, and social "ballroom" dancing, not expressive and hence not entitled to First Amendment protection (*see* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989)), still hangs by a few threads. Justice Souter, concurring in *Barnes*, 501 U.S. 560, 587 (1991), recognized the validity of the distinction between ballroom and erotic dancing, a validity that had been questioned by a dissent in the lower court. Miller v. Civil City of South Bend, 904 F.2d 1081, 1128–29 (7th Cir. 1990) (Easterbrook, J.).

[1164] Although Justice Souter relied on what were essentially zoning cases (*Young v. American Mini Theatres* and *Renton v. Playtime Theatres*) to justify regulation of expression itself, he nonetheless pointed out that a pornographic movie featuring one of the respondent dancers was playing nearby without interference by the authorities. This suggests that, at least with respect to direct regulation of the degree of permissible nudity, he might draw a distinction between "live" and film performances even while acknowledging the harmful "secondary" effects associated with *both*.

[1165] The Court has not ruled directly on such issues. *See* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (invalidating the denial of use of a public auditorium for a production of the musical "Hair," in the absence of procedural safeguards that must accompany a system of prior restraint). Presumably the *Barnes* plurality's public-morality rationale would apply equally to the "adult" stage and to the operatic theater, while Justice Souter's secondary effects rationale would not. But the plurality ducked this issue, reinterpreting the lower court record to deny that Indiana had distinguished between "adult" and theatrical productions. 501 U.S. at 564 n.1 (Chief Justice Rehnquist); id. at 574 n.2 (Justice Scalia). On the other hand, the fact that the state authorities disclaimed any intent to apply the statute to theatrical productions demonstrated to dissenting Justice White (who was joined by Justices Marshall, Blackmun, and Stevens) that the statute was *not* a general prohibition on public nudity, but instead was targeted at "the communicative aspect of the erotic dance." Id. at 591.

[1166] The Court had only recently affirmed that music is entitled to First Amendment protection independently of the message conveyed by any lyrics (Ward v. Rock Against Racism, 491 U.S. 781 (1989)), so it seems implausible that the Court is signaling a narrowing of protection to only ideas and opinions. Rather, the Court seems

application to barrooms; had it been, then the Twenty-first Amendment would have afforded additional authority to regulate the erotic dancing.

In *Erie v. Pap's A.M.*,[1167] the Supreme Court again upheld the application of a statute prohibiting public nudity to an "adult" entertainment establishment. Although there was again only a plurality opinion, parts of that opinion were joined by five justices. These five adopted Justice Souter's position in *Barnes*, that the statute satisfied the *O'Brien* test because it was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[1168] Justice Souter, however, though joining the plurality opinion, also dissented in part. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe "that the city has made a sufficient evidentiary showing to sustain its regulation," and therefore would have remanded the case for further proceedings.[1169] He acknowledged his "mistake" in *Barnes* in failing to make the same demand for evidence.[1170]

The plurality opinion found that Erie's public nudity ban "regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis," because Erie allowed dancers to perform wearing only pasties and G-strings.[1171] It may follow that "requiring dancers to wear pasties and G-strings may not greatly reduce . . . secondary effects, but *O'Brien* requires only that the regulation further the interest of combating such effects," not that it further it to a particular extent.[1172] The plurality opinion did not address the question of whether statutes prohibiting public

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willing to give government the benefit of the doubt when it comes to legitimate objectives in regulating expressive conduct that is sexually explicit. For an extensive discourse on the expressive aspects of dance and the arts in general, and the striptease in particular, *see* Judge Posner's concurring opinion in the lower court's disposition of *Barnes*. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990).

[1167] 529 U.S. 277 (2000).

[1168] 529 U.S. at 292, 291.

[1169] 529 U.S. 310-311.

[1170] 529 U.S. at 316.

[1171] 529 U.S. at 301. The plurality said that, though nude dancing is "expressive conduct," "we think that it falls only within the outer ambit of the First Amendment's protection." Id. at 289. The opinion also quotes Justice Stevens to the same effect with regard to erotic materials generally. Id. at 294. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000), however, the Court wrote that it "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech ["signal bleed" of sexually oriented cable programming] is not very important."

[1172] 529 U.S. at 301.

nudity could be applied to serious theater, but its reliance on secondary effects suggests that they could not.

### Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets. There is also "expressive conduct," which includes picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of "sit-ins." There is also a class of conduct now only vaguely defined which has been denominated "symbolic conduct," which includes such actions as flag desecration and draft-card burnings. Because all these ways of expressing oneself involve conduct—action—rather than mere speech, they are all much more subject to regulation and restriction than is simple speech. Some of them may be forbidden altogether. But to the degree that these actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent. Sorting out the conflicting lines of principle and doctrine is the point of this section.

***The Public Forum***.—In 1895, while on the highest court of Massachusetts, future Justice Oliver Wendell Holmes rejected a contention that public property was by right open to the public as a place where the right of speech could be recognized,[1173] and on review the United States Supreme Court endorsed Holmes' view.[1174] Years later, beginning with *Hague v. CIO*,[1175] the Court reconsidered the issue. Justice Roberts wrote in *Hague*: "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. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." While this opinion was not itself joined by a majority of the Justices, the view was subsequently endorsed by the Court in several opinions.[1176]

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[1173] Commonwealth v. Davis, 162 Mass. 510, 511 (1895). "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."

[1174] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

[1175] 307 U.S. 496, 515 (1939). Only Justice Black joined the Roberts opinion, but only Justices McReynolds and Butler dissented from the result.

[1176] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939); Kunz v. New York, 340 U.S. 290, 293 (1951).

The Roberts view was called into question in the 1960s, however, when the Court seemed to leave the issue open,[1177] and when a majority endorsed an opinion by Justice Black asserting his own narrower view of speech rights in public places.[1178] More recent decisions have restated and quoted the Roberts language from *Hague*, and that is now the position of the Court.[1179] Public streets and parks,[1180] including those adjacent to courthouses[1181] and foreign embassies,[1182] as well as public libraries[1183] and the grounds of legislative bodies,[1184] are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[1185] Moreover, not all public properties are thereby public fo-

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[1177] Cox v. Louisiana, 379 U.S. 536, 555 (1965). For analysis of this case in the broader context, *see* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

[1178] Adderley v. Florida, 385 U.S. 39 (1966). *See* id. at 47–48; Cox v. Louisiana, 379 U.S. 559, 578 (1965) (Justice Black concurring in part and dissenting in part); Jamison v. Texas, 318 U.S. 413, 416 (1943) (Justice Black for the Court).

[1179] *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Carey v. Brown, 447 U.S. 455, 460 (1980).

[1180] Hague v. CIO, 307 U.S. 496 (1939); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Grayned v. City of Rockford, 408 U.S. 104 (1972); Greer v. Spock, 424 U.S. 828, 835–36 (1976); Carey v. Brown, 447 U.S. 455 (1980).

[1181] Narrowly drawn statutes which serve the State's interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. Cox v. Louisiana, 379 U.S. 559 (1965). A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. United States v. Grace, 461 U.S. 171 (1983).

[1182] In Boos v. Barry, 485 U.S. 312 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute." However, another aspect of the District's law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.

[1183] Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in in library reading room).

[1184] Edwards v. South Carolina, 372 U.S. 229 (1963); Jeanette Rankin Brigade v. Capitol Police Chief, 342 F. Supp. 575 (D.C. 1972) (three-judge court), *aff'd*, 409 U.S. 972 (1972) (voiding statute prohibiting parades and demonstrations on United States Capitol grounds).

[1185] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse);

rums. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." [1186] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." [1187] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are. [1188] But if government does open non-traditional forums for expressive activities, it may not discriminate on the basis of content or viewpoint in according access. [1189] The Court in accepting the public forum concept has nevertheless been divided with respect to the reach of the doctrine. [1190] The concept is likely, therefore, to continue be a focal point of judicial debate in coming years.

Speech in public forums is subject to time, place, and manner regulations, which take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like. [1191] Such regulations are closely scrutinized in order to protect free expression, and, to be valid, must be justified without reference to the content or subject matter

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Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

[1186] United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

[1187] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[1188] *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (jails); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); Greer v. Spock, 424 U.S. 828 (1976) (military bases); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (private mail boxes); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system); ISKCON v. Lee, 505 U.S. 672 (1992) (publicly owned airport terminal).

[1189] *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater); Madison School District v. WERC, 429 U.S. 167 (1976) (school board meeting); Heffron v. ISKCON, 452 U.S. 640 (1981) (state fair grounds); Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities).

[1190] *Compare* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 454 U.S. 114, 128–31 (1981), *with* id. at 136–40 (Justice Brennan concurring), and 142 (Justice Marshall dissenting). For evidence of continuing division, *compare* ISKCON v. Lee, 505 U.S. 672 (1992) *with* id. at 693 (Justice Kennedy concurring).

[1191] *See, e.g.*, Heffron v. ISKCON, 452 U.S. 640, 647–50 (1981), and id. at 656 (Justice Brennan concurring in part and dissenting in part) (stating law and discussing cases); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping).

of speech,[1192] must serve a significant governmental interest,[1193] and must leave open ample alternative channels for communication of the information.[1194] A recent formulation is that a time, place, or manner regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests, but . . . need not be the least-restrictive or least-intrusive means of doing so." All that is required is that "the means chosen are not substantially broader than necessary to achieve the government's interest . . . ."[1195] A content-neutral time, place, and manner regulation of the use of a public forum must also "contain adequate standards to guide the official's decision and render it subject to effective judicial review."[1196] Unlike a content-based licensing scheme, however, it need not "adhere to the procedural requirements set forth in *Freedman*."[1197] These requirements include that the "burden of proving that the film [or other speech] is unprotected expression must rest on the censor," and that the censor must, "within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[1198]

Corollary to the rule forbidding regulation premised on content is the principle, a merging of free expression and equal protection standards, that government may not discriminate between different kinds of messages in affording access.[1199] In order to ensure

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[1192] Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 536 (1965); Police Department v. Mosley, 408 U.S. 92 (1972); Madison School District v. WERC, 429 U.S. 167 (1976); Carey v. Brown, 447 U.S. 455 (1980); Widmar v. Vincent, 454 U.S. 263 (1981). In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), a divided Court permitted the city to sell commercial advertising space on the walls of its rapid transit cars but to refuse to sell political advertising space.

[1193] *E.g.*, the governmental interest in safety and convenience of persons using public forum, Heffron v. ISKCON, 452 U.S. 640, 650 (1981); the interest in preservation of a learning atmosphere in school, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); and the interest in protecting traffic and pedestrian safety in the streets, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Hague v. CIO, 307 U.S. 496, 515–16 (1939).

[1194] Heffron v. ISKCON, 452 U.S. 640, 654–55 (1981); Consolidated Edison Co. v. PSC, 447 U.S. 530, 535 (1980).

[1195] Ward v. Rock Against Racism, 491 U.S. 781, 798, 800 (1989).

[1196] Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002).

[1197] 534 U.S. at 322, citing Freedman v. Maryland, 380 U.S. 51 (1965). *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

[1198] Freedman v. Maryland, 380 U.S. 1, 58-59 (1965).

[1199] Police Department v. Mosley, 408 U.S. 92 (1972) (ordinance void that barred all picketing around school building except labor picketing); Carey v. Brown, 447 U.S. 455 (1980) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (college rule permitting access to all student organizations except religious groups); Niemotko v. Maryland, 340 U.S. 268 (1951) (permission to use parks for some groups but not for others). These principles apply only to the traditional public forum and to the govern-

against covert forms of discrimination against expression and between different kinds of content, the Court has insisted that licensing systems be constructed as free as possible of the opportunity for arbitrary administration.[1200] The Court has also applied its general strictures against prior restraints in the contexts of permit systems and judicial restraint of expression.[1201]

It appears that government may not deny access to the public forum for demonstrators on the ground that the past meetings of

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mentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. *See, e.g.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (use of school mail system); and Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may sell commercial advertising space on the walls of its rapid transit cars but refuse to sell political advertising space); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (University's subsidy for printing costs of student publications, available for student "news, information, opinion, entertainment, or academic communications," could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).

[1200] *E.g.*, Hague v. CIO, 307 U.S. 496, 516 (1939); Schneider v. Town of Irvington, 308 U.S. 147, 164 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953); Staub v. City of Baxley, 355 U.S. 313, 321–25 (1958); Cox v. Louisiana, 379 U.S. 536, 555–58 (1965); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–53 (1969). Justice Stewart for the Court described these and other cases as "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." Id. at 150–51. A person faced with an unconstitutional licensing law may ignore it, engage in the desired conduct, and challenge the constitutionality of the permit system upon a subsequent prosecution for violating it. Id. at 151; Jones v. Opelika, 316 U.S. 584, 602 (1942) (Chief Justice Stone dissenting), adopted per curiam on rehearing, 319 U.S. 103 (1943). *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (upholding facial challenge to ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property); Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) (invalidating as permitting "delay without limit" licensing requirement for professional fundraisers); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). *But see* Walker v. City of Birmingham, 388 U.S. 307 (1967) (same rule not applicable to injunctions).

[1201] In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Stewart, for the Court, id. at 155 n.4, and Justice Harlan concurring, id. at 162–64, asserted that the principles of Freedman v. Maryland, 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades and demonstrations. The Court also voided an injunction against a protest meeting that was issued ex parte, without notice to the protestors and with, of course, no opportunity for them to rebut the representations of the seekers of the injunction. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).

these demonstrators resulted in violence,[1202] and may not vary a demonstration licensing fee based on an estimate of the amount of hostility likely to be engendered,[1203] but the Court's position with regard to the "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction, remains quite unclear.[1204]

The Court has defined three different categories of public property for public forum analysis. First, there is the public forum, places such as streets and parks which have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve some legitimate interest. Government may also open property for communicative activity, and thereby create a public forum. Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin PERC* (school board business)," [1205] but within the framework of such legitimate limitations discrimination based on content must be justified by compelling governmental interests.[1206] Thirdly, government "may reserve the forum for its intended purposes, communicative or otherwise,

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[1202] The only precedent is Kunz v. New York, 340 U.S. 290 (1951). The holding was on a much narrower basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." Id. at 294. A different rule applies to labor picketing. *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing). The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." United States v. Albertini, 472 U.S. 675 (1985).

[1203] Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (a fee based on anticipated crowd response necessarily involves examination of the content of the speech, and is invalid as a content regulation).

[1204] Dicta clearly indicate that a hostile reaction will not justify suppression of speech, Hague v. CIO, 307 U.S. 496, 502 (1939); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Bachellar v. Maryland, 397 U.S. 564, 567 (1970), and one holding appears to point this way. Gregory v. City of Chicago, 394 U.S. 111 (1969). On the other hand, the Court has upheld a breach of the peace conviction of a speaker who refused to cease speaking upon the demand of police who feared imminent violence. Feiner v. New York, 340 U.S. 315 (1951). In Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion), Justice Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker."

[1205] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

[1206] 460 U.S. at 46 n.7.

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."[1207] The distinction between the second and third categories can therefore determine the outcome of a case, since speakers may be excluded from the second category only for a "compelling" governmental interest, while exclusion from the third category need only be "reasonable." Yet, distinguishing between the two categories creates no small difficulty, as evidenced by recent case law.

The Court has held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups "that engage in activities of interest and educational relevance to students," and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being "of a similar character" to the civic groups.[1208] Less problematic was the Court's conclusion that utility poles and other municipal property did not constitute a public forum for the posting of signs.[1209] More problematic was the Court's conclusion that the Combined Federal Campaign, the Federal Government's forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering "reasonable" governmental interests in offering a forum to "traditional health and welfare charities," avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disruption of the federal workplace by controversy.[1210] The Court

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[1207] 460 U.S. at 46. Candidate debates on public television are an example of this third type of public forum: the "nonpublic forum." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998). "Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine [i.e., public broadcasters ordinarily are entitled to the editorial discretion to engage in viewpoint discrimination], candidate debates present the narrow exception to this rule." Id. at 675. A public broadcaster, therefore, may not engage in viewpoint discrimination in granting or denying access to candidates. Under the third type of forum analysis, however, it may restrict candidate access for "a reasonable, viewpoint-neutral" reason, such as a candidate's "objective lack of support." Id. at 683.

[1208] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O'Connor, and with Justice Brennan's dissent being joined by Justices Marshall, Powell, and Stevens. *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student newspaper published as part of journalism class is not a public forum).

[1209] City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that "it is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." Id. at 815 n.32.

[1210] Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985). Precedential value of *Cornelius* may be subject to question, since it was de-

pinpointed the government's intention as the key to whether a public forum has been created: "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." [1211] Under this categorical approach, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum. [1212]

Application of the doctrine continues to create difficulty. A majority of Justices could not agree on the public forum status of a sidewalk located entirely on Postal Service property. [1213] The Court was also divided over whether nonsecured areas of an airport terminal, including shops and restaurants, constituted a public forum. Holding that the terminal was not a public forum, the Court upheld restrictions on the solicitation and receipt of funds. [1214] But the Court also invalidated a ban on the sale or distribution of literature to passers-by within the same terminal, four Justices believing that the terminal constituted a public forum, and a fifth contending that the multipurpose nature of the forum (shopping mall as well as airport) made restrictions on expression less "reasonable." [1215]

The Supreme Court has not explicitly held that the Internet is a public forum. It has, however, noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information." [1216] Although particular Web sites, like particular newspapers, would not constitute public

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cided by 4–3 vote, the non-participating Justices (Marshall and Powell) having dissented in *Perry*. Justice O'Connor wrote the opinion of the Court, joined by Chief Justice Burger and by Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan, dissented, and Justice Stevens dissented separately.

[1211] 473 U.S. at 802. Justice Blackmun criticized "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." Id. at 813–14.

[1212] Justice Kennedy criticized this approach in ISKCON v. Lee, 505 U.S. 672, 695 (1992) (concurring), contending that recognition of government's authority to designate the forum status of property ignores the nature of the First Amendment as "a limitation on government, not a grant of power." Justice Brennan voiced similar misgivings in his dissent in *United States v. Kokinda*: "public forum categories—originally conceived of as a way of *preserving* First Amendment rights—have been used . . . as a means of upholding restrictions on speech." 497 U.S. at 741 (emphasis in original) (citation omitted).

[1213] United States v. Kokinda, 497 U.S. 720 (1990) (upholding a ban on solicitation on the sidewalk).

[1214] ISKCON v. Lee, 505 U.S. 672 (1992).

[1215] Lee v. ISKCON, 505 U.S. 672 (1992).

[1216] Reno v. ACLU, 521 U.S. 844, 853 (1997).

fora, the Internet as a whole has been viewed as a public forum, despite its lack of a historic tradition. A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes*, 523 U.S. at 679 ("reject[ing] the view that traditional public forum status extends beyond its historic confines" [to a public television station]) *with Reno v. ACLU*, 521 U.S. 844, 851-53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web).""[1217] A three-judge federal district court wrote: "In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics."[1218]

***Quasi-Public Places***.—The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses or other property to those wishing to communicate about a particular topic.[1219] But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon it. In *Marsh v. Alabama*,[1220] the Court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. The town, wholly owned by a private corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court reasoned, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his

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[1217] Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternative citations to Forbes and Reno omitted).

[1218] American Library Ass'n v. United States, 201 F. Supp.2d 401, 409 (E.D. Pa. 2002).

[1219] In Garner v. Louisiana, 368 U.S. 157, 185, 201–07 (1961), Justice Harlan, concurring, would have reversed breach of the peace convictions of "sit-in" demonstrators who conducted their "sit-in" at lunch counters of department stores. He asserted that the protesters were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. "Such a demonstration . . . is as much a part of the 'free trade in ideas' . . . as is verbal expression, more commonly thought of as 'speech.'" Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however protect "demonstrations conducted on private property over the objection of the owner . . . , just as it would surely not encompass verbal expression in a private home if the owner has not consented." He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers. *See also* Frisby v. Schultz, 487 U.S. 474 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).

[1220] 326 U.S. 501 (1946).

rights become circumscribed by the statutory and constitutional rights of those who use it." [1221] This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it, and then withdrew to a narrow interpretation.

First, in *Food Employees Union v. Logan Valley Plaza*, [1222] the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store's employment of nonunion labor. Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, the Court announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership." [1223] "[T]he State," said Justice Marshall, "may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." [1224] The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center and it reserved for future decision "whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." [1225]

Four years later, the Court answered the reserved question in the negative. [1226] Several members of an antiwar group had attempted to distribute leaflets on the mall of a large shopping center, calling on the public to attend a protest meeting. Center guards invoked a trespass law against them, and the Court held they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it invited the public in specifically to carry on business with those stores located in the center. Plaintiffs' leafleting, not directed to any store or to the customers *qua* customers of any of the stores, was unrelated to any activity in the center. Unlike the situation in *Logan Valley*

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[1221] 326 U.S. at 506.

[1222] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

[1223] 391 U.S. at 319. Justices Black, Harlan, and White dissented. Id. at 327, 333, 337.

[1224] 391 U.S. at 319-20.

[1225] 391 U.S. at 320 n.9.

[1226] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

*Plaza*, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property for communicative purposes.

Then, the Court formally overruled *Logan Valley Plaza*, holding that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[1227] Suburban malls may be the "new town squares" in the view of sociologists, but they are private property in the eye of the law. The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation are generally to be governed by federal labor laws[1228] rather than the First Amendment, although there is also the possibility that state constitutional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places.[1229] Henceforth, only when private property "'has taken on *all* the attributes of a town'" is it to be treated as a public forum.[1230]

***Picketing and Boycotts by Labor Unions***.—Though "logically relevant" to what might be called "public issue" picketing, the cases dealing with application of economic pressures by labor unions are set apart by different "economic and social interests,"[1231] and consequently are dealt with separately here.

It was in a labor case that the Court first held picketing to be entitled to First Amendment protection.[1232] Striking down a flat prohibition on picketing to influence or induce someone to do some-

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[1227] Hudgens v. NLRB, 424 U.S. 507 (1976). Justice Stewart's opinion for the Court asserted that *Logan Valley* had in fact been overruled by Lloyd Corp., 424 U.S. at 517–18, but Justice Powell, the author of the *Lloyd Corp.* opinion, did not believe that to be the case, id. at 523.

[1228] *But see* Sears, Roebuck & Co. v. Carpenters, 436 U.S. U.S. 180 (1978).

[1229] In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights. *But cf.* Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986), holding that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees, a majority of Justices distinguishing *PruneYard* as not involving such forced association with others' beliefs.

[1230] Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976) (quoting Justice Black's dissent in Logan Valley Plaza, 391 U.S. 308, 332–33 (1968).

[1231] Niemotko v. Maryland, 340 U.S. 268, 276 (1951) (Justice Frankfurter concurring).

[1232] Thornhill v. Alabama, 310 U.S. 88 (1940). Picketing as an aspect of communication was recognized in Senn v. Tile Layers Union, 301 U.S. 468 (1937).

thing, the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . ." [1233] The Court further reasoned that "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." [1234]

The Court soon recognized several caveats. Peaceful picketing may be enjoined if it is associated with violence and intimidation. [1235] Although initially the Court continued to find picketing protected in the absence of violence, [1236] it soon decided a series of cases recognizing a potentially far-reaching exception: injunctions against peaceful picketing in the course of a labor controversy may be enjoined when such picketing is counter to valid state policies in a domain open to state regulation. [1237] These cases proceeded upon a distinction drawn by Justice Douglas. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations." [1238] The apparent culmination of this course of decision was the

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[1233] 310 U.S. at 102.

[1234] 310 U.S. at 104-05. *See also* Carlson v. California, 310 U.S. 106 (1940). In AFL v. Swing, 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a State's common-law policy against picketing in the absence of an immediate dispute between employer and employee.

[1235] Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).

[1236] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[1237] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding on basis of state policy forbidding agreements in restraint of trade an injunction against picketing to persuade business owner not to deal with non-union peddlers); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (upholding injunction against union picketing protesting non-union proprietor's failure to maintain union shop card and observe union's limitation on weekend business hours); Building Service Emp. Intern. Union v. Gazzam, 339 U.S. 532 (1950) (injunction against picketing to persuade innkeeper to sign contract that would force employees to join union in violation of state policy that employees' choice not be coerced); Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953) (injunction against picketing in conflict with state's Right to Work Statute).

[1238] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769, 776–77 (1942) (concurring opinion).

*Vogt* case, in which Justice Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[1239] While the Court has not disavowed this broad language, the *Vogt* exception has apparently not swallowed the entire *Thornhill* rule.[1240] The Court has indicated that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."[1241]

***Public Issue Picketing and Parading***.—The early cases held that picketing and parading were forms of expression entitled to some First Amendment protection.[1242] Those early cases did not, however, explicate the difference in application of First Amendment principles which the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity.[1243] A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed, and more recent cases have expanded the procedural guarantees which must accompany a permissible licensing system.[1244] In one case, however, the Court applied the rules developed with regard to labor picketing to uphold an injunction against the picketing of a grocery chain by a black group to compel the chain to adopt a quota-hiring system for blacks. The Supreme Court affirmed the state courts' ruling that, while no law prevented

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[1239] International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 293 (1957). *See also* American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215, 228–32 (1974); NLRB v. Retail Store Employees, 447 U.S. 607 (1980); International Longshoremens' Ass'n v. Allied International, 456 U.S. 212, 226–27 (1982).

[1240] The dissenters in *Vogt* asserted that the Court had "come full circle" from Thornhill. 354 U.S. at 295 (Justice Douglas, joined by Chief Justice Warren and Justice Black).

[1241] NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 63 (1964) (requiring – and finding absent in NLRA – "clearest indication" that Congress intended to prohibit all consumer picketing at secondary establishments). *See also* Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957) (indicating that where violence is scattered through time and much of it was unconnected with the picketing, the State should proceed against the violence rather than the picketing).

[1242] Hague v. CIO, 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[1243] Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951).

[1244] *See, e.g.* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968).

the chain from hiring blacks on a quota basis, picketing to coerce the adoption of racially discriminatory hiring was contrary to state public policy.[1245]

A series of civil rights picketing and parading cases led the Court to formulate standards much like those it has established in the labor field, but more protective of expressive activity. The process began with *Edwards v. South Carolina*,[1246] in which the Court reversed a breach of the peace conviction of several blacks for their refusal to disperse as ordered by police. The statute was so vague, the Court concluded, that demonstrators could be convicted simply because their presence "disturbed" people. Describing the demonstration upon the grounds of the legislative building in South Carolina's capital, Justice Stewart observed that "[t]he circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form."[1247] In subsequent cases, the Court observed: "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech."[1248] "The conduct which is the subject to this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited."[1249]

The Court must determine, of course, whether the regulation is aimed primarily at conduct, as is the case with time, place, and manner regulations, or whether instead the aim is to regulate content of speech. In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for breach of the peace and similar offenses, when, in the Court's view, disturbance had resulted from opposition to the messages being uttered by demonstrators.[1250] More recently, how-

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[1245] Hughes v. Superior Court, 339 U.S. 460 (1950). This ruling, allowing content-based restriction, seems inconsistent with *NAACP v. Claiborne Hardware*, discussed infra under this topic.

[1246] 372 U.S. 229 (1963).

[1247] 372 U.S. at 235. *See also* Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964).

[1248] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[1249] 379 U.S. at 563.

[1250] Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D.Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978).

ever, the Court upheld a ban on residential picketing in *Frisby v. Shultz*,[1251] finding that the city ordinance was narrowly tailored to serve the "significant" governmental interest in protecting residential privacy. As interpreted, the ordinance banned only picketing that targets a single residence, and it is unclear whether the Court would uphold a broader restriction on residential picketing.[1252]

In 1982 the Justices confronted a case, that, like *Hughes v. Superior Court*,[1253] involved a "contrary-to-public-policy" restriction on picketing and parading. *NAACP v. Claiborne Hardware Co.*[1254] may join in terms of importance such cases as *New York Times Co. v. Sullivan*[1255] in requiring the States to observe new and enhanced constitutional standards in order to impose liability upon persons for engaging in expressive conduct implicating the First Amendment. The case arose in the context of a protest against racial conditions by black citizens of Claiborne County, Mississippi. Listing demands that included desegregation of public facilities, hiring of black policemen, hiring of more black employees by local stores, and ending of verbal abuse by police, a group of several hundred blacks unanimously voted to boycott the area's white merchants. The boycott was carried out through speeches and nonviolent picketing and solicitation of others to cease doing business with the merchants. Individuals were designated to watch stores and identify blacks patronizing the stores; their names were then announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at blacks who did not observe the boycott.

The state Supreme Court imposed joint and several liability upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants' lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants' business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

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[1251] 487 U.S. 474 (1988).

[1252] An earlier case involving residential picketing had been resolved on equal protection rather than First Amendment grounds, the ordinance at issue making an exception for labor picketing. Carey v. Brown, 447 U.S. 455 (1980).

[1253] 339 U.S. 460 (1950).

[1254] 458 U.S. 886 (1982). The decision was unanimous, with Justice Rehnquist concurring in the result and Justice Marshall not participating. The Court's decision was by Justice Stevens.

[1255] 376 U.S. 254 (1964).

Reversing, the Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; while violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage. Thus, speeches and nonviolent picketing, both to inform the merchants of grievances and to encourage other blacks to join the boycott, were protected activities, and association for those purposes was also protected.[1256] That some members of the group might have engaged in violence or might have advocated violence did not result in loss of protection for association, absent a showing that those associating had joined with intent to further the unprotected activities.[1257] Nor was protection to be denied because nonparticipants had been urged to join by speech, by picketing, by identification, by threats of social ostracism, and by other expressive acts: "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[1258] The boycott had a disruptive effect upon local economic conditions and resulted in loss of business for the merchants, but these consequences did not justify suppression of the boycott. Government may certainly regulate certain economic activities having an incidental effect upon speech (e.g., labor picketing or business conspiracies to restrain competition),[1259] but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.[1260]

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[1256] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

[1257] 458 U.S. at 908.

[1258] 458 U.S. at 910. The Court cited Thomas v. Collins, 323 U.S. 516, 537 (1945), a labor picketing case, and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. *Compare* NLRB v. Retail Store Employees, 447 U.S. 607, 618–19 (1980) (Justice Stevens concurring) (labor picketing that coerces or "signals" others to engage in activity that violates valid labor policy, rather than attempting to engage reason, prohibitable). To the contention that liability could be imposed on "store watchers" and on a group known as "Black Hats" who also patrolled stores and identified black patronizers of the businesses, the Court did not advert to the "signal" theory. "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." 458 U.S. at 925.

[1259] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (upholding application of *per se* antitrust liability to trial lawyers association's boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).

[1260] 458 U.S. at 912-15. In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of United States v. O'Brien, 391 U.S. 367, 376–77 (1968), which requires that the regulation be within the constitutional power of government, that it further an important or substantial governmental interest, that it be unrelated

The critical issue, however, had been the occurrence of violent acts and the lower court's conclusion that they deprived otherwise protected conduct of protection. "The First Amendment does not protect violence .... No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded .... Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[1261] In other words, the States may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity.[1262] Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and could not include losses suffered as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence and an intent to further it could similarly be held liable.[1263] Since most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages.[1264] As to the head of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, inasmuch as any violent acts that occurred were some time after the speeches, and a "clear and present danger" analysis of the speeches would not find them punishable.[1265] The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the

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to the suppression of speech, and that it impose no greater restraint on expression than is essential to achievement of the interest.

[1261] 458 U.S. at 916-17.

[1262] 458 U.S. at 917-18.

[1263] 458 U.S. at 918-29, relying on a series of labor cases and on the subversive activities association cases, *e.g.*, Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961).

[1264] 458 U.S. at 920-26. The Court distinguished Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been "pervasive." 458 U.S. at 923.

[1265] 458 U.S. at 926-29. The head's "emotionally charged rhetoric ... did not transcend the bounds of protected speech set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)."

NAACP without a finding that it "authorized—either actually or apparently—or ratified unlawful conduct." [1266]

*Claiborne Hardware* is, thus, a seminal decision in the Court's effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence, and forecloses the kind of "public policy" limit on demonstrations that was approved in *Hughes v. Superior Court*. [1267]

More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another look at principles distinguishing lawful public demonstrations from proscribable conduct. In *Madsen v. Women's Health Center*, [1268] the Court refined principles governing issuance of "content-neutral" injunctions that restrict expressive activity. [1269] The appropriate test, the Court stated, is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant govern-

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[1266] 458 U.S. at 931. In ordinary business cases, the rule of liability of an entity for actions of its agents is broader. *E.g.*, American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982). The different rule in cases of organizations formed to achieve political purposes rather than economic goals appears to require substantial changes in the law of agency with respect to such entities. Note, 96 HARV. L. REV. 171, 174–76 (1982).

[1267] "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means."

"[P]etitioners' ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection."

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognizes the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." 458 U.S. at 933-34.

[1268] 512 U.S. 753 (1994).

[1269] The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. "An injunction by its very nature applies only to a particular group (or individuals). . . . It does so, however, because of the group's past actions in the context of a specific dispute." There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. 512 U.S. at 762.

mental interest."[1270] Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) "is not sufficiently rigorous," the Court explained, "because injunctions create greater risk of censorship and discriminatory application, and because of the established principle that an injunction should be no broader than necessary to achieve its desired goals."[1271] Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion clinic. Similarly upheld were noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. Inclusion of private property within the 36–foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on "images observable" by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, the restriction covering a much larger zone than an earlier residential picketing ban that the Court had upheld.[1272]

In *Schenck v. Pro-Choice Network of Western New York*,[1273] the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities" what the Court called "fixed buffer zones."[1274] It struck down a prohibition against demonstrating "within fifteen feet of any person or vehicles seeking access to or leaving such facilities" what it called "floating buffer zones."[1275] The Court cited "public safety and order"[1276] in upholding the fixed buffer zones, but it found that the floating buffer zones "burden more speech than is necessary to serve the relevant governmental interests"[1277] because they make it "quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction."[1278] The Court also

[1270] 512 U.S. at 765.
[1271] 512 U.S. at 765.
[1272] Referring to Frisby v. Schultz, 487 U.S. 474 (1988).
[1273] 519 U.S. 357 (1997).
[1274] 519 U.S. at 366 n.3.
[1275] 519 U.S. at 366 n.3.
[1276] 519 U.S. at 376.
[1277] 519 U.S. at 377.
[1278] 519 U.S. at 378.

upheld a "provision, specifying that once sidewalk counselors who had entered the buffer zones were required to 'cease and desist' their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones." [1279]

In *Hill v. Colorado*, [1280] the Court upheld a Colorado statute that makes it unlawful, within 100 feet of the entrance to any health care facility, to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." [1281] This decision is notable because it upheld a statute, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners...." [1282] The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the "kind of cursory examination" that might be required to distinguish casual conversation from protest, education, or counseling is not "problematic." [1283] The law is narrowly tailored to achieve the state's interests. The eight-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic.

Different types of issues were presented by *Hurley v. Irish-American Gay Group*, [1284] in which the Court held that a state's public accommodations law could not be applied to compel private organizers of a St. Patrick's Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and applica-

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[1279] 519 U.S. at 367.
[1280] 530 U.S. 703 (2000).
[1281] 530 U.S. at 707.
[1282] 530 U.S. at 714.
[1283] 530 U.S. at 722.
[1284] 515 U.S. 557 (1995).

tion of the public accommodations law to the content of the organizers' message contravened the "fundamental rule ... that a speaker has the autonomy to choose the content of his own message."[1285]

***Leafleting, Handbilling, and the Like***.—In *Lovell v. City of Griffin*,[1286] the Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The First Amendment, the Court said, "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."[1287] State courts, responding to what appeared to be a hint in *Lovell* that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution,[1288] upheld total prohibitions and were reversed. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions .... We are of the opinion 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. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."[1289] In *Talley v. California*,[1290] the Court struck down an ordinance which banned all handbills that did not carry the name and address of the author, printer, and sponsor; conviction for violating the ordinance was set aside on behalf of one distributing leaflets urging boycotts against certain merchants because of their employment discrimination. The basis of the decision is not readily ascertainable. On the one hand, the Court celebrated anonymity. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all .... [I]dentification and fear of reprisal might deter perfectly peace-

[1285] 515 U.S. at 573.
[1286] 303 U.S. 444 (1938).
[1287] 303 U.S. at 452.
[1288] 303 U.S. at 451.
[1289] Schneider v. Town of Irvington, 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, id. at 160, and called for a balancing, with the weight inclined to the First Amendment rights. *See also* Jamison v. Texas, 318 U.S. 413 (1943).
[1290] 362 U.S. 60 (1960).

ful discussion of public matters of importance."[1291] On the other hand, responding to the City's defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that it "is in no manner so limited . . . [and] [t]herefore we do not pass on the validity of an ordinance limited to these or any other supposed evils."[1292]

*Talley*'s anonymity rationale was strengthened in *McIntyre v. Ohio Elections Comm'n*,[1293] invalidating Ohio's prohibition on the distribution of anonymous campaign literature. There is a "respected tradition of anonymity in the advocacy of political causes," the Court noted, and neither of the interests asserted by Ohio justified the limitation. The State's interest in informing the electorate was "plainly insufficient," and, while the more weighty interest in preventing fraud in the electoral process may be accomplished by a direct prohibition, it may not be accomplished indirectly by an indiscriminate ban on a whole category of speech. Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes.[1294]

The handbilling cases were distinguished in *City Council v. Taxpayers for Vincent*,[1295] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of utility pole signs "it is the medium of expression itself" that creates the visual blight. Hence, the city's prohibition, unlike a prohibition on distributing handbills,

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[1291] 362 U.S. at 64, 65.

[1292] 362 U.S. at 64. In Zwickler v. Koota, 389 U.S. 241 (1967), the Court directed a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. Golden v. Zwickler, 394 U.S. 103 (1969).

[1293] 514 U.S. 334 (1995).

[1294] In Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring initiative-petition circulators to wear identification badges. It found that "the restraint on speech in this case is more severe than was the restraint in *McIntyre*" because "[p]etition circulation is a less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. . . . [T]he badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." Id. at 199. In Watchtower Bible and Tract Society v. Village of Stratton, 122 S. Ct. 2080, 2089 (2002), concern for the right to anonymity was one reason that the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit.

[1295] 466 U.S. 789 (1984).

was narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[1296] Ten years later, however, the Court unanimously invalidated a town's broad ban on residential signs that permitted only residential identification signs, "for sale" signs, and signs warning of safety hazards.[1297] Prohibiting homeowners from displaying political, religious, or personal messages on their own property entirely foreclosed "a venerable means of communication that is unique and important," and that is "an unusually cheap form of communication" without viable alternatives for many residents.[1298] The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930s and 1940s. The prohibition in *Vincent* was distinguished as not removing a "uniquely valuable or important mode of communication," and as not impairing citizens' ability to communicate.[1299]

***Sound Trucks, Noise***.—Physical disruption may occur by other means than the presence of large numbers of demonstrators. For example, the use of sound trucks to convey a message on the streets may disrupt the public peace and may disturb the privacy of persons off the streets. The cases, however, afford little basis for a general statement of constitutional principle. *Saia v. New York*,[1300] while it spoke of "loud-speakers as today indispensable instruments of effective public speech," held only that a particular prior licensing system was void. A five-to-four majority upheld a statute in *Kovacs v. Cooper*,[1301] which was ambiguous with regard to whether all sound trucks were banned or only "loud and raucous" trucks and which the state court had interpreted as having the latter meaning. In another case, the Court upheld an antinoise ordinance which the state courts had interpreted narrowly to bar only noise that actually or immediately threatened to disrupt normal school activity during school hours.[1302] But the Court was careful to tie its ruling to the principle that the particular requirements of education necessitated observance of rules designed to

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[1296] Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

[1297] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[1298] 512 U.S. at 54, 57.

[1299] 512 U.S. at 54. The city's legitimate interest in reducing visual clutter could be addressed by "more temperate" measures, the Court suggested. Id. at 58.

[1300] 334 U.S. 558, 561 (1948).

[1301] 336 U.S. 77 (1949).

[1302] Grayned v. City of Rockford, 408 U.S. 104 (1972).

preserve the school environment.[1303] More recently, reaffirming that government has "a substantial interest in protecting its citizens from unwelcome noise," the Court applied time, place, and manner analysis to uphold New York City's sound amplification guidelines designed to prevent excessive noise and assure sound quality at outdoor concerts in Central Park.[1304]

***Door-to-Door Solicitation***.—In one of the Jehovah's Witness cases, the Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the aims of the ordinance being to protect privacy, to protect the sleep of many who worked night shifts, and to protect against burglars posing as canvassers. The five-to-four majority concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[1305]

More recently, while striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment."[1306] The Court indicated that its precedents supported measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvas house-to-house for charitable or political purposes.

However, an ordinance that limited solicitation of contributions door-to-door by charitable organizations to those which use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.[1307] A pri-

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[1303] 408 U.S. at 117. Citing *Saia* and *Kovacs* as examples of reasonable time, place, and manner regulation, the Court observed: "If overamplifled loudspeakers assault the citizenry, government may turn them down." Id. at 116.

[1304] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[1305] Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

[1306] Hynes v. Mayor of Oradell, 425 U.S. 610, 616–17 (1976). Justices Brennan and Marshall did not agree with the part of the opinion approving the regulatory power. Id. at 623.

[1307] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). *See also* Larson v. Valente, 456 U.S. 228 (1982) (state law distinguishing between religious organizations and their solicitation of funds on basis of whether organizations received more than half of their total contributions from members or

vacy rationale was rejected, inasmuch as just as much intrusion was likely by permitted as by non-permitted solicitors. A rationale of prevention of fraud was unavailing, inasmuch as it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

*Schaumburg* was extended in *Secretary of State of Maryland v. Joseph H. Munson Co.*,[1308] and *Riley v. National Federation of the Blind*.[1309] In *Munson* the Court invalidated a Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. And in *Riley* the Court invalidated a North Carolina fee structure containing even more flexibility.[1310] The Court sees "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," and is similarly hostile to any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable.[1311] Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in *Riley*, the Court indicating that the "more benign and narrowly tailored" alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.[1312]

In *Watchtower Bible and Tract Society v. Village of Stratton*, the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy—religious, political, or commercial—without first registering with the mayor and receiving a permit.[1313] "It is offensive to the very notion of a free society," the

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from public solicitation violates establishment clause). Meyer v. Grant, 486 U.S. 414 (1988) (criminal penalty on use of paid circulators to obtain signatures for ballot initiative suppresses political speech in violation of First and Fourteenth Amendments).

[1308] 467 U.S. 947 (1984).

[1309] 487 U.S. 781 (1988).

[1310] A fee of up to 20% of collected receipts was deemed reasonable, a fee between 20 and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity's ability to collect money or communicate would be significantly diminished.

[1311] 487 U.S. at 793.

[1312] 487 U.S. at 800. North Carolina's requirement for licensing of professional fundraisers was also invalidated in *Riley*, id. at 801–02.

[1313] 122 S. Ct. 2080 (2002).

Court wrote, "that a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." [1314] The ordinance violated the right to anonymity, burdened the freedom of speech of those who hold "religious or patriotic views" that prevent them from applying for a license, and effectively banned "a significant amount of spontaneous speech" that might be engaged in on a holiday or weekend when it was not possible to obtain a permit. [1315]

***The Problem of "Symbolic Speech"***.—Very little expression is "mere" speech. If it is oral, it may be noisy enough to be disturbing, [1316] and, if it is written, it may be litter; [1317] in either case, it may amount to conduct that is prohibitable in specific circumstances. [1318] Moving beyond these simple examples, one may see as well that conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist in flying a particular flag as a symbol [1319] or in refusing to salute a flag as a symbol. [1320] Sit-ins and stand-ins may effectively express a protest about certain things. [1321]

Justice Jackson wrote: "There is no doubt that, in connection with the pledge, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind." [1322] When conduct or action has a communicative content to it, governmental regulation or prohibition implicates the First Amendment, but this does not mean that such conduct or action is necessarily immune from governmental process. Thus, while the Court has had few opportu-

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[1314] 122 S. Ct. at 2089.

[1315] 122 S. Ct. at 2090.

[1316] *E.g.*, Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

[1317] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147 (1939).

[1318] *Cf.* Cohen v. California, 403 U.S. 15 (1971).

[1319] Stromberg v. California, 283 U.S. 359 (1931).

[1320] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[1321] In Brown v. Louisiana, 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Fortas said for the Court: "As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." Id. at 141–42. *See also* Garner v. Louisiana, 368 U.S. 157, 185, 201 (1961) (Justice Harlan concurring). On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

[1322] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

nities to formulate First Amendment standards in this area, in upholding a congressional prohibition on draft-card burnings, it has stated the generally applicable rule. "[A] government regulation is sufficiently justified if it is within the constitutional power of 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 freedom is no greater than is essential to the furtherance of that government interest." [1323] The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression. [1324]

Although almost unanimous in formulating and applying the test in *O'Brien*, the Court splintered when it had to deal with one of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s—flag burning and other forms of flag desecration. The Court remains closely divided to this day. No unifying theory capable of application to a wide range of possible flag abuse actions emerged from the early cases. Thus, in *Street v. New York*, [1325] the defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag. [1326]

A few years later the Court reversed two other flag desecration convictions, one on due process/vagueness grounds, the other under the First Amendment. were decided by the Court in a manner that indicated an effort to begin to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith v. Goguen*, [1327] a statute punishing anyone who "publicly ... treats contemptuously the flag of the United States ... ," was held unconstitutionally vague, and a conviction for wearing trousers with a

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[1323] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[1324] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

[1325] 394 U.S. 576 (1969).

[1326] 394 U.S. at 591-93. Four dissenters concluded that the First Amendment did not preclude a flat proscription of flag burning or flag desecration for expressive purposes. Id. at 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White), and 615 (Justice Fortas). In Radich v. New York, 401 U.S. 531 (1971), *aff'g* 26 N.Y.2d 114, 257 N.E.2d 30 (1970), an equally divided Court, Justice Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in some apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on habeas corpus, United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), *cert. denied*, 409 U.S. 115 (1973).

[1327] 415 U.S. 566 (1974).

small United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard "so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." [1328]

The First Amendment was the basis for reversal in *Spence v. Washington*, [1329] in which a conviction under a statute punishing the display of a United States flag to which something is attached or superimposed was set aside; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, the factual context and environment in which it was undertaken, the Court held it to be protected. The context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the State had a valid interest in preserving the flag as a national symbol, but whether that interest extended beyond protecting the physical integrity of the flag was left unclear. [1330]

The underlying assumption that flag burning could be prohibited as a means of protecting the flag's symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in *Texas v. Johnson* [1331] the Court rejected a state desecration statute designed to protect the flag's symbolic value, and then in *United States v. Eichman* [1332] rejected a more limited federal statute purporting to protect only the flag's physical integrity. Both cases were decided by 5–to–4 votes, with Justice Brennan writing the Court's opinions. [1333] The Texas statute invali-

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[1328] 415 U.S. at 578.

[1329] 418 U.S. 405 (1974).

[1330] 418 U.S. at 408-11, 412-13. Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. Sutherland v. Illinois, 418 U.S. 907 (1974); Farrell v. Iowa, 418 U.S. 907 (1974). The Court did, however, dismiss, "for want of a substantial federal question," an appeal from a flag desecration conviction of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it. Van Slyke v. Texas, 418 U.S. 907 (1974).

[1331] 491 U.S. 397 (1989).

[1332] 496 U.S. 310 (1990).

[1333] In each case Justice Brennan's opinion for the Court was joined by Justices Marshall, Blackmun, Scalia, and Kennedy, and in each case Chief Justice Rehnquist and Justices White, Stevens, and O'Connor dissented. In Johnson the Chief Justice's

dated in *Johnson* defined the prohibited act of "desecration" as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not "unrelated to the suppression of free expression" and that consequently the deferential standard of *United States v. O'Brien* was inapplicable. Applying strict scrutiny, the Court ruled that the State's prosecution of someone who burned a flag at a political protest was not justified under the State's asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court's opinion left little doubt that the existing Federal statute, 18 U.S.C. § 700, and the flag desecration laws of 47 other states would suffer a similar fate in a similar case. Doubt remained, however, as to whether the Court would uphold a "content-neutral" statute protecting the physical integrity of the flag.

Immediately following *Johnson*, Congress enacted a new flag protection statute providing punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States."[1334] The law was designed to be content-neutral, and to protect the "physical integrity" of the flag.[1335] Nonetheless, in overturning convictions of flag burners, the Court found that the law suffered from "the same fundamental flaw" as the Texas law in *Johnson*. The government's underlying interest, characterized by the Court as resting upon "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,"[1336] still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court "a focus on those acts likely to damage the flag's symbolic value."[1337] As in *Johnson*, such a law could not withstand "most exacting scrutiny" analysis.

The Court's ruling in *Eichman* rekindled congressional efforts, postponed with enactment of the Flag Protection Act, to amend the Constitution to authorize flag desecration legislation at the federal

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dissent was joined by Justices White and O'Connor, and Justice Stevens dissented separately. In Eichman Justice Stevens wrote the only dissenting opinion, to which the other dissenters subscribed.

[1334] The Flag Protection Act of 1989, Pub. L. 101–131.

[1335] *See* H.R. Rep. No. 231, 101st Cong., 1st Sess. 8 (1989) ("The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner").

[1336] United States v. Eichman, 496 U.S. at 316.

[1337] 496 U.S. at 317.

and state levels. In both the House and the Senate these measures failed to receive the necessary two-thirds vote. [1338]

## RIGHTS OF ASSEMBLY AND PETITION

### Background and Development

The right of petition took its rise from the modest provision made for it in chapter 61 of Magna Carta (1215). [1339] To this meager beginning are traceable, in some measure, Parliament itself and its procedures for the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right." Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as it increased in importance it came to claim the right to dictate the form of the King's reply, until, in 1414, Commons declared itself to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal." [1340]

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: "the right of the people peaceably to assemble" in order to "petition the government." [1341] Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental. . . . [It] 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. . . . The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on

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[1338] The House defeated H.J. Res. 350 by vote of 254 in favor to 177 against (136 CONG. REC. H4086 (daily ed. June 21, 1990); the Senate defeated S.J. Res. 332 by vote of 58 in favor to 42 against (136 CONG. REC. S8737 (daily ed. June 26, 1990).

[1339] C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 125 (1937).

[1340] 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98 (1934).

[1341] United States v. Cruikshank, 92 U.S. 542, 552 (1876), reflects this view.

that score. The question . . . is not as to the auspices under which the meeting is held but as to its purposes; not as to the relation of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." [1342] Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the Government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters. [1343] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." [1344]

The right of petition recognized by the First Amendment first came into prominence in the early 1830's, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Because of efforts of John Quincy Adams, this rule was repealed five years later. [1345] For many years now the rules of the House of Representatives have provided that members having petitions to present may deliver them to the Clerk and the petitions, except such as in the judgment of the Speaker are of an obscene or insulting character, shall be entered on the Journal and the Clerk shall furnish a transcript of such record to the official reporters of debates for publication in the Record. [1346] Even so, petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprison-

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[1342] De Jonge v. Oregon, 299 U.S. 353, 364, 365 (1937). *See also* Herndon v. Lowry, 301 U.S. 242 (1937).

[1343] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

[1344] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (boycott of States not ratifying ERA may not be subjected to antitrust suits for economic losses because of its political nature).

[1345] The account is told in many sources. *E.g.*, S. BEMIS, JOHN QUINCY ADAMS AND THE UNION, chs. 17, 18 and pp. 446–47 (1956).

[1346] Rule 22, ¶ 1, Rules of the House of Representatives, H.R. Doc. No. 256, 101st Congress, 2d sess. 571 (1991).

ment.[1347] Processions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration, however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

***The Cruikshank Case***.—The right of assembly was first before the Supreme Court in 1876[1348] in the famous case of *United States v. Cruikshank*[1349] The Enforcement Act of 1870[1350] forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." While the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its dicta broadly declared the outlines of the right of assembly. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."[1351] Absorption of the assembly and petition clauses into the liberty protected by the due process clause of the Fourteenth Amendment

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[1347] 1918 ATT'Y GEN. ANN. REP. 48.

[1348] *See*, however, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the State its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.

[1349] 92 U.S. 542 (1876).

[1350] Act of May 31, 1870, ch. 114, 16 Stat. 141 (1870).

[1351] United States v. Cruikshank, 92 U.S 542, 552–53 (1876).

means, or course, that the *Cruikshank* limitation is no longer applicable.[1352]

***The Hague Case***.—Illustrative of this expansion is *Hague v. CIO*,[1353] in which the Court, though splintered with regard to reasoning and rationale, struck down an ordinance which vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion which Justice Black joined and with which Chief Justice Hughes concurred, found protection against state abridgment of the rights of assembly and petition in the privileges and immunities clause of the Fourteenth Amendment. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[1354] Justices Stone and Reed invoked the due process clause of the Fourteenth Amendment for the result, thereby claiming the rights of assembly and petition for aliens as well as citizens. "I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."[1355] This due process view of Justice Stone has carried the day over the privileges and immunities approach.

Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. Certain conduct may call forth a denomination of petition[1356] or assembly,[1357] but there seems little question that no

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[1352] De Jonge v. Oregon, 299 U.S. 353 (1937); Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941); Thomas v. Collins, 323 U.S. 516 (1945).

[1353] 307 U.S. 496 (1939).

[1354] 307 U.S. at 515. For another holding that the right to petition is not absolute, *see* McDonald v. Smith, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity from libel).

[1355] 307 U.S. at 525.

[1356] *E.g.*, United States v. Harriss, 347 U.S. 612 (1954); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961); BE & K Construction Co. v. NLRB, 122 S. Ct. 2390 (2002).

[1357] *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971).

substantive issue turns upon whether one may be said to be engaged in speech or assembly or petition.

# BEARING ARMS

## SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

### IN GENERAL

In spite of extensive recent discussion and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there is no definitive resolution by the courts of just what right the Second Amendment protects. The opposing theories, perhaps oversimplified, are an "individual rights" thesis whereby individuals are protected in ownership, possession, and transportation, and a "states' rights" thesis whereby it is said the purpose of the clause is to protect the States in their authority to maintain formal, organized militia units.[1] Whatever the Amendment may mean, it is a bar only to federal action, not extending to state[2] or private[3] restraints. The Supreme Court has given effect to the dependent clause of the Amendment in the only case in which it has tested a congressional enactment against the constitutional prohibition, seeming to affirm individual protection

[1] A sampling of the diverse literature in which the same historical, linguistic, and case law background is the basis for strikingly different conclusions is: Staff of Subcom. on the Constitution, Senate Committee on the Judiciary, 97th Congress, 2d Sess., The Right to Keep and Bear Arms (Comm. Print 1982); DON B. KATES, HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT (1984); GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Robert J. Cottrol ed., 1993); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Symposium, *Gun Control*, 49 LAW & CONTEMP. PROBS. 1 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); William Van Alystyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994).

[2] Presser v. Illinois, 116 U.S. 252, 265 (1886). *See also* Miller v. Texas, 153 U.S. 535 (1894); Robertson v. Baldwin, 165 U.S. 275, 281-282 (1897). The non-application of the Second Amendment to the States was more recently reaffirmed in Quilici v. Village of Morton Grove, 695 F. 2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

[3] United States v. Cruikshank, 92 U.S. 542 (1875).

but only in the context of the maintenance of a militia or other such public force.

In *United States v. Miller*,[4] the Court sustained a statute requiring registration under the National Firearms Act of sawed-off shotguns. After reciting the original provisions of the Constitution dealing with the militia, the Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view."[5] The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion." It was upon this force that the States could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[6] Therefore, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[7]

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[4] 307 U.S. 174 (1939). The defendants had been released on the basis of the trial court determination that prosecution would violate the Second Amendment and no briefs or other appearances were filed on their behalf; the Court acted on the basis of the Government's representations.

[5] Id. at 178.

[6] Id. at 179.

[7] Id. at 178. In Cases v. United States, 131 F. 2d 916, 922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943), the court, upholding a similar provision of the Federal Firearms Act, said: "Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia." *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (dictum: *Miller* holds that the "Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'"). *See also* Hickman v. Block, 81 F.3d 98 (9th Cir.) (plaintiff lacked standing to challenge denial of permit to carry concealed weapon, because Second Amendment is a right held by states, not by private citizens), *cert. denied* 519 U.S. 912 (1996); United States v. Gomez, 92 F.3d 770, 775 n. 7 (9th Cir. 1996) (interpreting federal prohibition on possession of firearm by a felon as having a justification defense "ensures that [the provision] does not collide with the Second Amendment"). United States v. Wright, 117 F.3d 1265 (11th Cir.), *cert. denied* 522 U.S. 1007 (1997) (member of Georgia unorganized militia unable to establish that his possession of machine guns and pipe bombs bore any connection to the preservation or efficiency of a well regulated militia).

Since this decision, Congress has placed greater limitations on the receipt, possession, and transportation of firearms,[8] and proposals for national registration or prohibition of firearms altogether have been made.[9] At what point regulation or prohibition of what classes of firearms would conflict with the Amendment, if at all, the *Miller* case does little more than cast a faint degree of illumination toward an answer. Pointing out that interest in the "character of the Second Amendment right has recently burgeoned," Justice Thomas, concurring in the Court's invalidation (on other grounds) of the Brady Handgun Violence Prevention Act, questioned whether the Second Amendment bars federal regulation of gun sales, and suggested that the Court might determine "at some future date . . . whether Justice Story was correct . . . that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'"[10]

[8] Enacted measures include the Gun Control Act of 1968. 82 Stat. 226, 18 U.S.C. §§ 921-928. The Supreme Court's dealings with these laws have all arisen in the context of prosecutions of persons purchasing or obtaining firearms in violation of prohibitions against such conduct by convicted felons. Lewis v. United States, 445 U.S. 55 (1980); Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); United States v. Bass, 404 U.S. 336 (1971).

[9] *E.g.*, NATIONAL COMMISSION ON.REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1031-1058 (1970), and FINAL REPORT 246-247 (1971).

[10] Printz v. United States, 521 U.S. 898, 937-39 (1997) (quoting 3 Commentaries § 1890, p. 746 (1833)). Justice Scalia, in extra-judicial writing, has sided with the individual rights interpretation of the Amendment. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW, 136-37 n.13 (A. Gutmann, ed., 1997) (responding to Professor Tribe's critique of "my interpretation of the Second Amendment as a guarantee that the federal government will not interfere with the individual's right to bear arms for self-defense").

## QUARTERING SOLDIERS

### THIRD AMENDMENT

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.

#### IN GENERAL

There has been no Supreme Court explication of this Amendment, which was obviously one guarantee of the preference for the civilian over the military. [1]

[1] In fact, save for the curious case of Engblom v. Carey, 677 F. 2d 957 (2d Cir. 1982), on remand, 572 F. Supp. 44 (S.D.N.Y.), aff'd. per curiam, 724 F.2d 28 (2d Cir. 1983), there has been no judicial explication at all.

# FOURTH AMENDMENT

## SEARCH AND SEIZURE

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# SEARCH AND SEIZURE

## FOURTH AMENDMENT

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.

### SEARCH AND SEIZURE

#### History and Scope of the Amendment

***History***.—Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the utilization of the "writs of assistance." But while the insistence on freedom from unreasonable searches and seizures as a fundamental right gained expression in the Colonies late and as a result of experience,[1] there was also a rich English experience to draw on. "Every man's house is his castle" was a maxim much celebrated in England, as was demonstrated in *Semayne's Case*, decided in 1603.[2] A civil case of execution of process, *Semayne's Case* nonetheless recognized the right of the homeowner to defend his house against unlawful entry even by the King's agents, but at the same time recognized the authority of the appropriate officers to break and enter upon notice in order to arrest or to execute the King's process. Most famous of the English cases was *Entick v. Carrington*,[3] one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials

[1] Apparently the first statement of freedom from unreasonable searches and seizures appeared in The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, in the drafting of which Samuel Adams took the lead. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 199, 205-06 (1971).

[2] 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604). One of the most forceful expressions of the maxim was that of William Pitt in Parliament in 1763: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

[3] 19 Howell's State Trials 1029, 95 Eng. 807 (1705).

connected with John Wilkes' polemical pamphlets attacking not only governmental policies but the King himself.[4]

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets and the like. In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive "of all the comforts of society," and the issuance of a warrant for the seizure of all of a person's papers rather than only those alleged to be criminal in nature "contrary to the genius of the law of England."[5] Besides its general character, said the court, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized. *Entick v. Carrington*, the Supreme Court has said, is a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and a guide to an understanding of what the Framers meant in writing the Fourth Amendment.[6]

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize "prohibited and uncustomed" goods, and commanding all subjects to assist in these endeavors. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism.[7] Otis lost and the writs were issued and utilized, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

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[4] *See also* Wilkes v. Wood, 98 Eng. 489 (C.P. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), *aff'd* 19 Howell's State Trials 1002, 1028; 97 Eng. Rep. 1075 (K.B. 1765).

[5] 95 Eng. 817, 818.

[6] Boyd v. United States, 116 U.S. 616, 626 (1886).

[7] The arguments of Otis and others as well as much background material are contained in Quincy's MASSACHUSETTS REPORTS, 1761-1772, App. I, pp. 395-540, and in 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (Wroth & Zobel eds., 1965). *See also* Dickerson, *Writs of Assistance as a Cause of the American Revolution*, in THE ERA OF THE AMERICAN REVOLUTION: STUDIES INSCRIBED TO EVARTS BOUTELL GREENE 40 (R. Morris, ed., 1939).

***Scope of the Amendment***.—The language of the provision which became the Fourth Amendment underwent some modest changes on its passage through the Congress, and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses. Madison's introduced version provided "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."[8] As reported from committee, with an inadvertent omission corrected on the floor,[9] the section was almost identical to the introduced version, and the House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision.[10]

As noted above, the noteworthy disputes over search and seizure in England and the colonies revolved about the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently gave rise to no disputes. Thus, the question arises whether the Fourth Amendment's two clauses must be read together to mean that the only searches and seizures which are "reasonable" are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are "reasonable" searches under the first clause which need not comply with the second clause.[11] This issue has divided the Court for some time, has

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[8] 1 ANNALS OF CONGRESS 434-35 (June 8, 1789).

[9] The word "secured" was changed to "secure" and the phrase "against unreasonable searches and seizures" was reinstated. Id. at 754 (August 17, 1789).

[10] Id. It has been theorized that the author of the defeated revision, who was chairman of the committee appointed to arrange the amendments prior to House passage, simply inserted his provision and that it passed unnoticed. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101-03 (1937).

[11] The amendment was originally in one clause as quoted above; it was the insertion of the defeated amendment to the language which changed the text into two clauses and arguably had the effect of extending the protection against unreasonable searches and seizures beyond the requirements imposed on the issuance of warrants. It is also possible to read the two clauses together to mean that some seizures even under warrants would be unreasonable, and this reading has indeed been effectuated in certain cases, although for independent reasons. Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967); *but see* id. at 303 (reserving the question

seen several reversals of precedents, and is important for the resolution of many cases. It is a dispute which has run most consistently throughout the cases involving the scope of the right to search incident to arrest.[12] While the right to search the person of the arrestee without a warrant is unquestioned, how far afield into areas within and without the control of the arrestee a search may range is an interesting and crucial matter.

The Court has drawn a wavering line.[13] In *Harris v. United States*,[14] it approved as "reasonable" the warrantless search of a four-room apartment pursuant to the arrest of the man found there. A year later, however, a reconstituted Court majority set aside a conviction based on evidence seized by a warrantless search pursuant to an arrest and adopted the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable."[15] This rule was set aside two years later by another reconstituted majority which adopted the premise that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Whether a search is reasonable, the Court said, "must find resolution in the facts and circumstances of each case."[16] However, the Court soon returned to its emphasis upon the warrant. "The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part."[17] Therefore, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure."[18] Exceptions to searches under warrants were to

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whether "there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.")

[12] Approval of warrantless searches pursuant to arrest first appeared in dicta in several cases. Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925). Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. United States v. United States District Court, 407 U.S. 297, 320 (1972).

[13] *Compare* Marron v. United States, 275 U.S. 192 (1927), *with* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), *and* United States v. Lefkowitz, 285 U.S. 452 (1932).

[14] 331 U.S. 145 (1947).

[15] Trupiano v. United States, 334 U.S. 699, 705 (1948). *See also* McDonald v. United States, 335 U.S. 451 (1948).

[16] United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

[17] Chimel v. California, 395 U.S. 752, 761 (1969).

[18] Terry v. Ohio, 392 U.S. 1, 20 (1968). In United States v. United States District Court, 407 U.S. 297, 321 (1972), Justice Powell explained that the "very heart"

be closely contained by the rationale undergirding the necessity for the exception, and the scope of a search under one of the exceptions was similarly limited.[19]

During the 1970s the Court was closely divided on which standard to apply.[20] For a while, the balance tipped in favor of the view that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions.[21] Gradually, guided by the variable expectation of privacy approach to coverage of the Fourth Amendment, the Court broadened its view of permissible exceptions and of the scope of those exceptions.[22]

By 1992, it was no longer the case that the "warrants-with-narrow-exceptions" standard normally prevails over a "reasonable-

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of the Amendment's mandate is "that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Thus, what is "reasonable" in terms of a search and seizure derives content and meaning through reference to the warrant clause. Coolidge v. New Hampshire, 403 U.S. 443, 473-84 (1971). *See also* Davis v. Mississippi, 394 U.S. 721, 728 (1969); Katz v. United States, 389 U.S. 347, 356-58 (1967); Warden v. Hayden, 387 U.S. 294, 299 (1967).

[19] Chimel v. California, 395 U.S. 752, 762-64 (1969) (limiting scope of search incident to arrest). *See also* United States v. United States District Court, 407 U.S. 297 (1972) (rejecting argument that it was "reasonable" to allow President through Attorney General to authorize warrantless electronic surveillance of persons thought to be endangering the national security); Katz v. United States, 389 U.S. 347 (1967) (although officers acted with great self-restraint and reasonably in engaging in electronic seizures of conversations from a telephone booth, a magistrate's "antecedent" judgment was required); Preston v. United States, 376 U.S. 364 (1964) (warrantless search of seized automobile not justified because not within rationale of exceptions to warrant clause). There were exceptions, *e.g.*, Cooper v. California, 386 U.S. 58 (1967) (warrantless search of impounded car was reasonable); United States v. Harris, 390 U.S. 234 (1968) (warrantless inventory search of automobile).

[20] *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973), Justices Stewart, Douglas, Brennan, and Marshall adhered to the warrant-based rule, while Justices White, Blackmun, and Rehnquist, and Chief Justice Burger placed greater emphasis upon the question of reasonableness without necessary regard to the warrant requirement. Id. at 285. Justice Powell generally agreed with the former group of Justices, id. at 275 (concurring).

[21] *E.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-53 (1977) (unanimous); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Michigan v. Tyler, 436 U.S. 499, 506 (1978); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (unanimous); Arkansas v. Sanders, 442 U.S. 753, 758 (1979); United States v. Ross, 456 U.S. 798, 824-25 (1982).

[22] *E.g.*, Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile taken to police station); Texas v. White, 423 U.S. 67 (1975) (same); New York v. Belton, 453 U.S. 454 (1981) (search incident to arrest); United States v. Ross, 456 U.S. 798 (1982) (automobile search at scene). On the other hand, the warrant-based standard did preclude a number of warrantless searches. *E.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (warrantless administrative inspection of business premises); Mincey v. Arizona, 437 U.S. 385 (1978) (warrantless search of home that was "homicide scene").

ness" approach.[23] Exceptions to the warrant requirement have multiplied, tending to confine application of the requirement to cases that are exclusively "criminal" in nature. And even within that core area of "criminal" cases, some exceptions have been broadened. The most important category of exception is that of administrative searches justified by "special needs beyond the normal need for law enforcement." Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees.[24] In all of these instances the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government's regulatory interest against the individual's privacy interest; in all of these instances the government's interest has been found to outweigh the individual's. The broad scope of the administrative search exception is evidenced by the fact that an overlap between law enforcement objectives and administrative "special needs" does not result in application of the warrant requirement; instead, the Court has upheld warrantless inspection of automobile junkyards and dismantling operations in spite of the strong law enforcement component of the regulation.[25] In the law enforcement context, where search by warrant is still the general rule, there has also been some loosening of the requirement. For example, the Court has shifted focus from whether exigent circumstances justified failure to obtain a warrant, to whether an officer had a "reasonable" belief that an exception to the warrant requirement applied;[26] in another case the scope of a valid search "incident to arrest," once limited to areas within the immediate reach of the arrested suspect, was expanded to a "protective sweep" of the entire home if arresting officers have a reasonable belief that the home harbors an individual who may pose a danger.[27]

Another matter of scope recently addressed by the Court is the category of persons protected by the Fourth Amendment—who constitutes "the people." This phrase, the Court determined, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United

[23] Of the 1992 Justices, only Justice Stevens has frequently sided with the warrants-with-narrow-exceptions approach. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 189 (Justice Stevens joining Justice Marshall's dissent); New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Justice Stevens dissenting); California v. Acevedo, 500 U.S. 565, 585 (1991) (Justice Stevens dissenting).

[24] *See* various headings infra under the general heading "Valid Searches and Seizures Without Warrants."

[25] New York v. Burger, 482 U.S. 691 (1987).

[26] Illinois v. Rodriguez, 497 U.S. 177 (1990).

[27] Maryland v. Buie, 494 U.S. 325 (1990).

States] to be considered part of that community."[28] The Fourth Amendment therefore does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country. There is no resulting broad principle, however, that the Fourth Amendment constrains federal officials wherever and against whomever they act.

***The Interest Protected***.—For the Fourth Amendment to be applicable to a particular set of facts, there must be a "search" and a "seizure," occurring typically in a criminal case, with a subsequent attempt to use judicially what was seized.[29] Whether there was a search and seizure within the meaning of the Amendment, whether a complainant's interests were constitutionally infringed, will often turn upon consideration of his interest and whether it was officially abused. What does the Amendment protect? Under the common law, there was no doubt. Said Lord Camden in *Entick v. Carrington*.[30] "The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing . . . ." Protection of property interests as the basis of the Fourth Amendment found easy acceptance in the Supreme Court[31] and that acceptance controlled decision in numerous cases.[32] For

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[28] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[29] *See, e.g.,* California v. Hodari D., 499 U.S. 621, 626 (1991) (because there was no "seizure" of the defendant as he fled from police before being tackled, the drugs that he abandoned in flight could not be excluded as the fruits of an unreasonable seizure).

[30] 19 Howell's State Trials 1029, 1035, 95 Eng. Reg. 807, 817-18 (1765).

[31] Boyd v. United States, 116 U.S. 616, 627 (1886); Adams v. New York, 192 U.S. 585, 598 (1904).

[32] Thus, the rule that "mere evidence" could not be seized but rather only the fruits of crime, its instrumentalities, or contraband, turned upon the question of the right of the public to possess the materials or the police power to make possession by the possessor unlawful. Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967). *See also* Davis v. United States, 328 U.S. 582 (1946). Standing to contest unlawful searches and seizures was based upon property interests, United States v. Jeffers, 342 U.S. 48 (1951); Jones v. United States, 362 U.S. 257 (1960), as well as decision upon the validity of a consent to search. Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964); Frazier v. Culp, 394 U.S. 731, 740 (1969).

example, in *Olmstead v. United States*,[33] one of the two premises underlying the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises; where there had been an invasion, a technical trespass, electronic surveillance was deemed subject to Fourth Amendment restrictions.[34]

The Court later rejected this approach, however. "The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."[35] Thus, because the Amendment "protects people, not places," the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment's requirements.[36]

The test propounded in *Katz* is whether there is an expectation of privacy upon which one may "justifiably" rely.[37] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[38] That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion."[39]

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[33] 277 U.S. 438 (1928). *See also* Goldman v. United States, 316 U.S. 129 (1942) (detectaphone placed against wall of adjoining room; no search and seizure).

[34] Silverman v. United States, 365 U.S. 505 (1961) (spike mike pushed through a party wall until it hit a heating duct).

[35] Warden v. Hayden, 387 U.S. 294, 304 (1967).

[36] Katz v. United States, 389 U.S. 347, 353 (1967) (warrantless use of listening and recording device placed on outside of phone booth violates Fourth Amendment). *See also* Kyllo v. United States, 533 U.S. 27, 32–33 (2001) (holding presumptively unreasonable the warrantless use of a thermal imaging device to detect activity within a home by measuring heat outside the home, and noting that a contrary holding would permit developments in police technology "to erode the privacy guaranteed by the Fourth Amendment".

[37] 389 U.S. at 353. Justice Harlan, concurring, formulated a two pronged test for determining whether the privacy interest is paramount: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361.

[38] 389 U.S. at 351-52.

[39] Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (official had a reasonable expectation of privacy in an office he shared with others, although he owned neither the premises nor the papers seized). Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest in home has a reasonable expectation of privacy). *But cf.* Minnesota v. Carter, 525 U.S. 83 (1998) (a person present in someone else's apartment for only a few hours for the purpose of bagging cocaine for later sale has no legitimate expectation

*Katz's* focus on privacy was revitalized in *Kyllo v. United States*,[40] in which the Court invalidated the warrantless use of a thermal imaging device directed at a private home from a public street. The rule devised by the Court to limit police use of new technology that can "shrink the realm of guaranteed privacy" is that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' . . . constitutes a search – at least where (as here) the technology in question is not in general public use."[41] Relying on *Katz*, the Court rejected as "mechanical" the Government's attempted distinction between off-the-wall and through-the-wall surveillance. Permitting all off-the-wall observations, the Court observed, "would leave the homeowner at the mercy of advancing technology – including technology that could discern all human activity in the home."

While the sanctity of the home has been strongly reaffirmed, protection of privacy in other contexts becomes more problematic. The two-part test that Justice Harlan suggested in *Katz* often provides the starting point for analysis.[42] The first element, the "subjective expectation" of privacy, has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[43] As for the second element, whether one

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of privacy); *Cf.* Rakas v. Illinois, 439 U.S. 128 (1978) (auto passengers demonstrated no legitimate expectation of privacy in glove compartment or under seat of auto). Property rights are still protected by the Amendment, however. A "seizure" of property can occur when there is some meaningful interference with an individual's possessory interests in that property, and regardless of whether there is any interference with the individual's privacy interest. Soldal v. Cook County, 506 U.S. 56 (1992) (a seizure occurred when sheriff's deputies assisted in the disconnection and removal of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466 U.S. 109, 120-21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[40] 121 S. Ct. 2038 (2001).

[41] 121 S. Ct. at 2043.

[42] Justice Harlan's opinion has been much relied upon. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 19 (1968); Rakas v. Illinois, 439 U.S. 128, 143-144 n.12 (1978); Smith v. Maryland, 442 U.S. 735, 740-41 (1979); United States v. Salvucci, 448 U.S. 83, 91-92 (1980); Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980). Bond v. United States, 529 U.S. 334, 338 (2000).

[43] United States v. White, 401 U.S. 745, 786 (1971). *See* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (government could not condition "subjective expectations" by, say, announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the "legitimate expectation of privacy").

has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[44] Thus, protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others;[45] but ownership of other things, i.e., automobiles, does not carry a similar high degree of protection.[46] That a person has taken normal precautions to maintain his privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation.[47] Some expectations, the Court has held, are simply not those which society is prepared to accept.[48]

What seems to have emerged is a balancing standard that requires "an assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." While Justice Harlan saw a greater need to restrain police officers through the warrant requirement as the intrusions on individual privacy grow more extensive,[49] the Court's solicitude for law enforcement objectives frequently tilts the balance in the other direction.

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[44] Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

[45] *E.g.*, Alderman v. United States, 394 U.S. 165 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Payton v. New York, 445 U.S. 573 (1980); Kyllo v. United States, 121 S. Ct. 2038, 2041-42 (2001).

[46] *E.g.*, United States v. Ross , 456 U.S. 798 (1982). *See also* Donovan v. Dewey, 452 U.S. 594 (1981) (commercial premises); Maryland v. Macon, 472 U.S. 463 (1985) (no legitimate expectation of privacy in denying to undercover officers allegedly obscene materials offered to public in bookstore).

[47] *E.g.*, United States v. Chadwick, 433 U.S. 1, 11 (1977); Katz v. United States, 389 U.S. 347, 352 (1967). *But cf.* South Dakota v. Opperman, 428 U.S. 364 (1976) (no legitimate expectation of privacy in automobile left with doors locked and windows rolled up). In Rawlings v. Kentucky, 448 U.S. 98 (1980), the fact that defendant had dumped a cache of drugs into his companion's purse, having known her for only a few days and knowing others had access to the purse, was taken to establish that he had no legitimate expectation the purse would be free from intrusion.

[48] *E.g.*, United States v. Miller, 425 U.S. 435 (1976) (bank records); Smith v. Maryland, 442 U.S. 735 (1979) (numbers dialed from one's telephone); Hudson v. Palmer, 468 U.S. 517 (1984) (prison cell); Illinois v. Andreas, 463 U.S. 765 (1983) (shipping container opened and inspected by customs agents and resealed and delivered to the addressee); California v. Greenwood, 486 U.S. 35 (1988) (garbage in sealed plastic bags left at curb for collection).

[49] United States v. White, 401 U.S. 745, 786-87 (1971) (Justice Harlan dissenting).

Application of this balancing test, because of the Court's weighing in of law enforcement investigative needs[50] and the Court's subjective evaluation of privacy needs, has led to the creation of a two-tier or sliding-tier scale of privacy interests. The privacy test was originally designed to permit a determination that a Fourth Amendment protected interest had been invaded.[51] If it had been, then ordinarily a warrant was required, subject only to the narrowly defined exceptions, and the scope of the search under those exceptions was "strictly tied to and justified by the circumstances which rendered its initiation permissible."[52] But the Court now uses the test to determine whether the interest invaded is important or persuasive enough so that a warrant is required to justify it;[53] if the individual has a lesser expectation of privacy, then the invasion may be justified, absent a warrant, by the reasonableness of the intrusion.[54] Exceptions to the warrant requirement are no longer evaluated solely by the justifications for the exception, e.g., exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception.[55] The result

[50] *E.g.*, Robbins v. California, 453 U.S. 420, 429, 433-34 (1981) (Justice Powell concurring), quoted approvingly in United States v. Ross, 456 U.S. 798, 815-16 & n.21 (1982).

[51] Katz v. United States, 389 U. S. 347, 351-52 (1967).

[52] Terry v. Ohio, 392 U.S. 1, 19 (1968).

[53] The prime example is the home, so that for entries either to search or to arrest, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980); Steagald v. United States, 451 U.S. 204, 212 (1981). *And see* Mincey v. Arizona, 437 U.S. 385 (1978). Privacy in the home is not limited to intimate matters. "In the home *all* details are intimate details, because the entire area is held safe from prying government eyes." Kyllo v. United States, 121 S. Ct. 2038,2045 (2001).

[54] One has a diminished expectation of privacy in automobiles. Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (collecting cases); United States v. Ross, 456 U.S. 798, 804-09 (1982). A person's expectation of privacy in personal luggage and other closed containers is substantially greater than in an automobile, United States v. Chadwick, 433 U.S. 1, 13 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979), although if the luggage or container is found in an automobile as to which there exists probable cause to search, the legitimate expectancy diminishes accordingly. *United States v. Ross*, supra. There is also a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel. California v. Carney, 471 U.S. 386 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not adapted for immediate vehicular use).

[55] *E.g.*, Texas v. White, 423 U.S. 67 (1975) (if probable cause to search automobile existed at scene, it can be removed to station and searched without warrant); United States v. Robinson, 414 U.S. 218 (1973) (once an arrest has been validly made, search pursuant thereto is so minimally intrusive in addition that scope of search is not limited by necessity of security of officer); United States v. Edwards, 415 U.S. 800 (1974) (incarcerated suspect; officers need no warrant to take his clothes for test because little additional intrusion). *But see* Ybarra v. Illinois, 444 U.S. 85 (1979) (officers on premises to execute search warrant of premises may not without more search persons found on premises).

has been a considerable expansion, beyond what existed prior to *Katz*, of the power of police and other authorities to conduct searches.

***Arrests and Other Detentions***.—That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall[56] and is now established law.[57] At common law, warrantless arrests of persons who had committed a breach of the peace or a felony were permitted,[58] and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless of whether a warrant has been obtained.[59] However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant.[60] The Fourth Amendment applies to "seizures" and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants or probable cause in instances in which warrants may be forgone.[61] Some

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[56] Ex parte Burford, 7 U.S. (3 Cr.) 448 (1806).

[57] Giordenello v. United States, 357 U.S. 480, 485-86 (1958); United States v. Watson, 423 U.S. 411, 416-18 (1976); Payton v. New York, 445 U.S. 573, 583-86 (1980); Steagald v. United States, 451 U.S. 204, 211-13 (1981).

[58] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883). At common law warrantless arrest was also permissible for some misdemeanors not involving a breach of the peace. See the lengthy historical treatment in Atwater v. City of Lago Vista, 532 U.S. 318, 326-45 (2001).

[59] United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home when she was initially approached in her doorway and then retreated into house). However, a suspect arrested on probable cause but without a warrant is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody. Gerstein v. Pugh, 420 U.S. 103 (1975). A "prompt" hearing now means a hearing that is administratively convenient. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (authorizing "as a general matter" detention for up to 48 hours without a probable-cause hearing, after which time the burden shifts to the government to demonstrate extraordinary circumstances justifying further detention).

[60] Payton v. New York, 445 U.S. 573 (1980) (voiding state law authorizing police to enter private residence without a warrant to make an arrest); Steagald v. United States, 451 U.S. 204 (1981) (officers with arrest warrant for A entered B's home without search warrant and discovered incriminating evidence; violated Fourth Amendment in absence of warrant to search the home); Hayes v. Florida, 470 U.S. 811 (1985) (officers went to suspect's home and took him to police station for fingerprinting).

[61] United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Justice Stewart) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). *See also* Reid v. Georgia, 448 U.S. 438 (1980); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16-19 (1968). Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (police officer's fatal shooting of a flee-

objective justification must be shown to validate all seizures of the person, including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.[62]

The Fourth Amendment does not require an officer to consider whether to issue a citation rather than arresting (and placing in custody) a person who has committed a minor offense – even a minor traffic offense. In *Atwater v. City of Lago Vista*,[63] the Court, even while acknowledging that the case before it involved "gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment," refused to require that "case-by-case determinations of government need" to place traffic offenders in custody be subjected to a reasonableness inquiry, "lest every discretionary judgment in the field be converted into an occasion for constitutional review."[64] Citing some state statutes that limit warrantless arrests for minor offenses, the Court contended that the matter is better left to statutory rule than to application of broad constitutional principle.[65] Thus, *Atwater* and *County of Riverside v. McLaughlin*[66] together mean that – as far as the Constitution is concerned – police officers have almost unbridled discretion to decide whether to issue a summons for a minor traffic offense or whether instead to place the offending motorist in jail, where she may be kept for up to 48 hours with little recourse.

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure—unlike evidence obtained as a result of an unlawful search—remains subject to custody and presentation to court.[67] But the application of self-incrimination and other exclusionary rules to the States and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be

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ing suspect); Brower v. County of Inyo, 489 U.S. 593 (1989) (police roadblock designed to end car chase with fatal crash).

[62] Adams v. Williams, 407 U.S. 143, 146-49 (1972); Delaware v. Prouse, 440 U.S. 648, 661 (1979); Brown v. Texas, 443 U.S. 47, 51 (1979); Reid v. Georgia, 448 U.S. 438, 440 (1980); Michigan v. Summers, 452 U.S. 692 (1981); Illinois v. McArthur, 531 U.S. 326 (2001) (approving "securing" of premises, preventing homeowner from reentering, while search warrant obtained).

[63] 532 U.S. 318 (2001).

[64] 532 U.S. at 346-47.

[65] 532 U.S. at 352.

[66] 500 U.S. 44 (1991).

[67] Ker v. Illinois, 119 U.S. 436, 440 (1886); *see also* Albrecht v. United States, 273 U.S. 1 (1927); Frisbie v. Collins, 342 U.S. 519 (1952).

excluded.[68] Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed "tainted" by the former.[69] Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.[70]

***Searches and Inspections in Noncriminal Cases***.—Certain early cases held that the Fourth Amendment was applicable only when a search was undertaken for criminal investigatory purposes,[71] and the Supreme Court until recently employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant.[72] But in 1967, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects.[73] "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and

[68] Wong Sun v. United States, 371 U.S. 471 (1963). Such evidence is the "fruit of the poisonous tree," Nardone v. United States, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. Colombe v. Connecticut, 367 U.S. 568 (1961).

[69] Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of "an intervening . . . act of free will." Wong Sun v. United States, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time between the illegal arrest and the confession, whether there were intervening circumstances (such as consultation with others, *Miranda* warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. Brown v. Illinois, 422 U.S. 590 (1975) (*Miranda* warnings alone insufficient); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982). In Johnson v. Louisiana, 406 U.S. 356 (1972), the fact that the suspect had been taken before a magistrate who advised him of his rights and set bail, after which he confessed, established a sufficient intervening circumstance.

[70] Davis v. Mississippi, 394 U.S. 721 (1969); Taylor v. Alabama, 457 U.S. 687 (1982). In United States v. Crews, 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification. *See also* Hayes v. Florida, 470 U.S. 811, 815 (1985), suggesting in dictum that a "narrowly circumscribed procedure for fingerprinting detentions on less than probable cause" may be permissible.

[71] In re Strouse, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); In re Meador, 16 Fed. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869).

[72] Abel v. United States, 362 U.S. 217 (1960); Frank v. Maryland, 359 U.S. 360 (1959); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[73] Camara v. Municipal Court, 387 U.S. 523 (1967) (home); See v. City of Seattle, 387 U.S. 541 (1967) (commercial warehouse).

his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." [74] Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute. [75]

*Camara* and *See* were reaffirmed in *Marshall v. Barlow's, Inc.*, [76] in which the Court held violative of the Fourth Amendment a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations, without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that those industries had a long tradition of close government supervision, so that a person in those businesses gave up his privacy expectations. But OSHA was a relatively recent statute and it regulated practically every business in or affecting interstate commerce; it was not open to a legislature to extend regulation and then follow it with warrantless inspections. Additionally, OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest, inasmuch as most businesses would consent to inspection and it was not inconvenient to require OSHA to resort to an administrative warrant in order to inspect sites where consent was refused. [77]

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[74] Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

[75] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972). *Colonnade*, involving liquor, was based on the long history of close supervision of the industry. *Biswell*, involving firearms, introduced factors that were subsequently to prove significant. Thus, while the statute was of recent enactment, firearms constituted a pervasively regulated industry, so that dealers had no reasonable expectation of privacy, inasmuch as the law provides for regular inspections. Further, warrantless inspections were needed for effective enforcement of the statute.

[76] 436 U.S. 307 (1978). Dissenting, Justice Stevens, with Justices Rehnquist and Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. Id. at 325.

[77] Administrative warrants issued on the basis of less than probable cause but only on a showing that a specific business had been chosen for inspection on the basis of a general administrative plan would suffice. Even without a necessity for probable cause, the requirement would assure the interposition of a neutral officer to establish that the inspection was reasonable and was properly authorized. Id. at 321, 323. The dissenters objected that the warrant clause was being constitutionally diluted. Id. at 325. Administrative warrants were approved also in Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Previously, one of the reasons given for finding administrative and noncriminal inspections not covered by the Fourth Amendment was the fact that the warrant clause would be as rigorously applied to them

In *Donovan v. Dewey*,[78] however, *Barlow's* was substantially limited and a new standard emerged permitting extensive governmental inspection of commercial property,[79] absent warrants. Under the Federal Mine Safety and Health Act, governing underground and surface mines (including stone quarries), federal officers are directed to inspect underground mines at least four times a year and surface mines at least twice a year, pursuant to extensive regulations as to standards of safety. The statute specifically provides for absence of advanced notice and requires the Secretary of Labor to institute court actions for injunctive and other relief in cases in which inspectors are denied admission. Sustaining the statute, the Court proclaimed that government had a "greater latitude" to conduct warrantless inspections of commercial property than of homes, because of "the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."[80]

*Dewey* was distinguished from *Barlow's* in several ways. First, *Dewey* involved a single industry, unlike the broad coverage in *Barlow's*. Second, the OSHA statute gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, deference was due Congress' determination that unannounced inspections were necessary if the safety laws were to be effectively enforced. Fourth, FMSHA provided businesses the opportunity to contest the search by resisting in the civil proceeding the Secretary had to bring if consent was denied.[81] The standard

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as to criminal searches and seizures. Frank v. Maryland , 359 U.S. 360, 373 (1959). *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Justice Powell concurring) (suggesting a similar administrative warrant procedure empowering police and immigration officers to conduct roving searches of automobiles in areas near the Nation's borders); id. at 270 n.3 (indicating that majority Justices were divided on the validity of such area search warrants); id. at 288 (dissenting Justice White indicating approval); United States v. Martinez-Fuerte, 428 U.S. 543, 547 n.2, 562 n.15 (1976).

[78] 452 U.S. 594 (1981).

[79] There is no suggestion that warrantless inspections of homes is broadened. Id. at 598, or that warrantless entry under exigent circumstances is curtailed. *See, e.g.*, Michigan v. Tyler , 436 U.S. 499 (1978) (no warrant required for entry by firefighters to fight fire; once there, firefighters may remain for reasonable time to investigate the cause of the fire).

[80] Donovan v. Dewey , 452 U.S. 594, 598-99 (1981).

[81] Id. at 596-97, 604-05. Pursuant to the statute, however, the Secretary has promulgated regulations providing for the assessment of civil penalties for denial of entry and Dewey had been assessed a penalty of $1,000. Id. at 597 n.3. It was also

of a long tradition of government supervision permitting warrantless inspections was dispensed with, because it would lead to "absurd results," in that new and emerging industries posing great hazards would escape regulation.[82] *Dewey* suggests, therefore, that warrantless inspections of commercial establishments are permissible so long as the legislature carefully drafts its statute.

*Dewey* was applied in *New York v. Burger*[83] to inspection of automobile junkyards and vehicle dismantling operations, a situation where there is considerable overlap between administrative and penal objectives. Applying the *Dewey* three-part test, the Court concluded that New York has a substantial interest in stemming the tide of automobile thefts, that regulation of vehicle dismantling reasonably serves that interest, and that statutory safeguards provided adequate substitute for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means of enforcing the penal laws, and instead saw narrower, valid regulatory purposes to be served: e.g., establishing a system for tracking stolen automobiles and parts, and enhancing the ability of legitimate businesses to compete. "[A] State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions," the Court declared; in such circumstances warrantless administrative searches are permissible in spite of the fact that evidence of criminal activity may well be uncovered in the process.[84]

In other contexts, the Court has also elaborated the constitutional requirements affecting administrative inspections and searches. Thus, in *Michigan v. Tyler*,[85] it subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances, and no warrant or consent is needed; firemen on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and re-

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true in *Barlow's* that the Government resorted to civil process upon refusal to admit. 436 U.S. at 317 & n.12.

[82] Donovan v. Dewey, 452 U.S. 594, 606 (1981). Duration of regulation will now be a factor in assessing the legitimate expectation of privacy of a business. Id. *Accord*, New York v. Burger , 482 U.S. 691 (1987) (although duration of regulation of vehicle dismantling was relatively brief, history of regulation of junk business generally was lengthy, and current regulation of dismantling was extensive).

[83] 482 U.S. 691 (1987).

[84] 482 U.S. at 712 (emphasis original).

[85] 436 U.S. 499 (1978).

quires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant.[86]

One curious case has approved a system of "home visits" by welfare caseworkers, in which the recipients are required to admit the worker or lose eligibility for benefits.[87] In another unusual case, the Court held that a sheriff's assistance to a trailer park owner in disconnecting and removing a mobile home constituted a "seizure" of the home.[88]

In addition, there are now a number of situations, some of them analogous to administrative searches, where "'special needs' beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements."[89] In one of these cases the Court, without acknowledging the magnitude of the leap from one context to another, has taken the *Dewey*/ *Burger* rationale—developed to justify warrantless searches of business establishments—and applied it to justify the significant intrusion into personal privacy represented by urinalysis drug testing. Because of the history of pervasive regulation of the railroad industry, the Court reasoned, railroad employees have a diminished expectation of privacy that makes mandatory urinalysis less intrusive and more reasonable.[90]

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[86] The Court also held that, after the fire was extinguished, if fire investigators were unable to proceed at the moment, because of dark, steam, and smoke, it was proper for them to leave and return at daylight without any necessity of complying with its mandate for administrative or criminal warrants. Id. at 510-11. *But cf.* Michigan v. Clifford, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

[87] Wyman v. James, 400 U.S. 309 (1971). It is not clear what rationale the majority utilized. It appears to have proceeded on the assumption that a "home visit" was not a search and that the Fourth Amendment does not apply when criminal prosecution is not threatened. Neither premise is valid under Camara and its progeny, although *Camara* preceded *Wyman*. Presumably, the case would today be analyzed under the expectation of privacy/need/structural protection theory of the more recent cases.

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

[89] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (administrative needs of probation system justify warrantless searches of probationers' homes on less than probable cause); Hudson v. Palmer , 468 U.S. 517, 526 (1984) (no Fourth Amendment protection from search of prison cell); New Jersey v. T.L.O. , 469 U.S. 325 (1985) (simple reasonableness standard governs searches of students' persons and effects by public school authorities); O'Connor v. Ortega, 480 U.S. 709 (1987) (reasonableness test for work-related searches of employees' offices by government employer); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (neither probable cause nor individualized suspicion is necessary for mandatory drug testing of railway employees involved in accidents or safety violations). All of these cases are discussed infra under the general heading "Valid Searches and Seizures Without Warrants."

[90] *Skinner*, 489 U.S. at 627.

With respect to automobiles, the holdings are mixed. Random stops of automobiles to check drivers' licenses, vehicle registrations, and safety conditions were condemned as too intrusive; the degree to which random stops would advance the legitimate governmental interests involved did not outweigh the individual's legitimate expectations of privacy.[91] On the other hand, in *South Dakota v. Opperman*,[92] the Court sustained the admission of evidence found when police impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping. Marijuana was discovered in the glove compartment.

**Searches and Seizures Pursuant to Warrant**

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, authorizes invasion of that privacy only upon a showing that constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought.[93] While a warrant is issued *ex parte*, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought.[94]

***Issuance by Neutral Magistrate***.—In numerous cases, the Court has referred to the necessity that warrants be issued by a

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[91] Delaware v. Prouse , 440 U.S. 648 (1979). Standards applied in this case had been developed in the contexts of automobile stops at fixed points or by roving patrols in border situations. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Brignoni-Ponce , 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Martinez-Fuerte , 428 U.S. 543 (1976).

[92] 428 U.S. 364 (1976). *See also* Cady v. Dombrowski, 413 U.S. 433 (1973) (sustaining admission of criminal evidence found when police conducted a warrantless search of an out-of-state policeman's automobile following an accident, in order to find and safeguard his service revolver). The Court in both cases emphasized the reduced expectation of privacy in automobiles and the noncriminal purposes of the searches.

[93] While the exceptions may be different for arrest warrants and search warrants, the requirements for the issuance of the two are the same. Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964). Also, the standards by which the validity of warrants are to be judged are the same, whether federal or state officers are involved. Ker v. California, 374 U.S. 23 (1963).

[94] Most often, in the suppression hearings, the defendant will challenge the sufficiency of the evidence presented to the magistrate to constitute probable cause. Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971). He may challenge the veracity of the statements used by the police to procure the warrant and otherwise contest the accuracy of the allegations going to establish probable cause, but the Court has carefully hedged his ability to do so. Franks v. Delaware, 438 U.S. 154 (1978). He may also question the power of the official issuing the warrant, Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971), or the specificity of the particularity required. Marron v. United States, 275 U.S. 192 (1927).

"judicial officer" or a "magistrate."[95] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."[96] These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[97] The first test cannot be met when the issuing party is himself engaged in law enforcement activities,[98] but the Court has not required that an issuing party have that independence of tenure and guarantee of salary which characterizes federal judges.[99] And in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause.[100]

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[95] United States v. Lefkowitz , 285 U.S. 452, 464 (1932); Giordenello v. United States, 357 U.S. 480, 486 (1958); Jones v. United States, 362 U.S. 257, 270 (1960); Katz v. United States, 389 U.S. 347, 356 (1967); United States v. United States District Court , 407 U.S. 297, 321 (1972); United States v. Chadwick , 433 U.S. 1, 9 (1977); Lo-Ji Sales v. New York, 442 U.S. 319, 326 (1979).

[96] Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[97] Shadwick v. City of Tampa, 407 U.S. 345, 354 (1972).

[98] Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971) (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorized to issue warrants); Mancusi v. DeForte, 392 U.S. 364, 370-72 (1968) (subpoena issued by district attorney could not qualify as a valid search warrant); Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (justice of the peace issued open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).

[99] Jones v. United States, 362 U.S. 257, 270-71 (1960) (approving issuance of warrants by United States Commissioners, many of whom were not lawyers and none of whom had any guarantees of tenure and salary); Shadwick v. City of Tampa, 407 U.S. 345 (1972) (approving issuance of arrest warrants for violation of city ordinances by city clerks who were assigned to and supervised by municipal court judges). The Court reserved the question "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.' Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations." Id. at 352.

[100] Id. at 350-54 (placing on defendant the burden of demonstrating that the issuing official lacks capacity to determine probable cause). *See also* Connally v.

***Probable Cause***.—The concept of "probable cause" is central to the meaning of the warrant clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define "probable cause;" the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. "In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."[101] Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[102] Warrants are favored in the law and utilization of them will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony.[103] For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant."[104] Courts will sustain the determination of probable cause so long as "there was substantial basis for [the magistrate] to conclude that" there was probable cause.[105]

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Georgia, 429 U.S. 245 (1977) (unsalaried justice of the peace who receives a sum of money for each warrant issued but nothing for reviewing and denying a warrant is not sufficiently detached).

[101] Dumbra v. United States, 268 U.S. 435, 439, 441 (1925). "[T]he term 'probable cause'. . . means less than evidence which would justify condemnation." Lock v. United States, 11 U.S. (7 Cr.) 339, 348 (1813). *See* Steele v. United States, 267 U.S. 498, 504-05 (1925). It may rest upon evidence which is not legally competent in a criminal trial, Draper v. United States, 358 U.S. 307, 311 (1959), and it need not be sufficient to prove guilt in a criminal trial. Brinegar v. United States, 338 U.S. 160, 173 (1949). *See* United States v. Ventresca, 380 U.S. 102, 107-08 (1965).

[102] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[103] United States v. Ventresca , 380 U.S. 102, 108-09 (1965).

[104] Jones v. United States, 362 U.S. 257, 270-71 (1960). Similarly, the preference for proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 517 U.S. 690 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to *de novo* appellate review).

[105] Aguilar v. Texas, 378 U.S. 108, 111 (1964). It must be emphasized that the issuing party "must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause." Giordenello v. United States, 357 U.S. 480, 486 (1958). An insufficient affidavit cannot be rehabilitated by testimony after issuance concerning information possessed by the affiant but not disclosed to the magistrate. Whiteley v. Warden, 401 U.S. 560 (1971).

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough.[106] In *United States v. Ventresca*,[107] however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing.[108]

Requirements for establishing probable cause through reliance on information received from an informant has divided the Court in several cases. Although involving a warrantless arrest, *Draper v. United States*[109] may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that the defendant would arrive with narcotics on a particular train, and described the clothes he would be wearing and the bag he would be carrying; the informant, however, gave no basis for his information. FBI agents met the train, observed that the defendant fully answered the description, and arrested him. The Court held that the corroboration of part of the informer's tip established probable cause to support the arrest. A case involving a search warrant, *Jones v. United States*,[110] apparently utilized a test of considering the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit also set forth the reliability of the informer and sufficient detail to indicate that the tip was based on the in-

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[106] Byars v. United States, 273 U.S. 28 (1927) (affiant stated he "has good reason to believe and does believe" that defendant has contraband materials in his possession); Giordenello v. United States, 357 U.S. 480 (1958) (complainant merely stated his conclusion that defendant had committed a crime). *See also* Nathanson v. United States, 290 U.S. 41 (1933).

[107] 380 U.S. 102 (1965).

[108] Id. at 109.

[109] 358 U.S. 307 (1959). For another case applying essentially the same probable cause standard to warrantless arrests as govern arrests by warrant, *see* McCray v. Illinois, 386 U.S. 300 (1967) (informant's statement to arresting officers met *Aguilar* probable cause standard). *See also* Whitely v. Warden, 401 U.S. 560, 566 (1971) (standards must be "at least as stringent" for warrantless arrest as for obtaining warrant).

[110] 362 U.S. 257 (1960).

formant's personal observation. *Aguilar v. Texas* [111] held insufficient an affidavit which merely asserted that the police had "reliable information from a credible person" that narcotics were in a certain place, and held that when the affiant relies on an informant's tip he must present two types of evidence to the magistrate. First, the affidavit must indicate the informant's basis of knowledge—the circumstances from which the informant concluded that evidence was present or that crimes had been committed—and, second, the affiant must present information which would permit the magistrate to decide whether or not the informant was trustworthy. Then, in *Spinelli v. United States*, [112] the Court applied *Aguilar* in a situation in which the affidavit contained both an informant's tip and police information of a corroborating nature.

The Court rejected the "totality" test derived from *Jones* and held that the informant's tip and the corroborating evidence must be separately considered. The tip was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informant's credibility. The corroborating evidence was rejected as insufficient because it did not establish any element of criminality but merely related to details which were innocent in themselves. No additional corroborating weight was due as a result of the bald police assertion that defendant was a known gambler, although the tip related to gambling. Returning to the totality test, however, the Court in *United States v. Harris* [113] approved a warrant issued largely on an informer's tip that over a two-year period he had purchased illegal whiskey from the defendant at the defendant's residence, most recently within two weeks of the tip. The affidavit contained rather detailed information about the concealment of the whiskey, and asserted that the informer was a "prudent person," that defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous four years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informer had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable, and that the supporting

[111] 378 U.S. 108 (1964).

[112] 393 U.S. 410 (1969). Both concurring and dissenting Justices recognized tension between *Draper* and *Aguilar*. *See* id. at 423 (Justice White concurring), id. at 429 (Justice Black dissenting and advocating the overruling of *Aguilar*).

[113] 403 U.S. 573 (1971). *See also* Adams v. Williams , 407 U.S. 143, 147 (1972) (approving warrantless stop of motorist based on informant's tip that "may have been insufficient" under *Aguilar* and *Spinelli* as basis for warrant).

evidence, including defendant's reputation, could supplement this determination.

The Court expressly abandoned the two-part *Aguilar-Spinelli* test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip in *Illinois v. Gates*.[114] The main defect of the two-part test, Justice Rehnquist concluded for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."[115] In evaluating probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[116]

***Particularity***.—"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[117] This requirement thus acts to limit the scope of the search, inasmuch as the executing officers should be limited to looking in places where the described object could be expected to be found.[118]

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[114] 462 U.S. 213 (1983) (Justice Rehnquist's opinion of the Court was joined by Chief Justice Burger and by Justices Blackmun, Powell, and O'Connor. Justices Brennan, Marshall, and Stevens dissented.

[115] 462 U.S. at 213.

[116] 462 U.S. at 238.

[117] Marron v. United States, 275 U.S. 192, 196 (1927). *See* Stanford v. Texas, 379 U.S. 476 (1965). Of course, police who are lawfully on the premises pursuant to a warrant may seize evidence of crime in "plain view" even if that evidence is not described in the warrant. Coolidge v. New Hampshire, 403, U.S. 443, 464-71 (1971).

[118] "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen v. United States*, 353 U.S. 346 (1957); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-58 (1931); *see United States v. Di Re*, 332 U.S. 581, 586-87 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas concurring); *see, e.g.*, *Preston v. United States*, 376 U.S. 364, 367-68 (1964); *Agnello v. United States*, 296 U.S. 20, 30-31 (1925)." Terry v. Ohio, 392 U.S. 1, 18-19, (1968). *See also* Andresen v. Maryland, 427 U.S. 463, 470-82 (1976), and id. at 484, 492-93 (Justice Brennan dissenting). In Stanley v. Georgia, 394 U.S. 557, 569 (1969), Justices Stewart, Brennan, and White would have based decision on the principle that a valid warrant for gambling paraphernalia did not authorize police upon discovering motion picture films in the course of the search to project the films to learn their contents.

***First Amendment Bearing on Probable Cause and Particularity***.—Where the warrant process is used to authorize seizure of books and other items entitled either to First Amendment protection or to First Amendment consideration, the Court has required government to observe more exacting standards than in other cases.[119] Seizure of materials arguably protected by the First Amendment is a form of prior restraint that requires strict observance of the Fourth Amendment. At a minimum, a warrant is required, and additional safeguards may be required for large-scale seizures. Thus, in *Marcus v. Search Warrant*,[120] the seizure of 11,000 copies of 280 publications pursuant to warrant issued *ex parte* by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate, and it was further noted that police "were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity."[121] A state procedure which was designed to comply with *Marcus* by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant was nonetheless found inadequate by a plurality of the Court, which concluded that "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [appellant] was not afforded a hearing on the question of the obscenity even of the seven novels [seven of 59 listed titles were reviewed by the magistrate] before the warrant issued, the procedure was . . . constitutionally deficient."[122] Confusion remains, however, about the necessity for and the character of prior adversary hearings on the issue of obscenity. In a later decision the Court held that, with adequate safeguards, no pre-seizure adversary hearing on the issue of obscenity is required if the film is seized not for the purpose of destruction as contraband (the purpose in *Marcus* and *A Quantity of Books*), but instead to preserve a copy for evidence.[123] It is constitutionally permissible to seize a copy of a film pursuant to a warrant as long as there is a prompt post-seizure adversary hearing on the obscenity issue. Until there is a judicial determination of obscenity, the Court advised, the film may continue to be exhibited; if no other

[119] Marcus v. Search Warrant, 367 U.S. 717, 730-31 (1961); Stanford v. Texas, 379 U.S. 476, 485 (1965).

[120] 367 U.S. 717 (1961). *See* Kingsley Books v. Brown, 354 U.S. 436 (1957).

[121] Marcus v. Search Warrant, 367 U.S. 717, 732 (1961).

[122] A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964).

[123] Heller v. New York, 413 U.S. 483 (1973).

copy is available either a copy of it must be made from the seized film or the film itself must be returned.[124]

The seizure of a film without the authority of a constitutionally sufficient warrant is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself.[125] Nor may a warrant issue based "solely on the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer's conclusions."[126] Instead, a warrant must be "supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'"[127] This does not mean, however, that a higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in *Roaden* to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate . . . ."[128]

In *Stanford v. Texas*,[129] a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant which merely authorized the seizure of books, pamphlets, and other written instruments "concerning the Communist Party of Texas" was voided. "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms."[130]

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the

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[124] Id. at 492-93. *But cf.* New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986), rejecting the defendant's assertion, based on Heller, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.

[125] Roaden v. Kentucky, 413 U.S. 496 (1973). *See also* Lo-Ji Sales v. New York, 442 U.S. 319 (1979); Walter v. United States, 447 U.S. 649 (1980). These special constraints are inapplicable when obscene materials are purchased, and there is consequently no Fourth Amendment search or seizure. Maryland v. Macon, 472 U.S. 463 (1985).

[126] Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (per curiam).

[127] New York v. P.J. Video, Inc., 475 U.S. 868, 873-74 (1986) (quoting Marcus v. Search Warrant, 367 U.S. 717, 732 (1961)).

[128] New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986).

[129] 379 U.S. 476 (1965).

[130] Id. at 485-86. *See also* Marcus v. Search Warrant, 367 U.S. 717, 723 (1961).

Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search.[131]

***Property Subject to Seizure***.—There has never been any doubt that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime.[132] But in *Gouled v. United States*,[133] a unanimous Court limited the classes of property subject to seizures to these three and refused to permit a seizure of "mere evidence," in this instance defendant's papers which were to be used as evidence against him at trial. The Court recognized that there was "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure,"[134] but their character as evidence rendered them immune. This immunity "was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals."[135] More evaded than followed, the "mere evidence" rule was overturned in 1967.[136] It is now settled that such evidentiary items as fingerprints,[137] blood,[138] urine

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[131] Zurcher v. Stanford Daily, 436 U.S. 547 (1978). *See* id. at 566 (containing suggestion mentioned in text), and id. at 566 (Justice Powell concurring) (more expressly adopting that position). In the Privacy Protection Act, Pub. L. No. 96-440, 94 Stat. 1879 (1980), 42 U.S.C. § 2000aa, Congress provided extensive protection against searches and seizures not only of the news media and news people but also of others engaged in disseminating communications to the public, unless there is probable cause to believe the person protecting the materials has committed or is committing the crime to which the materials relate.

[132] United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932). Of course, evidence seizable under warrant is subject to seizure without a warrant in circumstances in which warrantless searches are justified.

[133] 255 U.S. 298 (1921). United States v. Lefkowitz, 285 U.S. 452 (1932), applied the rule in a warrantless search of premises. The rule apparently never applied in case of a search of the person. *Cf.* Schmerber v. California, 384 U.S. 757 (1966).

[134] Gouled v. United States, 255 U.S. 298, 306 (1921).

[135] Warden v. Hayden, 387 U.S. 294, 303 (1967). *See* Gouled v. United States, 255 U.S. 298, 309 (1921). The holding was derived from dicta in Boyd v. United States, 116 U.S. 616, 624-29 (1886).

[136] Warden v. Hayden, 387 U.S. 294 (1967). Justice Douglas dissented, wishing to retain the rule, id. at 312, and Justice Fortas with Chief Justice Warren concurred in the result while apparently wishing to retain the rule in warrant cases. Id. at 310, 312.

[137] Davis v. Mississippi, 394 U.S. 721 (1969).

[138] Schmerber v. California, 384 U.S. 757 (1966). Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless blood testing for drug use by railroad employee involved in accident).

samples,[139] fingernail and skin scrapings,[140] voice and handwriting exemplars,[141] conversations,[142] and other demonstrative evidence may be obtained through the warrant process or without a warrant if "special needs" of government are shown.[143]

However, some medically assisted bodily intrusions have been held impermissible, e.g., forcible administration of an emetic to induce vomiting,[144] and surgery under general anesthetic to remove a bullet lodged in a suspect's chest.[145] Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case.[146]

In *Warden v. Hayden*,[147] Justice Brennan for the Court cautioned that the items there seized were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." This merging of Fourth and Fifth Amendment considerations derived from *Boyd v. United States*,[148] the first case in which the Supreme Court considered at length the meaning of the

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[139] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless drug testing of railroad employee involved in accident).

[140] Cupp v. Murphy, 412 U.S. 291 (1973) (sustaining warrantless taking of scrapings from defendant's fingernails at the stationhouse, on the basis that it was a very limited intrusion and necessary to preserve evanescent evidence).

[141] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973) (both sustaining grand jury subpoenas to produce voice and handwriting exemplars; no reasonable expectation of privacy with respect to those items).

[142] Berger v. New York, 388 U.S. 41, 44 n.2 (1967). *See also* id. at 97 n.4, 107-08 (Justices Harlan and White concurring), 67 (Justice Douglas concurring).

[143] Another important result of *Warden v. Hayden* is that third parties not suspected of culpability in crime are subject to the issuance and execution of warrants for searches and seizures of evidence. Zurcher v. Stanford Daily, 436 U.S. 547, 553-60 (1978). Justice Stevens argued for a stiffer standard for issuance of warrants to nonsuspects, requiring in order to invade their privacy a showing that they would not comply with a less intrusive method, such as a subpoena. Id. at 577 (dissenting).

[144] Rochin v. California, 342 U.S. 165 (1952).

[145] Winston v. Lee, 470 U.S. 753 (1985).

[146] Winston v. Lee, 470 U.S. 753, 761-63 (1985). Chief Justice Burger concurred on the basis of his reading of the Court's opinion "as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." Id. at 767. *Cf.* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[147] 387 U.S. 294, 302-03 (1967). Seizure of a diary was at issue in Hill v. California, 401 U.S. 797, 805 (1971), but it had not been raised in the state courts and was deemed waived.

[148] 116 U.S. 616 (1886).

Fourth Amendment. *Boyd* was a quasi-criminal proceeding for the forfeiture of goods alleged to have been imported in violation of law, and concerned a statute which authorized court orders to require defendants to produce any document which might "tend to prove any allegation made by the United States."[149] That there was a self-incrimination problem the entire Court was in agreement, but Justice Bradley for a majority of the Justices also utilized the Fourth Amendment.

While the statute did not authorize a search but instead compulsory production, the Justice concluded that the law was well within the restrictions of the search and seizure clause.[150] With this point established, the Justice relied on Lord Camden's opinion in *Entick v. Carrington*[151] for the proposition that seizure of items to be used as evidence only was impermissible. Justice Bradley announced that the "essence of the offence" committed by the Government against Boyd "is not the breaking of his doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."[152]

While it may be doubtful that the equation of search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation,[153] the present analysis of the Court dispenses with any theory of "convergence" of the two Amendments.[154] Thus, in *Andresen v. Maryland*,[155] police executed a warrant to search defendant's offices for specified documents pertaining to a fraudulent sale of land, and the Court sustained the admission of the papers discovered as evidence at his trial. The Fifth Amendment was inapplicable, the Court held, because there had been no compulsion of defendant to produce or to authenticate the documents.[156] As for the Fourth Amendment, inasmuch as the "business records" seized were evidence of criminal acts, they were

[149] Act of June 22, 1874, § 5, 18 Stat. 187.
[150] Boyd v. United States, 116 U.S. 616, 622 (1886).
[151] Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).
[152] Boyd v. United States, 116 U.S. 616, 630 (1886).
[153] *E.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209-09 (1946).
[154] Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391, 405-14 (1976). *Fisher* states that "the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." Id. at 408.
[155] 427 U.S. 463 (1976).
[156] Id. at 470-77.

properly seizable under the rule of *Warden v. Hayden*; the fact that they were "testimonial" in nature, records in the defendant's handwriting, was irrelevant.[157] Acknowledging that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers," the Court's response was to observe that while some "innocuous documents" would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic "seizures" of conversations, "must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy."[158]

Although *Andresen* was concerned with business records, its discussion seemed equally applicable to "personal" papers, such as diaries and letters, as to which a much greater interest in privacy most certainly exists. The question of the propriety of seizure of such papers continues to be the subject of reservation in opinions,[159] but it is far from clear that the Court would accept any such exception should the issue be presented.[160]

***Execution of Warrants***.—The Fourth Amendment's "general touchstone of reasonableness . . . governs the method of execution of the warrant."[161] Until recently, however, most such issues have been dealt with by statute and rule.[162] It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance,[163] and until recently this has been a statutory requirement in the federal system[164] and generally in the States. In *Ker v. California*,[165] the Court considered the rule of announce-

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[157] Id. at 478-84.

[158] Id. at 482 n.11. Minimization, as required under federal law, has not proved to be a significant limitation. Scott v. United States, 425 U.S. 917 (1976).

[159] *E.g.*, United States v. Miller, 425 U.S. 435, 440, 444 (1976); Fisher v. United States, 425 U.S. 391, 401 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) (Justice Powell concurring).

[160] *See*, Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments* 90 HARV. L. REV. 945 (1977).

[161] United States v. Ramirez, 523 U.S. 65, 71 (1998).

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

[163] Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).

[164] 18 U.S.C. § 3109. *See* Miller v. United States, 357 U.S. 301 (1958); Wong Sun v. United States, 371 U.S. 471 (1963).

[165] 374 U.S. 23 (1963). *Ker* was an arrest warrant case, but no reason appears for differentiating search warrants. Eight Justices agreed that federal standards should govern and that the rule of announcement was of constitutional stature, but they divided 4-to-4 whether entry in this case had been pursuant to a valid excep-

ment as a constitutional requirement, although a majority there found circumstances justifying entry without announcement. In *Wilson v. Arkansas*,[166] the Court determined that the common law "knock and announce" rule is an element of the Fourth Amendment reasonableness inquiry. The rule is merely a presumption, however, that yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. The test, articulated two years later in *Richards v. Wisconsin*,[167] is whether police have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime." In *Richards*, the Court held that there is no blanket exception to the rule whenever officers are executing a search warrant in a felony drug investigation; instead, a case-by-case analysis is required to determine whether no-knock entry is justified under the circumstances.[168] Recent federal laws providing for the issuance of warrants authorizing in certain circumstances "no-knock" entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement.[169] A statute regulating the expiration of a warrant and issuance of another "should be liberally construed in favor of the individual."[170] Similarly, inasmuch as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause.[171]

Because police actions in execution of a warrant must be related to the objectives of the authorized intrusion, and because privacy of the home lies at the core of the Fourth Amendment, police officers violate the Amendment by bringing members of the media or other third parties into a home during execution of a warrant

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tion. Justice Harlan who had dissented from the federal standards issue joined the four finding a justifiable exception to carry the result.

[166] 514 U.S. 927 (1995).

[167] 520 U.S. 385, 394 (1997).

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

[169] In narcotics cases, magistrates are authorized to issue "no-knock" warrants if they find there is probable cause to believe (1) the property sought may, and if notice is given, will be easily and quickly destroyed or (2) giving notice will endanger the life or safety of the executing officer or another person. 21 U.S.C. § 879(b). *See also* D.C. Code, § 23-591.

[170] Sgro v. United States, 287 U.S. 206 (1932).

[171] Id.

if presence of those persons was not in aid of execution of the warrant.[172] In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically search someone else found on the premises.[173] If they can articulate some reasonable basis for fearing for their safety they may conduct a "patdown" of the person, but in order to search they must have probable cause particularized with respect to that person. However, in *Michigan v. Summers*,[174] the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. The Court determined that such a detention, which was "substantially less intrusive" than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found.[175] Also, under some circumstances officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant.[176]

Although for purposes of execution, as for many other matters, there is little difference between search warrants and arrest warrants, one notable difference is that the possession of a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises.[177]

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

[173] Ybarra v. Illinois, 444 U.S. 85 (1979) (patron in a bar), relying on and reaffirming United States v. Di Re, 332 U.S. 581 (1948) (occupant of vehicle may not be searched merely because there are grounds to search the automobile).

[174] 452 U.S. 692 (1981).

[175] Id. at 701-06. *Ybarra* was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. Id. at 695 n.4. By the time Summers was searched, police had probable cause to do so. Id. at 695. The warrant here was for contraband, id. at 701, and a different rule may apply with respect to warrants for other evidence.

[176] Maryland v. Garrison, 480 U.S. 79 (1987) (officers reasonably believed there was only one "third floor apartment" in city row house when in fact there were two).

[177] Steagald v. United States, 451 U.S. 204 (1981). An arrest warrant is a necessary and sufficient authority to enter a suspect's home to arrest him. Payton v. New York, 445 U.S. 573 (1980).

**Valid Searches and Seizures Without Warrants**

While the Supreme Court stresses the importance of warrants and has repeatedly referred to searches without warrants as "exceptional,"[178] it appears that the greater number of searches, as well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arraignment Procedure have noted "their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance" than searches pursuant to warrants. "[T]he evidence on hand . . . compel[s] the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws."[179] Nevertheless, the Court frequently asserts that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions.'"[180] The exceptions are said to be "jealously and carefully drawn,"[181] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."[182] While the record does indicate an effort to categorize the exceptions, the number and breadth of those exceptions have been growing.

***Detention Short of Arrest: Stop-and-Frisk***.—Arrests are subject to the requirements of the Fourth Amendment, but the courts have followed the common law in upholding the right of police officers to take a person into custody without a warrant if they have probable cause to believe that the person to be arrested has committed a felony or a misdemeanor in their presence.[183] The probable cause is, of course, the same standard required to be met

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[178] *E.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948); McDonald v. United States, 335 U.S. 451, 453 (1948); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-53, 355 (1977).

[179] American Law Institute, A Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3 (Philadelphia: 1970), xix.

[180] Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-53, 358 (1977).

[181] Jones v. United States, 357 U.S. 493, 499 (1958).

[182] McDonald v. United States, 335 U.S. 451, 456 (1948). In general, with regard to exceptions to the warrant clause, conduct must be tested by the reasonableness standard enunciated by the first clause of the Amendment, Terry v. Ohio, 392 U.S. 1, 20 (1968). The Court's development of its privacy expectation tests, discussed under "The Interest Protected," supra, substantially changed the content of that standard.

[183] United States v. Watson, 423 U.S. 411 (1976).

in the issuance of an arrest warrant, and must be satisfied by conditions existing prior to the policeman's stop, what is discovered thereafter not sufficing to establish retroactively reasonable cause.[184] There are, however, instances when a policeman's suspicions will have been aroused by someone's conduct or manner, but probable cause for placing such a person under arrest will be lacking.[185] In *Terry v. Ohio*,[186] the Court almost unanimously approved an on-the-street investigation by a police officer which involved "patting down" the subject of the investigation for weapons.

The case arose when a police officer observed three individuals engaging in conduct which appeared to him, on the basis of training and experience, to be the "casing" of a store for a likely armed robbery; upon approaching the men, identifying himself, and not receiving prompt identification, the officer seized one of the men, patted the exterior of his clothes, and discovered a gun. Chief Justice Warren for the Court wrote that the Fourth Amendment was applicable to the situation, applicable "whenever a police officer accosts an individual and restrains his freedom to walk away."[187] Since the warrant clause is necessarily and practically of no application to the type of on-the-street encounter present in *Terry*, the Chief Justice continued, the question was whether the policeman's actions were reasonable. The test of reasonableness in this sort of situation is whether the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts," would lead a neutral magistrate on review to conclude that a man of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a "frisk" was required.[188] Inasmuch as the conduct witnessed by the policeman reasonably led him to believe that an armed robbery was in prospect, he was as reasonably led to believe that the men were armed and probably dangerous and that his safety required a "frisk." Because the object of the "frisk" is the discovery of dangerous weapons, "it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[189] In a later case, the Court held that

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[184] Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10, 16-17 (1948); Sibron v. New York, 392 U.S. 40, 62-63 (1968).

[185] "The police may not arrest upon mere suspicion but only on 'probable cause.'" Mallory v. United States, 354 U.S. 449, 454 (1957).

[186] 392 U.S. 1 (1968). Only Justice Douglas dissented. Id. at 35.

[187] Id. at 16. *See* id. at 16-20.

[188] Id. at 20, 21, 22.

[189] Id. at 23-27, 29. *See also* Sibron v. New York, 392 U.S. 40 (1968) (after policeman observed defendant speak with several known narcotics addicts, he approached him and placed his hand in defendant's pocket, thus discovering narcotics;

an officer may seize an object if, in the course of a weapons frisk, "plain touch" reveals presence of an object that the officer has probable cause to believe is contraband, the officer may seize that object.[190] The Court viewed the situation as analogous to that covered by the "plain view" doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.[191] Also impermissible is physical manipulation, without reasonable suspicion, of a bus passenger's carry-on luggage stored in an overhead compartment.[192]

*Terry* did not pass on a host of problems, including the grounds that could permissibly lead an officer to momentarily stop a person on the street or elsewhere in order to ask questions rather than frisk for weapons, the right of the stopped individual to refuse to cooperate, and the permissible response of the police to that refusal. Following that decision, the standard for stops for investigative purposes evolved into one of "reasonable suspicion of criminal activity." That test permits some stops and questioning without probable cause in order to allow police officers to explore the foundations of their suspicions.[193] While not elaborating a set of rules governing the application of the tests, the Court was initially restrictive in recognizing permissible bases for reasonable sus-

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this was impermissible because he lacked a reasonable basis for frisk and in any event his search exceeded permissible scope of a weapons frisk); Adams v. Williams, 407 U.S. 143 (1972) (stop and frisk based on informer's tip that defendant was sitting in parked car with narcotics and gun at waist); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (after validly stopping car, officer required defendant to get out of car, observed bulge under his jacket, and frisked him and seized weapon; while officer did not suspect driver of crime or have an articulable basis for safety fears, safety considerations justified his requiring driver to leave car). Maryland v. Wilson, 519 U.S. 408, 413 (1997) (after validly stopping car, officer may order passengers as well as driver out of car; "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger").

[190] Minnesota v. Dickerson, 508 U.S. 366 (1993).

[191] 508 U.S. at 375, 378-79. In *Dickerson* the Court held that seizure of a small plastic container that the officer felt in the suspect's pocket was not justified; the officer should not have continued the search, manipulating the container with his fingers, after determining that no weapon was present.

[192] Bond v. United States, 529 U.S. 334 (2000) (bus passenger has reasonable expectation that, while other passengers might handle his bag in order to make room for their own, they will not "feel the bag in an exploratory manner").

[193] In United States v. Cortez, 449 U.S. 411 (1981), a unanimous Court attempted to capture the "elusive concept" of the basis for permitting a stop. Officers must have "articulable reasons" or "founded suspicions," derived from the totality of the circumstances. "Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. at 417-18. The inquiry is thus quite fact-specific. In the anonymous tip context, the same basic approach requiring some corroboration applies regardless of whether the standard is probable cause or reasonable suspicion; the difference is that less information, or less reliable information, can satisfy the lower standard. Alabama v. White, 496 U.S. 325 (1990).

picion.[194] Extensive instrusions on individual privacy, e.g., transportation to the stationhouse for interrogation and fingerprinting, were invalidated in the absence of probable cause,[195] although the Court has held that an uncorroborated, anonymous tip is insufficient basis for a *Terry* stop, and that there is no "firearms" exception to the reasonable suspicion requirement.[196] More recently, however, the Court has taken less restrictive approaches.[197]

It took the Court some time to settle on a test for when a "seizure" has occurred, and the Court has recently modified its approach. The issue is of some importance, since it is at this point that Fourth Amendment protections take hold. The *Terry* Court recognized in dictum that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," and suggested that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[198] Years later Justice Stewart proposed a similar standard, that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[199] This reasonable perception standard was subsequently endorsed by a majority of Justices,[200] and was applied in several cases in which admissibility of evidence turned on whether a seizure of the person not justified by probable cause or reasonable suspicion had occurred prior to the uncovering of the evidence.

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[194] *E.g.*, Brown v. Texas, 443 U.S. 47 (1979) (individual's presence in high crime area gave officer no articulable basis to suspect him of crime); Delaware v. Prouse, 440 U.S. 648 (1979) (reasonable suspicion of a license or registration violation is necessary to authorize automobile stop; random stops impermissible); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (officers could not justify random automobile stop solely on basis of Mexican appearance of occupants); Reid v. Georgia, 448 U.S. 438 (1980) (no reasonable suspicion for airport stop based on appearance that suspect and another passenger were trying to conceal the fact that they were travelling together). *But cf.* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (halting vehicles at fixed checkpoints to question occupants as to citizenship and immigration status permissible, even if officers should act on basis of appearance of occupants).

[195] Davis v. Mississippi, 394 U.S. 721 (1969); Dunaway v. New York, 442 U.S. 200 (1979). Illinois v. Wardlow, 528 U.S. 119 (2000) (unprovoked flight from high crime area upon sight of police produces "reasonable suspicion").

[196] Florida v. J.L., 529 U.S. 266 (2000) (reasonable suspicion requires that a tip be reliable in its assertion of illegality, not merely in its identification of someone).

[197] *See, e.g.*, United States v. Hensley, 469 U.S. 221 (1985) (reasonable suspicion to stop a motorist may be based on a "wanted flyer" as long as issuance of the flyer has been based on reasonable suspicion); United States v. Sokolow, 490 U.S. 1, 9 (1989) (airport stop based on drug courier profile may rely on a combination of factors that individually may be "quite consistent with innocent travel").

[198] 392 U.S. at 19, n.16.

[199] United States v. Mendenhall, 446 U.S. 544, 554 (1980).

[200] *See, e.g.*, Florida v. Royer, 460 U.S. 491 (1983), in which there was no opinion of the Court, but in which the test was used by the plurality of four, id. at 502, and also endorsed by dissenting Justice Blackmun, id. at 514.

No seizure occurred, for example, when INS agents seeking to identify illegal aliens conducted workforce surveys within a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees.[201] This brief questioning, even with blocked exits, amounted to "classic consensual encounters rather than Fourth Amendment seizures."[202] The Court also ruled that no seizure had occurred when police in a squad car drove alongside a suspect who had turned and run down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, display of a weapon, or blocking of the suspect's path), the Court concluded, the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [one's] freedom of movement."[203]

Soon thereafter, however, the Court departed from the *Mendenhall* reasonable perception standard and adopted a more formalistic approach, holding that an actual chase with evident intent to capture did not amount to a "seizure" because the suspect did not comply with the officer's order to halt. *Mendenhall*, said the Court in *California v. Hodari D.*, stated a "necessary" but not a "sufficient" condition for a seizure of the person through show of authority.[204] A Fourth Amendment "seizure" of the person, the Court determined, is the same as a common law arrest; there must be either application of physical force (or the laying on of hands), or submission to the assertion of authority.[205] Indications are, however, that *Hodari D.* does not signal the end of the reasonable perception standard, but merely carves an exception applicable to chases and perhaps other encounters between suspects and police.

Later in the same term the Court ruled that the *Mendenhall* "free-to-leave" inquiry was misplaced in the context of a police sweep of a bus, but that a modified reasonable perception approach still governed.[206] In conducting a bus sweep, aimed at detecting illegal drugs and their couriers, police officers typically board a bus during a stopover at a terminal and ask to inspect tickets, identification, and sometimes luggage of selected passengers. The Court did not focus on whether an "arrest" had taken place,

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[201] INS v. Delgado, 466 U.S. 210 (1984).

[202] Id. at 221.

[203] Michigan v. Chesternut, 486 U.S. 567, 575 (1988)

[204] 499 U.S. 621, 628 (1991). As in *Michigan v. Chesternut*, supra, the suspect dropped incriminating evidence while being chased.

[205] Adherence to this approach would effectively nullify the Court's earlier position that Fourth Amendment protections extend to "seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), *quoted in* INS v. Delgado, 466 U.S. 210, 215 (1984).

[206] Florida v. Bostick, 501 U.S. 429 (1991).

as adherence to the *Hodari D.* approach would have required, but instead suggested that the appropriate inquiry is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." [207] "When the person is seated on a bus and has no desire to leave," the Court explained, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." [208]

A *Terry* search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses "a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons." [209] How lengthy a *Terry* detention may be varies with the circumstances. In approving a 20-minute detention of a driver made necessary by the driver's own evasion of drug agents and a state police decision to hold the driver until the agents could arrive on the scene, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." [210]

Similar principles govern detention of luggage at airports in order to detect the presence of drugs; *Terry* "limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause." [211] The general rule is that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* . . . would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided

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[207] Id. at 2387.

[208] Id. The Court asserted that the case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS 'survey' at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct—i.e., by his being a passenger on a bus." Id.

[209] Michigan v. Long, 463 U.S. 1032 (1983) (suspect appeared to be under the influence of drugs, officer spied hunting knife exposed on floor of front seat and searched remainder of passenger compartment). Similar reasoning has been applied to uphold a "protective sweep" of a home in which an arrest is made if arresting officers have a reasonable belief that the area swept may harbor another individual posing a danger to the officers or to others. Maryland v. Buie, 494 U.S. 325 (1990).

[210] United States v. Sharpe, 470 U.S. 675, 686 (1985). A more relaxed standard has been applied to detention of travelers at the border, the Court testing the reasonableness in terms of "the period of time necessary to either verify or dispel the suspicion." United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (approving warrantless detention for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[211] United States v. Place, 462 U.S. 696, 709 (1983).

that the investigative detention is properly limited in scope."[212] Seizure of luggage for an expeditious "canine sniff" by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure results in "limited disclosure," impinges only slightly on a traveler's privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment.[213] By contrast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible *Terry* investigative stop and amounted to an invalid arrest.[214] But the same requirements for brevity of detention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a 24-hour detention of a traveler suspected of smuggling drugs in her alimentary canal.[215]

***Search Incident to Arrest***.—The common-law rule permitting searches of the person of an arrestee as an incident to the arrest has occasioned little controversy in the Court.[216] The dispute has centered around the scope of the search. Since it was the stated general rule that the scope of a warrantless search must be strictly tied to and justified by the circumstances which rendered its justification permissible, and since it was the rule that the justification of a search of the arrestee was to prevent destruction of evidence and to prevent access to a weapon,[217] it was argued to the court that a search of the person of the defendant arrested for a traffic offense, which discovered heroin in a crumpled cigarette package, was impermissible, inasmuch as there could have been no destructible evidence relating to the offense for which he was arrested and no weapon could have been concealed in the cigarette package. The Court rejected this argument, ruling that "no addi-

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[212] Id. at 706.

[213] 462 U.S. at 707. However, the search in *Place* was not expeditious, and hence exceeded Fourth Amendment bounds, when agents took 90 minutes to transport luggage to another airport for administration of the canine sniff.

[214] Florida v. Royer, 460 U.S. 491 (1983). On this much the plurality opinion of Justice White (id. at 503), joined by three other Justices, and the concurring opinion of Justice Brennan (id. at 509) were in agreement.

[215] United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[216] Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925).

[217] Terry v. Ohio, 392 U.S. 1, 19 (1968); Chimel v. California, 395 U.S. 752, 762, 763 (1969).

tional justification" is required for a custodial arrest of a suspect based on probable cause.[218]

However, the Justices have long found themselves embroiled in argument about the scope of the search incident to arrest as it extends beyond the person to the area in which the person is arrested, most commonly either his premises or his vehicle. Certain early cases went both ways on the basis of some fine distinctions,[219] but in *Harris v. United States*,[220] the Court approved a search of a four-room apartment pursuant to an arrest under warrant for one crime and in which the search turned up evidence of another crime. A year later, in *Trupiano v. United States*,[221] a raid on a distillery resulted in the arrest of a man found on the premises and a seizure of the equipment; the Court reversed the conviction because the officers had had time to obtain a search warrant and had not done so. "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest."[222] This decision was overruled in *United States v. Rabinowitz*,[223] in which officers arrested defendant in his one-room office pursuant to an arrest warrant and proceeded to search the room completely. The Court observed that the issue was not whether the officers had the time and opportunity to obtain a search warrant but whether the search incident to arrest was reasonable. Though *Rabinowitz* referred to searches of the area within the arrestee's "immediate control,"[224] it provided no standard by which this area was to be determined, and extensive searches were permitted under the rule.[225]

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[218] United States v. Robinson, 414 U.S. 218, 235 (1973). *See also* id. at 237-38 (Justice Powell concurring). The Court applied the same rule in Gustafson v. Florida, 414 U.S. 260 (1973), involving a search of a motorist's person following his custodial arrest for an offense for which a citation would normally have issued. Unlike the situation in *Robinson*, police regulations did not require the *Gustafson* officer to take the suspect into custody, nor did a departmental policy guide the officer as to when to conduct a full search. The Court found these differences inconsequential, and left for another day the problem of pretextual arrests in order to obtain basis to search. Soon thereafter, the Court upheld conduct of a similar search at the place of detention, even after a time lapse between the arrest and search. United States v. Edwards, 415 U.S. 800 (1974).

[219] *Compare* Marron v. United States, 275 U.S. 192 (1927), *with* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), *and* United States v. Lefkowitz, 285 U.S. 452 (1932).

[220] 331 U.S. 145 (1947).

[221] 334 U.S. 699 (1948).

[222] Id. at 708.

[223] 339 U.S. 56 (1950).

[224] Id. at 64.

[225] *Cf.* Chimel v. California, 395 U.S. 752, 764-65 & n.10 (1969). But in Kremen v. United States, 353 U.S. 346 (1957), the Court held that the seizure of the entire

In *Chimel v. California*,[226] however, a narrower view was asserted, the primacy of warrants was again emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertained was set out. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of someone who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."[227]

Although the viability of *Chimel* had been in doubt for some time as the Court refined and applied its analysis of reasonable and justifiable expectations of privacy,[228] it has in some but not all contexts survived the changed rationale. Thus, in *Mincey v. Arizona*,[229] the Court rejected a state effort to create a "homicide-

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contents of a house and the removal to F.B.I. offices 200 miles away for examination, pursuant to an arrest under warrant of one of the persons found in the house, was unreasonable. In decisions contemporaneous to and subsequent to *Chimel*, applying pre- *Chimel standards because that case was not retroactive, Williams v. United States, 401 U.S. 646 (1971), the Court has applied Rabinowitz* somewhat restrictively. *See* Von Cleef v. New Jersey, 395 U.S. 814 (1969), which followed *Kremen*; Shipley v. California, 395 U.S. 818 (1969), and Vale v. Louisiana, 399 U.S. 30 (1970) (both involving arrests outside the house with subsequent searches of the house); Coolidge v. New Hampshire, 403 U.S. 443, 455-57 (1971). Substantially extensive searches were, however, approved in Williams v. United States, 401 U.S. 646 (1971), and Hill v. California, 401 U.S. 797 (1971).

[226] 395 U.S. 752 (1969).

[227] Id. at 762-63.

[228] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 492, 493, 510 (1971), in which the four dissenters advocated the reasonableness argument rejected in Chimel.

[229] 437 U.S. 385, 390-91 (1978) Accord, Flippo v. West Virginia, 528 U.S. 11 (1999) (per curiam).

scene" exception for a warrantless search of an entire apartment extending over four days. The occupant had been arrested and removed and it was true, the Court observed, that a person legally taken into custody has a lessened right of privacy in his person, but he does not have a lessened right of privacy in his entire house. And, in *United States v. Chadwick*,[230] emphasizing a person's reasonable expectation of privacy in his luggage or other baggage, the Court held that, once police have arrested and immobilized a suspect, validly seized bags are not subject to search without a warrant.[231] Police may, however, in the course of jailing an arrested suspect conduct an inventory search of the individual's personal effects, including the contents of a shoulder bag, since "the scope of a station-house search may in some circumstances be even greater than those supporting a search immediately following arrest."[232]

Still purporting to reaffirm *Chimel*, the Court in *New York v. Belton*[233] held that police officers who had made a valid arrest of the occupant of a vehicle could make a contemporaneous search of the entire passenger compartment of the automobile, including containers found therein. Believing that a fairly simple rule understandable to authorities in the field was desirable, the Court ruled "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"[234]

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[230] 433 U.S. 1 (1977). Defendant and his luggage, a footlocker, had been removed to the police station, where the search took place.

[231] If, on the other hand, a sealed shipping container had already been opened and resealed during a valid customs inspection, and officers had maintained surveillance through a "controlled delivery" to the suspect, there is no reasonable expectation of privacy in the contents of the container and officers may search it, upon the arrest of the suspect, without having obtained a warrant. Illinois v. Andreas, 463 U.S. 765 (1983).

[232] Illinois v. LaFayette, 462 U.S. 640, 645 (1983) (inventory search) (following South Dakota v. Opperman, 428 U.S. 364 (1976)). Similarly, an inventory search of an impounded vehicle may include the contents of a closed container. Colorado v. Bertine, 479 U.S. 367 (1987). Inventory searches of closed containers must, however, be guided by a police policy containing standardized criteria for exercise of discretion. Florida v. Wells, 495 U.S. 1 (1990).

[233] 453 U.S. 454 (1981).

[234] Id. at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). In this particular instance, Belton had been removed from the automobile and handcuffed, but the Court wished to create a general rule removed from the fact-specific nature of any one case. "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." Id. at 460-61 n.4.

*Chimel* has, however, been qualified by another consideration. Not only may officers search areas within the arrestee's immediate control in order to alleviate any threat posed by the arrestee, but they may extend that search if there may be a threat posed by "unseen third parties in the house." A "protective sweep" of the entire premises (including an arrestee's home) may be undertaken on less than probable cause if officers have a "reasonable belief," based on "articulable facts," that the area to be swept may harbor an individual posing a danger to those on the arrest scene. [235]

***Vehicular Searches***.—In the early days of the automobile the Court created an exception for searches of vehicles, holding in *Carroll v. United States* [236] that vehicles may be searched without warrants if the officer undertaking the search has probable cause to believe that the vehicle contains contraband. The Court explained that the mobility of vehicles would allow them to be quickly moved from the jurisdiction if time were taken to obtain a warrant. [237]

Initially the Court limited *Carroll's* reach, holding impermissible the warrantless seizure of a parked automobile merely because it is movable, and indicating that vehicles may be stopped only while moving or reasonably contemporaneously with movement. [238] Also, the Court ruled that the search must be reasonably contemporaneous with the stop, so that it was not permissible to remove the vehicle to the stationhouse for a warrantless search at the convenience of the police. [239]

The Court next developed a reduced privacy rationale to supplement the mobility rationale, explaining that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." [240] "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. .

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[235] Maryland v. Buie, 494 U.S. 325, 334 (1990). This "sweep" is not to be a full-blown, "top-to-bottom" search, but only "a cursory inspection of those spaces where a person may be found." Id. at 335-36.

[236] 267 U.S. 132 (1925). *Carroll* was a Prohibition-era liquor case, whereas a great number of modern automobile cases involve drugs.

[237] Id. at 153. *See also* Husty v. United States, 282 U.S. 694 (1931); Scher v. United States, 305 U.S. 251 (1938); Brinegar v. United States, 338 U.S. 160 (1949). All of these cases involved contraband, but in Chambers v. Maroney, 399 U.S. 42 (1970), the Court, without discussion, and over Justice Harlan's dissent, id. at 55, 62, extended the rule to evidentiary searches.

[238] Coolidge v. New Hampshire, 403 U.S. 443, 458-64 (1971). This portion of the opinion had the adherence of a plurality only, Justice Harlan concurring on other grounds, and there being four dissenters. Id. at 493, 504, 510, 523.

[239] Preston v. United States, 376 U.S. 364 (1964); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[240] Arkansas v. Sanders, 442 U.S. 753, 761 (1979).

. . It travels public thoroughfares where both its occupants and its contents are in plain view.'" [241] While motor homes do serve as residences and as repositories for personal effects, and while their contents are often shielded from public view, the Court extended the automobile exception to them as well, holding that there is a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel, hence "readily mobile." [242]

The reduced expectancy concept has broadened police powers to conduct automobile searches without warrants, but they still must have probable cause to search a vehicle [243] and they may not make random stops of vehicles on the roads, but instead must base stops of individual vehicles on probable cause or some "articulable and reasonable suspicion" [244] of traffic or safety violation or some other criminal activity. [245] By contrast, fixed-checkpoint stops in the absence of any individualized suspicion have been upheld for purposes of promoting highway safety [246] or policing the international

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[241] Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion), *quoted in* United States v. Chadwick, 433 U.S. 1, 12 (1977). *See also* United States v. Ortiz, 422 U.S. 891, 896 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976); Robbins v. California, 453 U.S. 420, 424-25 (1981); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[242] California v. Carney, 471 U.S. 386, 393 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not "readily mobile").

[243] Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (roving patrols); United States v. Ortiz, 422 U.S. 891 (1975). *Cf.* Colorado v. Bannister, 449 U.S. 1 (1980). An automobile's "ready mobility [is] an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear"; there is no need to find the presence of "unforeseen circumstances" or other additional exigency. Pennsylvania v. Labron, 527 U.S. 465 (1996). *Accord*, Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam).

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

[245] An officer who observes a traffic violation may stop a vehicle even if his real motivation is to investigate for evidence of other crime. Whren v. United States, 517 U.S. 806 (1996). The existence of probable cause to believe that a traffic violation has occurred establishes the constitutional reasonableness of traffic stops regardless of the actual motivation of the officers involved, and regardless of whether it is customary police practice to stop motorists for the violation observed. Similarly, pretextual arrest of a motorist who has committed a traffic offense is permissible. Arkansas v. Sullivan, 121 S. Ct. 1876 (2001) (per curiam) (upholding search of the motorist's car for crime not related to the traffic offense).

[246] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding a sobriety checkpoint at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication).

border,[247] but not for more generalized law enforcement purposes.[248] Once police have validly stopped a vehicle, they may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a *Terry*-type protective search of those portions of the passenger compartment in which a weapon could be placed or hidden.[249] And, in the absence of such reasonable suspicion as to weapons, police may seize contraband and suspicious items "in plain view" inside the passenger compartment.[250]

Although officers who have stopped a car to issue a routine traffic citation may conduct a *Terry*-type search, even including a pat-down of driver and passengers if there is reasonable suspicion that they are armed and dangerous, they may not conduct a full-blown search of the car[251] unless they exercise their discretion to arrest the driver instead of issuing a citation.[252] And once police have probable cause to believe there is contraband in a vehicle, they may remove the vehicle from the scene to the station house in order to conduct a search, without thereby being required to obtain a warrant.[253] "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with,

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[247] United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding border patrol checkpoint, over 60 miles from the border, for questioning designed to apprehend illegal aliens).

[248] City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (vehicle checkpoint set up for the "primary purpose [of] detect[ing] evidence of ordinary criminal wrongdoing" (here interdicting illegal narcotics) does not fall within the highway safety or border patrol exception to the individualized suspicion requirement, and hence violates the Fourth Amendmentc)

[249] Michigan v. Long, 463 U.S. 1032, 1049 (1983) (holding that contraband found in the course of such a search is admissible).

[250] Texas v. Brown, 460 U.S. 730 (1983). Similarly, since there is no reasonable privacy interest in the vehicle identification number, required by law to be placed on the dashboard so as to be visible through the windshield, police may reach into the passenger compartment to remove items obscuring the number and may seize items in plain view while doing so. New York v. Class, 475 U.S. 106 (1986).

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

[252] *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (police officers, in their discretion, may arrest a motorist for a minor traffic offense rather than issuing a citation); New York v. Belton, 453 U.S. 454 (1981) (officers who arrest an occupant of a vehicle may make a contemporaneous search of the entire passenger compartment, including closed containers); and Arkansas v. Sullivan, 532 U.S. 769 (2001) (pretextual arrest of motorist who has committed a traffic offense is permissible even if purpose is to search vehicle for evidence of other crime).

[253] Michigan v. Thomas, 458 U.S. 259 (1982). The same rule applies if it is the vehicle itself that is forfeitable contraband; police, acting without a warrant, may seize the vehicle from a public place. Florida v. White, 526 U.S. 559 (1999).

during the period required for the police to obtain a warrant."[254] Because of the lessened expectation of privacy, inventory searches of impounded automobiles are justifiable in order to protect public safety and the owner's property, and any evidence of criminal activity discovered in the course of the inventories is admissible in court.[255] The Justices were evenly divided, however, on the propriety of warrantless seizure of an arrestee's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings.[256]

Police in undertaking a warrantless search of an automobile may not extend the search to the persons of the passengers therein[257] unless there is a reasonable suspicion that the passengers are armed and dangerous, in which case a *Terry* patdown is permissible.[258] But because passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passengers.[259] Luggage and other closed containers found in automobiles may also be subjected to warrantless searches based on probable cause, regardless of whether the luggage or containers belong to the driver or to a passenger, and regardless of whether it is the driver or a passenger who is under suspicion.[260] The same rule now applies whether the police have probable cause to search only the containers[261] or whether they have probable cause to search the automobile for something capable of being held in the container.[262]

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[254] Michigan v. Thomas, 458 U.S. at 261. *See also* Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White, 423 U.S. 67 (1975); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[255] Cady v. Dombrowski, 413 U.S. 433 (1973); South Dakota v. Opperman, 428 U.S. 364 (1976). *See also* Cooper v. California, 386 U.S. 58 (1967); United States v. Harris, 390 U.S. 234 (1968). Police, in conducting an inventory search of a vehicle, may open closed containers in order to inventory contents. Colorado v. Bertine, 479 U.S. 367 (1987).

[256] Cardwell v. Lewis, 417 U.S. 583 (1974). Justice Powell concurred on other grounds.

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

[258] Knowles v. Iowa, 525 U.S. 113, 118 (1998).

[259] Rakas v. Illinois, 439 U.S. 128 (1978).

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

[261] California v. Acevedo, 500 U.S. 565 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753 (1979).

[262] United States v. Ross, 456 U.S. 798 (1982). A *Ross* search of a container found in an automobile need not occur soon after its seizure. United States v. Johns, 469 U.S. 478 (1985) (three-day time lapse). *See also* Florida v. Jimeno, 500 U.S. 248

***Vessel Searches***.—Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary predicates to stops of vessels. In *United States v. Villamonte-Marquez*,[263] the Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress ,[264] and hence had "an impressive historical pedigree" carrying with it a presumption of constitutionality. Moreover, "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. "But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do."[265] Because there is a "substantial" governmental interest in enforcing documentation laws, "especially in waters where the need to deter or apprehend smugglers is great," the Court found the "limited" but not "minimal" intrusion occasioned by boarding for documentation inspection to be reasonable.[266] Dissenting Justice Brennan argued that the Court for the first time was approving "a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations

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(1991) (consent to search automobile for drugs constitutes consent to open containers within the car that might contain drugs).

[263] 462 U.S. 579 (1983). The opinion of the Court, written by Justice Rehnquist, was joined by Chief Justice Burger and by Justices White, Blackmun, Powell, and O'Connor. Justice Brennan's dissent was joined by Justice Marshall and, on mootness but not on the merits, by Justice Stevens.

[264] 19 U.S.C. § 1581(a), derived from § 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 164.

[265] 462 U.S. at 589. Justice Brennan's dissent argued that a fixed checkpoint was feasible in this case, involving a ship channel in an inland waterway. Id. at 608 n.10. The fact that the Court's rationale was geared to the difficulties of law enforcement in the open seas suggests a reluctance to make exceptions to the general rule. Note as well the Court's later reference to this case as among those "reflect[ing] longstanding concern for the protection of the integrity of the border." United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

[266] 462 U.S. at 593.

whatever on the officers' discretion or any safeguards against abuse." [267]

***Consent Searches***.—Fourth Amendment rights, like other constitutional rights, may be waived, and one may consent to search of his person or premises by officers who have not complied with the Amendment. [268] The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent [269] and awareness of the right of choice. [270] Reviewing courts must determine on the basis of the totality of the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential to the issue of voluntariness, and therefore police are not required to acquaint a person with his rights, as through a Fourth Amendment version of *Miranda* warnings. [271] But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields to these factors rather than makes his own determination to admit officers. [272] When consent is obtained through the deception of an undercover officer or an informer gaining admission without, of course, advising a suspect who he is, the Court has held that the suspect has simply assumed the risk that an invitee would betray him, and evidence obtained through the deception is admissible. [273]

Additional issues arise in determining the validity of consent to search when consent is given not by the suspect but by a third party. In the earlier cases, third party consent was deemed suffi-

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[267] 462 U.S. at 598. Justice Brennan contended that all previous cases had required some "discretion-limiting" feature such as a requirement of probable cause, reasonable suspicion, fixed checkpoints instead of roving patrols, and limitation of border searches to border areas, and that these principles set forth in Delaware v. Prouse, 440 U.S. 648 (1979) should govern. id. at 599, 601.

[268] Amos v. United States, 255 U.S. 313 (1921); Zap v. United States, 328 U.S. 624 (1946); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[269] Bumper v. North Carolina, 391 U.S. 543 (1968).

[270] Johnson v. United States, 333 U.S. 10, 13 (1948).

[271] Schneckloth v. Bustamonte, 412 U.S. 218, 231-33 (1973). Ohio v. Robinette, 519 U.S. 33 (1996) (officer need not always inform a detained motorist that he is free to go before consent to search auto may be deemed voluntary).

[272] Amos v. United States, 255 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10 (1948); Bumper v. North Carolina, 391 U.S. 543 (1968).

[273] On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); United States v. White, 401 U.S. 745 (1971). *Cf.* Osborn v. United States, 385 U.S. 323 (1966) (prior judicial approval obtained before wired informer sent into defendant's presence). Problems may be encountered by police, however, in special circumstances. *See* Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); United States v. Karo, 468 U.S. 705 (1984) (installation of beeper with consent of informer who sold container with beeper to suspect is permissible with prior judicial approval, but use of beeper to monitor private residence is not).

cient if that party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[274] Now, however, actual common authority over the premises is no longer required; it is enough if the searching officer had a reasonable but mistaken belief that the third party had common authority and could consent to the search.[275]

***Border Searches***.—"That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."[276] Authorized by the First Congress,[277] the customs search in these circumstances requires no warrant, no probable cause, not even the showing of some degree of suspicion that accompanies even investigatory stops.[278] Moreover, while prolonged detention of travelers beyond the routine customs search and inspection must be justified by the *Terry* standard of reasonable suspicion having a particularized and objective basis,[279] *Terry* protections as to the length and intrusiveness of the search do not apply.[280]

Inland stoppings and searches in areas away from the borders are a different matter altogether. Thus, in *Almeida-Sanchez v. United States*,[281] the Court held that a warrantless stop and search

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[274] United States v. Matlock, 415 U.S. 164, 171 (1974) (valid consent by woman with whom defendant was living and sharing the bedroom searched). *See also* Chapman v. United States, 365 U.S. 610 (1961) (landlord's consent insufficient); Stoner v. California, 376 U.S. 483 (1964) (hotel desk clerk lacked authority to consent to search of guest's room); Frazier v. Culp, 394 U.S. 731 (1969) (joint user of duffel bag had authority to consent to search).

[275] Illinois v. Rodriguez, 497 U.S. 177 (1990). *See also* Florida v. Jimeno, 500 U.S. 248, 251 (1991) (it was "objectively reasonable" for officer to believe that suspect's consent to search his car for narcotics included consent to search containers found within the car).

[276] United States v. Ramsey, 431 U.S. 606, 616 (1977) (sustaining search of incoming mail). *See also* Illinois v. Andreas, 463 U.S. 765 (1983) (opening by customs inspector of locked container shipped from abroad).

[277] Act of July 31, 1789, ch. 5, §§ 23, 24, 1 Stat. 43. *See* 19 U.S.C. §§ 507, 1581, 1582.

[278] Carroll v. United States, 267 U.S. 132, 154 (1925); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

[279] United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (approving warrantless detention incommunicado for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[280] Id. A traveler suspected of alimentary canal drug smuggling was strip searched, and then given a choice between an abdominal x-ray or monitored bowel movements. Because the suspect chose the latter option, the court disavowed decision as to "what level of suspicion, if any, is required for . . . strip, body cavity, or involuntary x-ray searches." Id. at 541 n.4.

[281] 413 U.S. 266 (1973). Justices White, Blackmun, Rehnquist, and Chief Justice Burger would have found the search reasonable upon the congressional determina-

of defendant's automobile on a highway some 20 miles from the border by a roving patrol lacking probable cause to believe that the vehicle contained illegal aliens violated the Fourth Amendment. Similarly, the Court invalidated an automobile search at a fixed checkpoint well removed from the border; while agreeing that a fixed checkpoint probably gave motorists less cause for alarm than did roving patrols, the Court nonetheless held that the invasion of privacy entailed in a search was just as intrusive and must be justified by a showing of probable cause or consent.[282] On the other hand, when motorists are briefly stopped, not for purposes of a search but in order that officers may inquire into their residence status, either by asking a few questions or by checking papers, different results are achieved, so long as the stops are not truly random. Roving patrols may stop vehicles for purposes of a brief inquiry, provided officers are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that an automobile contains illegal aliens; in such a case the interference with Fourth Amendment rights is "modest" and the law enforcement interests served are significant.[283] Fixed checkpoints provide additional safeguards; here officers may halt all vehicles briefly in order to question occupants even in the absence of any reasonable suspicion that the particular vehicle contains illegal aliens.[284]

***"Open Fields"***.—In *Hester v. United States*,[285] the Court held that the Fourth Amendment did not protect "open fields" and that,

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tion that searches by such roving patrols were the only effective means to police border smuggling. Id. at 285. Justice Powell, concurring, argued in favor of a general, administrative warrant authority not tied to particular vehicles, much like the type of warrant suggested for noncriminal administrative inspections of homes and commercial establishments for health and safety purposes, id. at 275, but the Court has not yet had occasion to pass on a specific case. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 547 n.2, 562 n.15 (1976).

[282] United States v. Ortiz, 422 U.S. 891 (1975).

[283] United States v. Brignoni-Ponce, 422 U.S. 873 (1975). However, stopping of defendant's car solely because the officers observed the Mexican appearance of the occupants was unjustified. Id. at 886. *Contrast* United States v. Cortez, 449 U.S. 411 (1981), where border agents did have grounds for reasonable suspicion that the vehicle they stopped contained illegal aliens.

[284] United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The Court deemed the intrusion on Fourth Amendment interests to be quite limited, even if officers acted on the basis of the Mexican appearance of the occupants in referring motorists to a secondary inspection area for questioning, whereas the elimination of the practice would deny to the Government its only practicable way to apprehend smuggled aliens and to deter the practice. Similarly, outside of the border/aliens context, the Court has upheld use of fixed "sobriety" checkpoints at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

[285] 265 U.S. 57 (1924). *See also* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 86 (1974).

therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. The Court's announcement in *Katz v. United States*[286] that the Amendment protects "people not places" cast some doubt on the vitality of the open fields principle, but all such doubts were cast away in *Oliver v. United States*.[287] Invoking *Hester*'s reliance on the literal wording of the Fourth Amendment (open fields are not "effects") and distinguishing *Katz*, the Court ruled that the open fields exception applies to fields that are fenced and posted. "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[288] Nor may an individual demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside.[289] Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from fixed-wing aircraft flying in navigable airspace.[290] Similarly, naked-eye inspection from helicopters flying even lower contravenes no reasonable expectation of privacy.[291] And aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.[292]

***'Plain View'***.—Somewhat similar in rationale is the rule that objects falling in the 'plain view' of an officer who has a right to

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[286] 389 U.S. 347, 353 (1967). *Cf.* Cady v. Dombrowski, 413 U.S. 433, 450 (1973) (citing Hester approvingly).

[287] 466 U.S. 170 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property).

[288] Id. at 178. *See also* California v. Greenwood, 486 U.S. 35 (1988) (approving warrantless search of garbage left curbside "readily accessible to animals, children, scavengers, snoops, and other members of the public").

[289] United States v. Dunn, 480 U.S. 294 (1987) (space immediately outside a barn, accessible only after crossing a series of "ranch-style" fences and situated one-half mile from the public road, constitutes unprotected "open field").

[290] California v. Ciraolo, 476 U.S. 207 (1986). Activities within the curtilage are nonetheless still entitled to some Fourth Amendment protection. The Court has described four considerations for determining whether an area falls within the curtilage: proximity to the home, whether the area is included within an enclosure also surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to shield the area from view of passersby. United States v. Dunn, 480 U.S. 294 (1987) (barn 50 yards outside fence surrounding home, used for processing chemicals, and separated from public access only by a series of livestock fences, by a chained and locked driveway, and by one-half mile's distance, is not within curtilage).

[291] Florida v. Riley, 488 U.S. 445 (1989) (view through partially open roof of greenhouse).

[292] Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (suggesting that aerial photography of the curtilage would be impermissible).

be in the position to have that view are subject to seizure without a warrant [293] or that if the officer needs a warrant or probable cause to search and seize his lawful observation will provide grounds therefor. [294] The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them. [295]

The Court has analogized from the plain view doctrine to hold that once officers have lawfully observed contraband, "the owner's privacy interest in that item is lost," and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant. [296]

***Public Schools***.—In *New Jersey v. T.L.O.*, [297] the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because "school officials act as representatives of the State, not merely as surrogates for the parents." [298] However, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." [299] Neither the warrant requirement nor the probable cause standard is appro-

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[293] Washington v. Chrisman, 455 U.S. 1 (1982) (officer lawfully in dorm room may seize marijuana seeds and pipe in open view); United States v. Santana, 427 U.S. 38 (1976) ('plain view' justification for officers to enter home to arrest after observing defendant standing in open doorway); Harris v. United States, 390 U.S. 234 (1968) (officer who opened door of impounded automobile and saw evidence in plain view properly seized it); Ker v. California, 374 U.S. 23 (1963) (officers entered premises without warrant to make arrest because of exigent circumstances seized evidence in plain sight). *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971), and id. at 510 (Justice White dissenting). Maryland v. Buie, 494 U.S. 325 (1990) (items seized in plain view during protective sweep of home incident to arrest); Texas v. Brown, 460 U.S. 730 (1983) (contraband on car seat in plain view of officer who had stopped car and asked for driver's license); New York v. Class, 475 U.S. 106 (1986) (evidence seen while looking for vehicle identification number). There is no requirement that the discovery of evidence in plain view must be 'inadvertent.' *See* Horton v. California, 496 U.S. 128 (1990) (in spite of Amendment's particularity requirement, officers with warrant to search for *proceeds* of robbery may seize *weapons* of robbery in plain view).

[294] Steele v. United States, 267 U.S. 498 (1925) (officers observed contraband in view through open doorway; had probable cause to procure warrant). *Cf.* Taylor v. United States, 286 U.S. 1 (1932) (officers observed contraband in plain view in garage, warrantless entry to seize was unconstitutional).

[295] Arizona v. Hicks, 480 U.S. 321 (1987) (police lawfully in apartment to investigate shooting lacked probable cause to inspect expensive stereo equipment to record serial numbers).

[296] Illinois v. Andreas, 463 U.S. 765, 771 (1983) (locker customs agents had opened, and which was subsequently traced). *Accord*, United States v. Jacobsen, 466 U.S. 109 (1984) (inspection of package opened by private freight carrier who notified drug agents).

[297] 469 U.S. 325 (1985).

[298] Id. at 336.

[299] Id. at 340.

priate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[300] A search must be reasonable at its inception, i.e., there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[301] School searches must also be reasonably related in scope to the circumstances justifying the interference, and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[302] In applying these rules, the Court upheld as reasonable the search of a student's purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

***Government Offices***.—Similar principles apply to a public employer's work-related search of its employees' offices, desks, or file cabinets, except that in this context the Court distinguished searches conducted for law enforcement purposes. In *O'Connor v. Ortega*,[303] a majority of Justices agreed, albeit on somewhat differing rationales, that neither a warrant nor a probable cause requirement should apply to employer searches "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct."[304] Four Justices would require a case-by-case inquiry into the reasonableness of such searches;[305] one would hold that such searches "do not violate the Fourth Amendment."[306]

***Prisons and Regulation of Probation***.—Searches of prison cells by prison administrators are not limited even by a reasonableness standard, the Court having held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[307] Thus, prison administrators may conduct random "shakedown" searches of inmates' cells without the need to adopt any established practice or plan, and inmates must

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[300] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." Id. at n.9.

[301] 469 U.S. at 342.

[302] Id.

[303] 480 U.S. 709 (1987).

[304] 480 U.S. at 725. Not at issue was whether there must be individualized suspicion for investigations of work-related misconduct.

[305] This position was stated in Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and by Justices White and Powell.

[306] 480 U.S. at 732 (Scalia, J., concurring in judgment).

[307] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

Neither a warrant nor probable cause is needed for an administrative search of a probationer's home. It is enough, the Court ruled in *Griffin v. Wisconsin*, that such a search was conducted pursuant to a valid regulation that itself satisfies the Fourth Amendment's reasonableness standard (e.g., by requiring "reasonable grounds" for a search).[308] "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."[309] "Probation, like incarceration, is a form of criminal sanction," the Court noted, and a warrant or probable cause requirement would interfere with the "ongoing [non-adversarial] supervisory relationship" required for proper functioning of the system.[310]

***Drug Testing***.—In two 1989 decisions the Court held that no warrant, probable cause, or even individualized suspicion is required for mandatory drug testing of certain classes of railroad and public employees. In each case, "special needs beyond the normal need for law enforcement" were identified as justifying the drug testing. In *Skinner v. Railway Labor Executives' Ass'n*,[311] the Court upheld regulations requiring railroads to administer blood, urine, and breath tests to employees involved in certain train accidents or violating certain safety rules; upheld in *National Treasury Employees Union v. Von Raab*[312] was a Customs Service screening program requiring urinalysis testing of employees seeking transfer or promotion to positions having direct involvement with drug interdiction, or to positions requiring the incumbent to carry firearms. The Court in *Skinner* found a "compelling" governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs "can cause great human loss before any signs of impairment become noticeable."[313] By contrast, the intrusions on privacy were termed "limited." Blood and breath tests were passed off as routine; the urine test, while more intrusive, was deemed permissible because of the "diminished expectation of privacy" in employees having some responsibility for safety in a pervasively regulated indus-

[308] 483 U.S. 868 (1987) (search based on information from police detective that there was or might be contraband in probationer's apartment).
[309] 483 U.S. at 873-74.
[310] Id. at 718, 721.
[311] 489 U.S. 602 (1989).
[312] 489 U.S. 656 (1989).
[313] 489 U.S. at 628.

try.[314] The lower court's emphasis on the limited effectiveness of the urine test (it detects past drug use but not necessarily the level of impairment) was misplaced, the Court ruled. It is enough that the test may provide some useful information for an accident investigation; in addition, the test may promote deterrence as well as detection of drug use.[315] In *Von Raab* the governmental interests underlying the Customs Service's screening program were also termed "compelling": to ensure that persons entrusted with a firearm and the possible use of deadly force not suffer from drug-induced impairment of perception and judgment, and that "front-line [drug] interdiction personnel [be] physically fit, and have unimpeachable integrity and judgment."[316] The possibly "substantial" interference with privacy interests of these Customs employees was justified, the Court concluded, because, "[u]nlike most private citizens or government employees generally, they have a diminished expectation of privacy."[317]

Emphasizing the "special needs" of the public school context, reflected in the "custodial and tutelary" power that schools exercise over students, and also noting schoolchildren's diminished expectation of privacy, the Court in *Vernonia School District v. Acton*[318] upheld a school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term "compelling" governmental interest. The phrase does not describe a "fixed, minimum quantum of governmental concern," the Court explained, but rather "describes an interest which appears *important enough* to justify the particular search at hand."[319] Applying this standard, the Court concluded that "deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen."[320] On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, "[l]egitimate privacy expectations are even less [for] student athletes, since they normally suit up, shower, and dress in locker rooms that afford no privacy,

[314] Id. at 628.
[315] Id. at 631-32.
[316] Von Raab, 489 U.S. at 670-71. Dissenting Justice Scalia discounted the "feeble justifications" relied upon by the Court, believing instead that the "only plausible explanation" for the drug testing program was the "symbolism" of a government agency setting an example for other employers to follow. 489 U.S. at 686-87.
[317] Id. at 672.
[318] 515 U.S. 646 (1995).
[319] Id. at 661.
[320] Id.

and since they voluntarily subject themselves to physical exams and other regulations above and beyond those imposed on non-athletes."[321] The Court "caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts," identifying as "the most significant element" in *Vernonia* the fact that the policy was implemented under the government's responsibilities as guardian and tutor of schoolchildren.[322]

In two more recent cases, the Court found that there were no "special needs" justifying random testing. Georgia's requirement that candidates for state office certify that they had passed a drug test, the Court ruled in *Chandler v. Miller*[323] was "symbolic" rather than "special." There was nothing in the record to indicate any actual fear or suspicion of drug use by state officials, the required certification was not well designed to detect illegal drug use, and candidates for state office, unlike the customs officers held subject to drug testing in *Von Raab*, are subject to "relentless" public scrutiny. In the second case, a city-run hospital's program for drug screening of pregnant patients suspected of cocaine use was invalidated because its purpose was to collect evidence for law enforcement.[324] In the previous three cases in which random testing had been upheld, the Court pointed out, the "special needs" asserted as justification were "divorced from the general interest in law enforcement."[325] By contrast, the screening program's focus on law enforcement brought it squarely within the Fourth Amendment's restrictions.

**Electronic Surveillance and the Fourth Amendment**

***The Olmstead Case***.—With the invention of the microphone, the telephone, and the dictograph recorder, it became possible to "eavesdrop" with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged, and in 1928 the Court reviewed convictions obtained on the basis of evidence gained through taps on telephone wires in violation of state law. On a five-to-four vote, the Court held that wiretapping was not within the confines of the Fourth Amendment.[326] Chief Justice Taft, writing the opinion of the Court, relied on two lines of argument for the conclusion. First, inasmuch as the Amendment was designed to protect one's property interest in his premises, there was no search so long as there was no physical trespass on

[321] Id. at 657.
[322] Id. at 665.
[323] 520 U.S. 305 (1997).
[324] Ferguson v. City of Charleston, 532 U.S. 67 (2001).
[325] 532 U.S. at 79.
[326] Olmstead v. United States, 277 U.S. 438 (1928).

premises owned or controlled by a defendant. Second, all the evidence obtained had been secured by hearing, and the interception of a conversation could not qualify as a seizure, for the Amendment referred only to the seizure of tangible items. Furthermore, the violation of state law did not render the evidence excludible, since the exclusionary rule operated only on evidence seized in violation of the Constitution.[327]

***Federal Communications Act***.—Six years after the decision in the *Olmstead* case, Congress enacted the Federal Communications Act and included in § 605 of the Act a broadly worded proscription on which the Court seized to place some limitation upon governmental wiretapping.[328] Thus, in *Nardone v. United States*,[329] the Court held that wiretapping by federal officers could violate § 605 if the officers both intercepted and divulged the contents of the conversation they overheard, and that testimony in court would constitute a form of prohibited divulgence. Such evidence was therefore excluded, although wiretapping was not illegal under the Court's interpretation if the information was not used outside the governmental agency. Because § 605 applied to intrastate as well as interstate transmissions,[330] there was no question

[327] Among the dissenters were Justice Holmes, who characterized "illegal" wiretapping as "dirty business," id. at 470, and Justice Brandeis, who contributed to his opinion the famous peroration about government as "the potent, the omnipresent, teacher" which "breeds contempt for law" among the people by its example. Id. at 485. More relevant here was his lengthy argument rejecting the premises of the majority, an argument which later became the law of the land. (1) "To protect [the right to be left alone], every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Id. at 478. (2) "There is, in essence, no difference between the sealed letter and the private telephone message. . . . The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject . . . may be overheard." Id. at 475-76.

[328] Ch. 652, 48 Stat. 1103 (1934), providing, inter alia, that ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person." Nothing in the legislative history indicated what Congress had in mind in including this language. The section, which appeared at 47 U.S.C. § 605, was rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803, so that the "regulation of the interception of wire or oral communications in the future is to be governed by" the provisions of Title III. S. Rep. No. 1097, 90th Cong., 2d Sess. 107-08 (1968).

[329] 302 U.S. 379 (1937). Derivative evidence, that is, evidence discovered as a result of information obtained through a wiretap, was similarly inadmissible, Nardone v. United States, 308 U.S. 338 (1939), although the testimony of witnesses might be obtained through the exploitation of wiretap information. Goldstein v. United States, 316 U.S. 114 (1942). Eavesdropping on a conversation on an extension telephone with the consent of one of the parties did not violate the statute. Rathbun v. United States, 355 U.S. 107 (1957).

[330] Weiss v. United States, 308 U.S. 321 (1939).

about the applicability of the ban to state police officers, but the Court declined to apply either the statute or the due process clause to require the exclusion of such evidence from state criminal trials.[331] State efforts to legalize wiretapping pursuant to court orders were held by the Court to be precluded by the fact that Congress in § 605 had intended to occupy the field completely to the exclusion of the States.[332]

***Nontelephonic Electronic Surveillance***.—The trespass rationale of *Olmstead* was utilized in cases dealing with "bugging" of premises rather than with tapping of telephones. Thus, in *Goldman v. United States*,[333] the Court found no Fourth Amendment violation when a listening device was placed against a party wall so that conversations were overheard on the other side. But when officers drove a "spike mike" into a party wall until it came into contact with a heating duct and thus broadcast defendant's conversations, the Court determined that the trespass brought the case within the Amendment.[334] In so holding, the Court, without alluding to the matter, overruled in effect the second rationale of *Olmstead*, the premise that conversations could not be seized.

***The Berger and Katz Cases***.—In *Berger v. New York*,[335] the Court confirmed the obsolesence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense.[336] *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded." For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. "First, . . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor

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[331] Schwartz v. Texas, 344 U.S. 199 (1952). At this time, evidence obtained in violation of the Fourth Amendment could be admitted in state courts. Wolf v. Colorado, 338 U.S. 25 (1949). Although *Wolf* was overruled by Mapp v. Ohio, 367 U.S. 643 (1961), it was some seven years later and after wiretapping itself had been made subject to the Fourth Amendment that *Schwartz* was overruled in Lee v. Florida, 392 U.S. 378 (1968).

[332] Bananti v. United States, 355 U.S. 96 (1957).

[333] 316 U.S. 129 (1942).

[334] Silverman v. United States, 365 U.S. 505 (1961). *See also* Clinton v. Virginia, 377 U.S. 158 (1964) (physical trespass found with regard to amplifying device stuck in a partition wall with a thumb tack).

[335] 388 U.S. 41 (1967).

[336] Id. at 50-53.

that the 'property' sought, the conversations, be particularly described."

"The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized. . . . Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits. . . extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the public interest.'. . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. . . . Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures."[337]

[337] Id. at 58-60. Justice Stewart concurred because he thought that the affidavits in this case had not been sufficient to show probable cause, but he thought the statute constitutional in compliance with the Fourth Amendment. Id. at 68. Justice Black dissented, arguing that the Fourth Amendment was not applicable to electronic eavesdropping but that in any event the "search" authorized by the statute was reasonable. Id. at 70. Justice Harlan dissented, arguing that the statute with its judicial gloss was in compliance with the Fourth Amendment. Id. at 89. Justice

Both Justices Black and White in dissent accused the *Berger* majority of so construing the Fourth Amendment that no wiretapping-eavesdropping statute could pass constitutional scrutiny,[338] and in *Katz v. United States*,[339] the Court in an opinion by one of the *Berger* dissenters, Justice Stewart, modified some of its language and pointed to Court approval of some types of statutorily-authorized electronic surveillance. Just as *Berger* had confirmed that one rationale of the *Olmstead* decision, the inapplicability of "seizure" to conversations, was no longer valid, *Katz* disposed of the other rationale. In the latter case, officers had affixed a listening device to the outside wall of a telephone booth regularly used by Katz and activated it each time he entered; since there had been no physical trespass into the booth, the lower courts held the Fourth Amendment not relevant. The Court disagreed, saying that "once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[340] Because the surveillance of Katz's telephone calls had not been authorized by a magistrate, it was invalid; however, the Court thought that "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place."[341] The notice requirement, which had loomed in *Berger* as

White thought both the statute and its application in this case were constitutional. Id. at 107.

[338] Id. at 71, 113.

[339] 389 U.S. 347 (1967).

[340] Id. at 353. "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." Id.

[341] Id. at 354. The "narrowly circumscribed" nature of the surveillance was made clear by the Court in the immediately preceding passage. "[The Government agents] did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself." Id. For similar emphasis upon pre-

an obstacle to successful electronic surveillance, was summarily disposed of.[342] Finally, Justice Stewart observed that it was unlikely that electronic surveillance would ever come under any of the established exceptions so that it could be conducted without prior judicial approval.[343]

Following *Katz*, Congress enacted in 1968 a comprehensive statute authorizing federal officers and permitting state officers pursuant to state legislation complying with the federal law to seek warrants for electronic surveillance to investigate violations of prescribed classes of criminal legislation.[344] The Court has not yet had occasion to pass on the federal statute and to determine whether its procedures and authorizations comport with the standards sketched in *Osborn*, *Berger*, and *Katz* or whether those standards are somewhat more flexible than they appear to be on the faces of the opinions.[345]

***Warrantless "National Security" Electronic Surveillance***.—In *Katz v. United States*,[346] Justice White sought to pre-

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cision and narrow circumscription, *see* Osborn v. United States, 385 U.S. 323, 329-30 (1966).

[342] "A conventional warrant ordinarily serves to notify the suspect of an intended search . . . . In omitting any requirement of advance notice, the federal court . . . simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." 389 U.S. at 355 n.16.

[343] Id. at 357-58. Justice Black dissented, feeling that the Fourth Amendment applied only to searches for and seizures of tangible things and not conversations. Id. at 364. Two "beeper" decisions support the general applicability of the warrant requirement if electronic surveillance will impair legitimate privacy interests. *Compare* United States v. Knotts, 460 U.S. 276 (1983) (no Fourth Amendment violation in relying on a beeper, installed without warrant, to aid in monitoring progress of a car on the public roads, since there is no legitimate expectation of privacy in destination of travel on the public roads), *with* United States v. Karo, 468 U.S. 705 (1984) (beeper installed without a warrant may not be used to obtain information as to the continuing presence of an item within a private residence).

[344] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, 18 U.S.C. §§ 2510-20.

[345] The Court has interpreted the statute several times without reaching the constitutional questions. United States v. Kahn, 415 U.S. 143 (1974); United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974); United States v. Donovan, 429 U.S. 413 (1977); Scott v. United States, 436 U.S. 128 (1978); Dalia v. United States, 441 U.S. 238 (1979); United States v. New York Telephone Co., 434 U.S. 159 (1977); *United States v. Caceres*, 440 U.S. 741 (1979). *Dalia* supra, did pass on one constitutional issue, whether the Fourth Amendment mandated specific warrant authorization for a surreptitious entry to install an authorized "bug." *See also* Smith v. Maryland, 442 U.S. 735 (1979) (no reasonable expectation of privacy in numbers dialed on one's telephone, so Fourth Amendment does not require a warrant to install "pen register" to record those numbers).

[346] 389 U.S. 347, 363-64 (1967) (concurring opinion). Justices Douglas and Brennan rejected the suggestion. Id. at 359-60 (concurring opinion). When it enacted its 1968 electronic surveillance statute, Congress alluded to the problem in ambiguous fashion, 18 U.S.C. § 2511(3), which the Court subsequently interpreted as having

serve for a future case the possibility that in "national security cases" electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to "bug" in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of "inherent" presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a "reasonable" search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required.[347] Whether or not a search was reasonable, wrote Justice Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circumscribed classes of situations, only those searches conducted pursuant to warrants were reasonable. The Government's duty to preserve the national security did not override the guarantee that before government could invade the privacy of its citizens it must present to a neutral magistrate evidence sufficient to support issuance of a warrant authorizing that invasion of privacy.[348] This protection was even more needed in "national security cases" than in cases of "ordinary" crime, the Justice con-

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expressed no congressional position at all. United States v. United States District Court, 407 U.S. 297, 302-08 (1972).

[347] United States v. United States District Court, 407 U.S. 297 (1972). Chief Justice Burger concurred in the result and Justice White concurred on the ground that the 1968 law required a warrant in this case, and therefore did not reach the constitutional issue. Id. at 340. Justice Rehnquist did not participate. Justice Powell carefully noted that the case required "no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." Id. at 308.

[348] The case contains a clear suggestion that the Court would approve a congressional provision for a different standard of probable cause in national security cases. "We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crimes specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some future crisis or emergency. . . . Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen right deserving protection. . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases. . . ." Id. at 322-23.

tinued, inasmuch as the tendency of government so often is to regard opponents of its policies as a threat and hence to tread in areas protected by the First Amendment as well as by the Fourth.[349] Rejected also was the argument that courts could not appreciate the intricacies of investigations in the area of national security or preserve the secrecy which is required.[350]

The question of the scope of the President's constitutional powers, if any, remains judicially unsettled.[351] Congress has acted, however, providing for a special court to hear requests for warrants for electronic surveillance in foreign intelligence situations, and permitting the President to authorize warrantless surveillance to acquire foreign intelligence information provided that the communications to be monitored are exclusively between or among foreign powers and there is no substantial likelihood any "United States person" will be overheard.[352]

**Enforcing the Fourth Amendment: The Exclusionary Rule**

A right to be free from unreasonable searches and seizures is declared by the Fourth Amendment, but how this right translates into concrete terms is not specified. Several possible methods of enforcement have been suggested, but only one—the exclusionary rule—has been applied with any frequency by the Supreme Court, and the Court in recent years has limited its application.

***Alternatives to the Exclusionary Rule***.—Theoretically, there are several alternatives to the exclusionary rule. An illegal search and seizure may be criminally actionable and officers undertaking one thus subject to prosecution, but the examples when officers are criminally prosecuted for overzealous law enforcement are extremely rare.[353] A policeman who makes an illegal search and seizure is subject to internal departmental discipline which may be backed up in the few jurisdictions which have adopted them by the

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[349] Id. at 313-24.

[350] Id. at 320.

[351] *See* United States v. Butenko, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), *appeal after remand* 565 F.2d 742 (D.C. Cir. 1977), *on remand*, 444 F. Supp. 1296 (D.D.C. 1978), *aff'd. in part, rev'd. in part*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); United States v. Truong Ding Hung, 629 F.2d 908 (4th Cir. 1980), after remand, 667 F.2d 1105 (4th Cir. 1981); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

[352] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797, 50 U.S.C. §§ 1801-1811. *See* United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) (upholding constitutionality of disclosure restrictions in Act).

[353] Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955).

oversight of police review boards, but again the examples of disciplinary actions are exceedingly rare.[354]

Persons who have been illegally arrested or who have had their privacy invaded will usually have a tort action available under state statutory or common law. Moreover, police officers acting under color of state law who violate a person's Fourth Amendment rights are subject to a suit for damages and other remedies[355] under a civil rights statute in federal courts.[356] While federal officers and others acting under color of federal law are not subject to this statute, the Supreme Court has recently held that a right to damages for violation of Fourth Amendment rights arises by implication and that this right is enforceable in federal courts.[357] While a damage remedy might be made more effectual,[358] a number of legal and practical problems stand in the way.[359] Police officers have available to them the usual common-law defenses, most important of which is the claim of good faith.[360] Federal officers are entitled to qualified immunity based on an objectively reasonable belief that a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances.[361] And on the practical side, per-

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[354] Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967).

[355] If there are continuing and recurrent violations, federal injunctive relief would be available. *Cf.* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Wheeler v. Goodman, 298 F. Supp. 935 (preliminary injunction), 306 F. Supp. 58 (permanent injunction) (W.D.N.C. 1969), *vacated on jurisdictional grounds*, 401 U.S. 987 (1971).

[356] 42 U.S.C. § 1983 (1964). *See* Monroe v. Pape, 365 U.S. 167 (1961). In some circumstances, the officer's liability may be attributed to the municipality. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). These claims that officers have used excessive force in the course of an arrest or investigatory stop are to be analyzed under the Fourth Amendment, not under substantive due process. The test is "whether the officers' actions are 'objectively reasonable' under the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989).

[357] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The possibility had been hinted at in Bell v. Hood, 327 U.S. 678 (1946).

[358] *See, e.g.*, Chief Justice Burger's dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411, 422-24 (1971), which suggests suit against the Government in a special tribunal and the abolition of the exclusionary rule.

[359] Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[360] This is the rule in actions under 42 U.S.C. § 1983, Pierson v. Ray, 386 U.S. 547 (1967), and on remand in *Bivens* the Court of Appeals promulgated the same rule to govern trial of the action. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

[361] Anderson v. Creighton, 483 U.S. 635 (1987). The qualified immunity inquiry "has a further dimension" beyond what is required in determining whether a police officer used excessive force in arresting a suspect: the officer may make "a reasonable mistake" in his assessment of what the law requires. Saucier v. Katz, 533 U.S. 194, 205-206 (2001). *See also* Malley v. Briggs, 475 U.S. 335, 345 (1986) (qualified immunity protects police officers who applied for a warrant unless "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant").

sons subjected to illegal arrests and searches and seizures are often disreputable persons toward whom juries are unsympathetic, or they are indigent and unable to bring suit. The result, therefore, is that the Court has emphasized exclusion of unconstitutionally seized evidence in subsequent criminal trials as the only effective enforcement method.

***Development of the Exclusionary Rule***.—Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in *Boyd v. United States*,[362] which, as was noted above, involved not a search and seizure but a compulsory production of business papers, which the Court likened to a search and seizure. Further, the Court analogized the Fifth Amendment's self-incrimination provision to the Fourth Amendment's protections to derive a rule which required exclusion of the compelled evidence because the defendant had been compelled to incriminate himself by producing it.[363] The *Boyd* case was closely limited to its facts and an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later, with the Justices adhering to the common-law rule that evidence was admissible however acquired.[364]

Nevertheless, ten years later the common-law view was itself rejected and an exclusionary rule propounded in *Weeks v. United States*.[365] Weeks had been convicted on the basis of evidence seized from his home in the course of two warrantless searches; some of the evidence consisted of private papers like those sought to be

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[362] 116 U.S. 616 (1886).

[363] "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." Id. at 633. It was this utilization of the Fifth Amendment's clearly required exclusionary rule, rather than one implied from the Fourth, on which Justice Black relied, and absent a Fifth Amendment self-incrimination violation he did not apply such a rule. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496-500 (1971) (dissenting opinion). The theory of a "convergence" of the two Amendments has now been disavowed by the Court. *See* discussion, supra, under "Property Subject to Seizure."

[364] Adams v. New York, 192 U.S. 585 (1904). Since the case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. *See* National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

[365] 232 U.S. 383 (1914).

compelled in the *Boyd* case. Unanimously, the Court held that the evidence should have been excluded by the trial court. The Fourth Amendment, Justice Day said, placed on the courts as well as on law enforcement officers restraints on the exercise of power compatible with its guarantees. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[366] The ruling is ambiguously based but seems to have had as its foundation an assumption that admission of illegally-seized evidence would itself violate the Amendment. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[367]

Because the Fourth Amendment does not restrict the actions of state officers,[368] there was originally no question about the application of an exclusionary rule in state courts[369] as a mandate of

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[366] Id. at 392.

[367] Id. at 393.

[368] Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855); National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

[369] The history of the exclusionary rule in the state courts was surveyed by Justice Frankfurter in Wolf v. Colorado, 338 U.S. 25, 29, 33-38 (1949). The matter was canvassed again in Elkins v. United States, 364 U.S. 206, 224-32 (1960).

federal constitutional policy.[370] But in *Wolf v. Colorado*,[371] a unanimous Court held that freedom from unreasonable searches and seizures was such a fundamental right as to be protected against state violations by the due process clause of the Fourteenth Amendment.[372] However, the Court held that the right thus guaranteed did not require that the exclusionary rule be applied in the state courts, since there were other means to observe and enforce the right. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."[373]

It developed, however, that the Court had not vested in the States total discretion in regard to the admissibility of evidence, as the Court proceeded to evaluate under the due process clause the methods by which the evidence had been obtained. Thus, in *Rochin v. California*,[374] evidence of narcotics possession had been obtained by forcible administration of an emetic to defendant at a hospital after officers had been unsuccessful in preventing him from swal-

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[370] During the period in which the Constitution did not impose any restrictions on state searches and seizures, the Court permitted the introduction in evidence in federal courts of items seized by state officers which had they been seized by federal officers would have been inadmissible, Weeks v. United States, 232 U.S. 383, 398 (1914), so long as no federal officer participated in the search, Byars v. United States, 273 U.S. 28 (1927), or the search was not made on behalf of federal law enforcement purposes. Gambino v. United States, 275 U.S. 310 (1927). This rule became known as the "silver platter doctrine" after the phrase coined by Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 78-79 (1949): "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." In Elkins v. United States, 364 U.S. 206 (1960), the doctrine was discarded by a five-to-four majority which held that inasmuch as Wolf v. Colorado, 338 U.S. 25 (1949), had made state searches and seizures subject to federal constitutional restrictions through the Fourteenth Amendment's due process clause, the "silver platter doctrine" was no longer constitutionally viable. During this same period, since state courts were free to admit any evidence no matter how obtained, evidence illegally seized by federal officers could be used in state courts, Wilson v. Schnettler, 365 U.S. 381 (1961), although the Supreme Court ruled out such a course if the evidence had first been offered in a federal trial and had been suppressed. Rea v. United States, 350 U.S. 214 (1956).

[371] 338 U.S. 25 (1949).

[372] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Id. at 27-28.

[373] Id. at 31. Justices Douglas, Murphy, and Rutledge dissented with regard to the issue of the exclusionary rule and Justice Black concurred.

[374] 342 U.S. 165 (1952). The police had initially entered defendant's house without a warrant. Justices Black and Douglas concurred in the result on self-incrimination grounds.

lowing certain capsules. The evidence, said Justice Frankfurter for the Court, should have been excluded because the police methods were too objectionable. "This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw." [375] The *Rochin* standard was limited in *Irvine v. California*, [376] in which defendant was convicted of bookmaking activities on the basis of evidence secured by police who repeatedly broke into his house and concealed electronic gear to broadcast every conversation in the house. Justice Jackson's plurality opinion asserted that *Rochin* had been occasioned by the element of brutality, and that while the police conduct in *Irvine* was blatantly illegal the admissibility of the evidence was governed by *Wolf*, which should be consistently applied for purposes of guidance to state courts. The Justice also entertained considerable doubts about the efficacy of the exclusionary rule. [377] *Rochin* emerged as the standard, however, in a later case in which the Court sustained the admissibility of the results of a blood test administered while defendant was unconscious in a hospital following a traffic accident, the Court observing the routine nature of the test and the minimal intrusion into bodily privacy. [378]

Then, in *Mapp v. Ohio*, [379] the Court held that the exclusionary rule should and did apply to the States. It was "logically and constitutionally necessary," wrote Justice Clark for the majority, "that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right" to be secure from unreasonable searches and seizures. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." [380] Further, the Court then held that since ille-

[375] Id. at 172.

[376] 347 U.S. 128 (1954).

[377] Id. at 134-38. Justice Clark, concurring, announced his intention to vote to apply the exclusionary rule to the States when the votes were available. Id. at 138. Justices Black and Douglas dissented on self-incrimination grounds, id. at 139, and Justice Douglas continued to urge the application of the exclusionary rule to the States. Id. at 149. Justices Frankfurter and Burton dissented on due process grounds, arguing the relevance of Rochin. Id. at 142.

[378] Breithaupt v. Abram, 352 U.S. 432 (1957). Chief Justice Warren and Justices Black and Douglas dissented. Though a due process case, the results of the case have been reaffirmed directly in a Fourth Amendment case. Schmerber v. California, 384 U.S. 757 (1966).

[379] 367 U.S. 643 (1961).

[380] Id. at 655-56. Justice Black concurred, doubting that the Fourth Amendment itself compelled adoption of an exclusionary rule but relying on the Fifth Amendment for authority. Id. at 661. Justice Stewart would not have reached the issue but would have reversed on other grounds, id. at 672, while Justices Harlan, Frankfurter, and Whittaker dissented, preferring to adhere to *Wolf*. Id. at 672. Justice

gally-seized evidence was to be excluded from both federal and state courts, the standards by which the question of legality was to be determined should be the same, regardless of whether the court in which the evidence was offered was state or federal.[381]

***The Foundations of the Exclusionary Rule***.—Important to determination of such questions as the application of the exclusionary rule to the States and the ability of Congress to abolish or to limit it is the fixing of the constitutional source and the basis of the rule. For some time, it was not clear whether the exclusionary rule was derived from the Fourth Amendment, from some union of the Fourth and Fifth Amendments, or from the Court's supervisory power over the lower federal courts. It will be recalled that in *Boyd*[382] the Court fused the search and seizure clause with the provision of the Fifth Amendment protecting against compelled self-incrimination. *Weeks v. United States*,[383] though the Fifth Amendment was mentioned, seemed to be clearly based on the Fourth Amendment. Nevertheless, in opinions following *Weeks* the Court clearly identified the basis for the exclusionary rule as the self-incrimination clause of the Fifth Amendment.[384] Then in *Mapp v. Ohio*,[385] the Court tied the rule strictly to the Fourth Amendment, finding exclusion of evidence seized in violation of the Amendment to be the "most important constitutional privilege" of the right to be free from unreasonable searches and seizures, find-

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Harlan advocated the overruling of *Mapp* down to the conclusion of his service on the Court. *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (concurring opinion).

[381] Ker v. California, 374 U.S. 23 (1963).

[382] Boyd v. United States, 116 U.S. 616 (1886).

[383] 232 U.S. 383 (1914). Defendant's room had been searched and papers seized by officers acting without a warrant. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id. at 393.

[384] *E.g.*, Gouled v. United States, 255 U.S. 298, 306, 307 (1921); Amos v. United States, 255 U.S. 313, 316 (1921); Agnello v. United States, 269 U.S. 20, 33-34 (1925); McGuire v. United States, 273 U.S. 95, 99 (1927). In Olmstead v. United States, 277 U.S. 438, 462 (1928), Chief Justice Taft ascribed the rule both to the Fourth and the Fifth Amendments, while in dissent Justices Holmes and Brandeis took the view that the Fifth Amendment was violated by the admission of evidence seized in violation of the Fourth. Id. at 469, 478-79. Justice Black was the only modern proponent of this view. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496-500 (1971) (dissenting opinion). *See*, however, Justice Clark's plurality opinion in Ker v. California, 374 U.S. 23, 30 (1963), in which he brought up the self-incrimination clause as a supplementary source of the rule, a position which he had discarded in Mapp.

[385] 367 U.S. 643, 656 (1961). Wolf v. Colorado, 338 U.S. 25, 28 (1949), also ascribed the rule to the Fourth Amendment exclusively.

ing that the rule was "an essential part of the right of privacy" protected by the Amendment.

"This Court has ever since [*Weeks* was decided in 1914] required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and *constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" [386] It was a necessary step in the application of the rule to the States to find that the rule was of constitutional origin rather than a result of an exercise of the Court's supervisory power over the lower federal courts, inasmuch as the latter could not constitutionally be extended to the state courts. [387] In fact, Justice Frankfurter seemed to find the exclusionary rule to be based on the Court's supervisory powers in *Wolf v. Colorado* [388] in declining to extend the rule to the States. That the rule is of constitutional origin *Mapp* establishes, but this does not necessarily establish that it is immune to statutory revision.

Suggestions appear in a number of cases, including *Weeks*, to the effect that admission of illegally-seized evidence is itself unconstitutional. [389] These were often combined with a rationale empha-

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[386] Mapp v. Ohio, 367 U.S. 643, 648 (1961) (emphasis supplied).

[387] An example of an exclusionary rule not based on constitutional grounds may be found in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), in which the Court enforced a requirement that arrestees be promptly presented to a magistrate by holding that incriminating admissions obtained during the period beyond a reasonable time for presentation would be inadmissible. The rule was not extended to the States, *cf.* Culombe v. Connecticut, 367 U.S. 568, 598-602 (1961), but the Court's resort to the self-incrimination clause in reviewing confessions made such application irrelevant in most cases in any event. For an example of a transmutation of a supervisory rule into a constitutional rule, *see* McCarthy v. United States, 394 U.S. 459 (1969), and Boykin v. Alabama, 395 U.S. 238 (1969).

[388] *Weeks* "was not derived from the explicit requirements of the Fourth Amendment; . . . The decision was a matter of judicial implication." 338 U.S. 25, 28 (1949). Justice Black was more explicit. "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Id. at 39-40. He continued to adhere to the supervisory power basis in strictly search-and-seizure cases, Berger v. New York, 388 U.S. 41, 76 (1967) (dissenting), except where self-incrimination values were present. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring). *And see* id. at 678 (Justice Harlan dissenting); Elkins v. United States, 364 U.S. 206, 216 (1960) (Justice Stewart for the Court).

[389] "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution . . . ." Weeks v. United States, 232 U.S. 383, 392 (1914). In Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961), Justice Clark maintained that "the Fourth Amendment include[s] the exclusion of the evidence seized in violation of its provisions" and that it, and the Fifth Amendment with regard to confessions "assures . . . that no man is to be convicted on unconstitutional evidence." In Terry v. Ohio, 392 U.S. 1, 12, 13 (1968), Chief Justice Warren wrote: "Courts which

sizing "judicial integrity" as a reason to reject the proffer of such evidence.[390] Yet the Court permitted such evidence to be introduced into trial courts when the defendant lacked "standing" to object to the search and seizure which produced the evidence[391] or when the search took place before the announcement of the decision extending the exclusionary rule to the States.[392] At these times, the Court turned to the "basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[393] "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."[394]

***Narrowing Application of the Exclusionary Rule***.—For as long as we have had the exclusionary rule, critics have attacked it, challenged its premises, disputed its morality.[395] By the early 1980s a majority of Justices had stated a desire either to abolish the rule or to sharply curtail its operation,[396] and numerous opinions had rejected all doctrinal bases save that of deterrence.[397] At

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sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence."

[390] Elkins v. United States, 364 U.S. 206, 222-23 (1960); Mapp v. Ohio, 367 U.S. 643, 660 (1961). *See* McNabb v. United States, 318 U.S. 332, 339-40 (1943).

[391] *See* "Operation of the Rule: Standing", infra.

[392] Linkletter v. Walker, 381 U.S. 618 (1965).

[393] Elkins v. United States, 364 U.S. 206, 217 (1960).

[394] Linkletter v. Walker, 381 U.S. 618, 636-37 (1965). The Court advanced other reasons for its decision as well. Id. at 636-40.

[395] Among the early critics were Judge Cardozo, People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (the criminal will go free "because the constable has blundered"); and Dean Wigmore. 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 2183-84 (3d ed. 1940). For extensive discussion of criticism and support, with citation to the literature, *see* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT § 1.2 (2d ed. 1987).

[396] *E.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Chief Justice Burger: rule ought to be discarded now, rather than wait for a replacement as he argued earlier); id. at 536 (Justice White: modify rule to admit evidence seized illegally but in good faith); Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Justice Powell); Brown v. Illinois , 422 U.S. 590, 609 (1975) (Justice Powell); Robbins v. California, 453 U.S. 420, 437 (1981) (Justice Rehnquist); California v. Minjares, 443 U.S. 916 (1979) (Justice Rehnquist, joined by Chief Justice Burger); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Justice Blackmun joining Justice Black's dissent that "the Fourth Amendment supports no exclusionary rule").

[397] *E.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (deterrence is the "prime purpose" of the rule, "if not the sole one."); United States v. Calandra, 414

the same time, these opinions voiced strong doubts about the efficacy of the rule as a deterrent, and advanced public interest values in effective law enforcement and public safety as reasons to discard the rule altogether or curtail its application.[398] Thus, the Court emphasized the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations have been technical or in good faith, and suggested that such use of the rule may well "generat[e] disrespect for the law and administration of justice,"[399] as well as free guilty defendants.[400] No longer does the Court declare that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[401]

Although the exclusionary rule has not been completely repudiated, its utilization has been substantially curbed. Initial decisions chipped away at the rule's application. Defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction of evidence illegally obtained from co-conspirators or codefendants,[402] and even a defendant whose rights have

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U.S. 338, 347-48 (1974); United States v. Peltier, 422 U.S. 531, 536-39 (1975); Stone v. Powell , 428 U.S. 465, 486 (1976); Rakas v. Illinois, 439 U.S. 128, 134 n.3, 137-38 (1978); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979). Thus, admission of the fruits of an unlawful search or seizure "work[s] no new Fourth Amendment wrong," the wrong being "fully accomplished by the unlawful search or seizure itself," United States v. Calandra, 414 U.S. at 354, and the exclusionary rule does not "cure the invasion of the defendant's rights which he has already suffered." Stone v. Powell, 428 U.S. at 540 (Justice White dissenting). "Judicial integrity" is not infringed by the mere admission of evidence seized wrongfully. "[T]he courts must not commit or encourage violations of the Constitution," and the integrity issue is answered by whether exclusion would deter violations by others. United States v. Janis, 428 U.S. at 458 n.35; United States v. Calandra, 414 U.S. at 347, 354; United States v. Peltier, 422 U.S. at 538; Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974).

[398] United States v. Janis, 428 U.S. 433, 448-54 (1976), contains a lengthy review of the literature on the deterrent effect of the rule and doubts about that effect. *See also* Stone v. Powell, 428 U.S. 465, 492 n.32 (1976).

[399] Stone v. Powell , 428 U.S. at 490, 491.

[400] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Chief Justice Burger dissenting).

[401] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[402] *E.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests); United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980). In United States v. Payner, 447 U.S. 727 (1980), the Court held it impermissible for a federal court to exercise its supervisory power to police the administration of justice in the federal system to suppress otherwise admissible evidence on the ground that federal agents had flagrantly violated the Fourth Amendment rights of third parties in order to obtain evidence to use against others when the agents knew that the defendant would be unable to challenge their conduct under the Fourth Amendment.

been infringed may find the evidence coming in, not as proof of guilt, but to impeach his testimony.[403] Defendants who have been convicted after trials in which they were given a full and fair opportunity to raise claims of Fourth Amendment violations may not subsequently raise those claims on federal habeas corpus, because the costs outweigh the minimal deterrent effect.[404] Evidence obtained through a wrongful search and seizure may sometimes be used in the criminal trial, if the prosecution can show a sufficient attenuation of the link between police misconduct and obtaining of the evidence.[405] If an arrest or a search which was valid at the time it was effectuated becomes bad through the subsequent invalidation of the statute under which the arrest or search was made, evidence obtained thereby is nonetheless admissible.[406] A grand jury witness was not permitted to refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure,[407] and federal tax authorities were permitted to use in a civil proceeding evidence found to have been un-

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[403] United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954). *Cf.* Agnello v. United States, 269 U.S. 20 (1925) (now vitiated by *Havens*). The impeachment exception applies only to the defendant's own testimony, and may not be extended to use illegally obtained evidence to impeach the testimony of other defense witnesses. James v. Illinois, 493 U.S. 307 (1990).

[404] Stone v. Powell, 428 U.S. 465 (1976).

[405] Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Alderman v. United States, 394 U.S. 165, 180-85 (1969); Brown v. Illinois, 422 U.S. 590 (1975); Taylor v. Alabama, 457 U.S. 687 (1982). United States v. Ceccolini, 435 U.S. 268 (1978), refused to exclude the testimony of a witness discovered through an illegal search. Because a witness was freely willing to testify and therefore more likely to come forward, the application of the exclusionary rule was not to be tested by the standard applied to exclusion of inanimate objects. Deterrence would be little served and relevant and material evidence would be lost to the prosecution. In New York v. Harris, 495 U.S. 14 (1990), the Court refused to exclude a station-house confession made by a suspect whose arrest at his home had violated the Fourth Amendment because, even though probable cause had existed, no warrant had been obtained. And in Segura v. United States, 468 U.S. 796 (1984), evidence seized pursuant to warrant obtained after an illegal entry was admitted because there had been an independent basis for issuance of a warrant. This rule applies as well to evidence observed in plain view during the initial illegal search. Murray v. United States, 487 U.S. 533 (1988). *See also* United States v. Karo , 468 U.S. 705 (1984) (excluding consideration of tainted evidence, there was sufficient untainted evidence in affidavit to justify finding of probable cause and issuance of search warrant).

[406] Michigan v. DeFillippo, 443 U.S. 31 (1979) (statute creating substantive criminal offense). Statutes that authorize unconstitutional searches and seizures but which have not yet been voided at the time of the search or seizure may not create this effect, however, Torres v. Puerto Rico, 442 U.S. 465 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). This aspect of *Torres* and *Ybarra* was to a large degree nullified by Illinois v. Krull, 480 U.S. 340 (1987), rejecting a distinction between substantive and procedural statutes and holding the exclusionary rule inapplicable in the case of a police officer's objectively reasonable reliance on a statute later held to violate the Fourth Amendment. Similarly, the exclusionary rule does not require suppression of evidence that was seized incident to an arrest that was the result of a clerical error by a court clerk. Arizona v. Evans, 514 U.S. 1 (1995).

[407] United States v. Calandra, 414 U.S. 338 (1974).

constitutionally seized from defendant by state authorities.[408] The rule is inapplicable in parole revocation hearings.[409]

The most severe curtailment of the rule came in 1984 with adoption of a "good faith" exception. In *United States v. Leon*,[410] the Court created an exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. Justice White's opinion for the Court[411] could find little benefit in applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the "substantial social costs exacted by the [rule]."[412] "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates.[413] Moreover, the Court thought that the rule should not be applied "to deter objectively reasonable law enforcement activity," and that "[p]enalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations."[414] The Court also suggested some circumstances in which courts would be unable to find that officers' reliance on a warrant was objectively reasonable: if the officers have been "dishonest or reckless in preparing their affidavit," if it should have been obvious that the magistrate had "wholly abandoned" his neutral role, or if the warrant was obviously deficient on its face (e.g., lacking in particularity). The Court applied the *Leon* standard in *Massachusetts v. Sheppard*,[415] holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant.

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[408] United States v. Janis, 428 U.S. 433 (1976). Similarly, the rule is inapplicable in civil proceedings for deportation of aliens. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[409] Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998).

[410] 468 U.S. 897 (1984). The same objectively reasonable "good-faith" rule now applies in determining whether officers obtaining warrants are entitled to qualified immunity from suit. Malley v. Briggs, 475 U.S. 335 (1986).

[411] The opinion was joined by Chief Justice Burger, and by Justices Blackmun, Powell, Rehnquist, and O'Connor. Justice Blackmun also added a separate concurring opinion. Dissents were filed by Justice Brennan, joined by Justice Marshall, and by Justice Stevens.

[412] 468 U.S. at 907.

[413] 468 U.S. at 916-17.

[414] 468 U.S. at 919, 921.

[415] 468 U.S. 981 (1984).

The Court then extended *Leon* to hold that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held violative of the Fourth Amendment.[416] Justice Blackmun's opinion for the Court reasoned that application of the exclusionary rule in such circumstances would have no more deterrent effect on officers than it would when officers reasonably rely on an invalid warrant, and no more deterrent effect on legislators who enact invalid statutes than on magistrates who issue invalid warrants.[417]

It is unclear from the Court's analysis in *Leon* and its progeny whether a majority of the Justices would also support a good-faith exception for evidence seized without a warrant, although there is some language broad enough to apply to warrantless seizures.[418] It is also unclear what a good-faith exception would mean in the context of a warrantless search, since the objective reasonableness of an officer's action in proceeding without a warrant is already taken into account in determining whether there has been a Fourth Amendment violation.[419] The Court's increasing willingness to uphold warrantless searches as not "unreasonable" under the Fourth Amendment, however, may reduce the frequency with which the good-faith issue arises in the context of the exclusionary rule.[420]

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[416] Illinois v. Krull , 480 U.S. 340 (1987). The same difficult-to-establish qualifications apply: there can be no objectively reasonable reliance "if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws," or if "a reasonable officer should have known that the statute was unconstitutional." 480 U.S. at 355.

[417] Dissenting Justice O'Connor disagreed with this second conclusion, suggesting that the grace period "during which the police may freely perform unreasonable searches . . . creates a positive incentive [for legislatures] to promulgate unconstitutional laws," and that the Court's ruling "destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights" and thereby obtain a ruling on the validity of the statute. 480 U.S. at 366, 369.

[418] The whole thrust of analysis in *Leon* dealt with reasonableness of reliance on a warrant. The Court several times, however, used language broad enough to apply to warrantless searches as well. *See, e.g.*, 468 U.S. at 909 (quoting Justice White's concurrence in *Illinois v. Gates*): "the balancing approach that has evolved . . . 'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment'"; and id. at 919: "[the rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

[419] *See* Yale Kamisar, *Gates, 'Probable Cause', 'Good Faith', and Beyond*, 69 IOWA L. REV. 551, 589 (1984) (imposition of a good-faith exception on top of the "already diluted" standard for validity of a warrant "would amount to double dilution").

[420] *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177 (1990) (upholding search premised on officer's reasonable but mistaken belief that a third party had common authority over premises and could consent to search); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (no requirement of knowing and intelligent waiver in consenting to warrantless search); New York v. Belton, 453 U.S. 454 (1981) (upholding warrantless search of entire interior of passenger car, including closed containers,

***Operation of the Rule: Standing***.—The Court for a long period followed a rule of "standing" by which it determined whether a party was the appropriate person to move to suppress allegedly illegal evidence. Akin to Article III justiciability principles, which emphasize that one may ordinarily contest only those government actions that harm him, the standing principle in Fourth Amendment cases "require[d] of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."[421] The Court recently has departed from the concept of "standing" to telescope the inquiry into one inquiry rather than two. Finding that "standing" served no useful analytical purpose, the Court has held that the issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant's Fourth Amendment rights have been violated. "We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same."[422] One must therefore show that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[423]

The *Katz* reasonable expectation of privacy rationale has now displaced property-ownership concepts which previously might have supported either standing to suppress or the establishment of an interest that has been invaded. Thus, it is no longer sufficient to allege possession or ownership of seized goods to establish the interest, if a justifiable expectation of privacy of the defendant was not violated in the seizure.[424] Also, it is no longer sufficient that

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as incident to arrest of driver); United States v. Ross, 456 U.S. 798 (1982) (upholding warrrantless search of movable container found in a locked car trunk).

[421] Jones v. United States, 362 U.S. 257, 261 (1960). That is, the movant must show that he was "a victim of search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of search or seizure directed at someone else." Id. *See* Alderman v. United States, 394 U.S. 165, 174 (1969).

[422] Rakas v. Illinois, 439 U.S. 128, 139 (1978).

[423] Id. at 140.

[424] Previously, when ownership or possession was the issue, such as a charge of possessing contraband, the Court accorded "automatic standing" to one on the basis, first, that to require him to assert ownership or possession at the suppression hearing would be to cause him to incriminate himself with testimony that could later be used against him, and, second, that the government could not simultaneously as-

one merely be lawfully on the premises in order to be able to object to an illegal search; rather, one must show some legitimate interest in the premises that the search invaded.[425] The same illegal search might, therefore, invade the rights of one person and not of another.[426] Again, the effect of the application of the privacy rationale has been to narrow considerably the number of people who can complain of an unconstitutional search.

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sert that defendant was in possession of the items and deny that it had invaded his interests. Jones v. United States, 362 U.S. 257, 261-265 (1960). *See also* United States v. Jeffers, 342 U.S. 48 (1951). But in Simmons v. United States, 390 U.S. 377 (1968), the Court held inadmissible at the subsequent trial admissions made in suppression hearings. When it then held that possession alone was insufficient to give a defendant the interest to move to suppress, because he must show that the search itself invaded his interest, the second consideration was mooted as well, and thus the "automatic standing" rule was overturned. United States v. Salvucci, 448 U.S. 83 (1980) (stolen checks found in illegal search of apartment of the mother of the defendant, in which he had no interest; defendant could not move to suppress on the basis of the illegal search); Rawlings v. Kentucky, 448 U.S. 98 (1980) (drugs belonging to defendant discovered in illegal search of friend's purse, in which he had no privacy interest; admission of ownership insufficient to enable him to move to suppress).

[425] Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in automobile had no privacy interest in interior of the car; could not object to illegal search). United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests). Jones v. United States, 362 U.S. 257 (1960), had established the rule that anyone legitimately on the premises could object; the rationale was discarded but the result in *Jones* was maintained because he was there with permission, he had his own key, his luggage was there, he had the right to exclude and therefore a legitimate expectation of privacy. Similarly maintained were the results in United States v. Jeffers, 342 U.S. 48 (1951) (hotel room rented by defendant's aunts to which he had a key and permission to store things); Mancusi v. DeForte, 392 U.S. 364 (1968) (defendant shared office with several others; though he had no reasonable expectation of absolute privacy, he could reasonably expect to be intruded on only by other occupants and not by police).

[426] *E.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (fearing imminent police search, defendant deposited drugs in companion's purse where they were discovered in course of illegal search; defendant had no legitimate expectation of privacy in her purse, so that *his* Fourth Amendment rights were not violated, although hers were).

# FIFTH AMENDMENT

## RIGHTS OF PERSONS

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## RIGHTS OF PERSONS

### FIFTH AMENDMENT

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

#### INDICTMENT BY GRAND JURY

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II.[1] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[2] Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments

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

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

or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." [3]

The prescribed constitutional function of grand juries in federal courts [4] is to return criminal indictments, but the juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, not bound by many evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it. [5] The exclusionary rule is inapplicable

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

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

[5] Witnesses are not entitled to have counsel present in the room. FED. R. CIV. P. 6(d). The validity of this restriction was asserted in dictum in In re Groban, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. Id. at 346–47 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in Coleman v. Alabama, 399 U.S. 1 (1970), deeming the preliminary hearing a "critical stage of the prosecution" at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See* id. at 25 (Chief Justice Burger dissenting). In United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion), Chief Justice Burger wrote: "Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." By emphasizing the point of institution of criminal proceedings, relevant to the right

in grand jury proceedings, with the result that a witness called before a grand jury may be questioned on the basis of knowledge obtained through the use of illegally-seized evidence.[6] In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, while free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional consideration.[7] A witness called before a grand jury is not entitled to be informed that he may be indicted for the offense under inquiry[8] and the commission of per-

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of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult with counsel out of the room, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have no right to appointed counsel. Concurring, Justice Brennan argued that it was essential and constitutionally required for the protection of one's constitutional rights that he have access to counsel, appointed if necessary, accepting the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness' rights, Id. at 602–09 (with Justice Marshall). Justices Stewart and Blackmun reserved judgment. Id. at 609. The dispute appears ripe for revisiting.

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

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

[8] United States v. Washington, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer ques-

jury by a witness before the grand jury is punishable, irrespective of the nature of the warning given him when he appears and regardless of the fact that he may already be a putative defendant when he is called.[9]

Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.[10] According to the Court, the issue turned upon a two-tiered analysis— "whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment."[11] First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal affront than did an arrest or an investigative stop, and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.[12] Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.[13] Inasmuch as the Fourth Amendment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

Besides indictments, grand juries may also issue reports which may indicate nonindictable misbehavior, mis- or malfeasance of

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tions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses. . . ." Id. at 186, 190.

[9] United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no *Miranda* warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. Id. at 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude a perjury prosecution.

[10] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

[11] Dionisio, 410 U.S. at 9.

[12] 410 U.S. at 9–13.

[13] 410 U.S. at 13–15. The privacy rationale proceeds from Katz v. United States, 389 U.S. 347 (1967).

public officers, or other objectionable conduct.[14] Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them.[15]

Within the meaning of this article a crime is made "infamous" by the quality of the punishment which may be imposed.[16] "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[17] Imprisonment in a state prison or penitentiary, with or without hard labor,[18] or imprisonment at hard labor in the workhouse of the District of Columbia,[19] falls within this category. The pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial. When an accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.[20] Thus, an act which authorized imprisonment at hard labor for one year, as well as deportation, of Chinese aliens found to be unlawfully within the United States, created an offense which could be tried only upon indictment.[21] Counterfeiting,[22] fraudulent alteration of poll books,[23] fraudulent voting,[24] and embezzlement,[25] have been declared to be infamous crimes. It is immaterial how Congress has classified the offense.[26] An act punishable by a fine of not more than $1,000 or imprisonment for not more than six

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

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

[16] Ex parte Wilson, 114 U.S. 417 (1885).

[17] 114 U.S. at 427.

[18] Mackin v. United States, 117 U.S. 348, 352 (1886).

[19] United States v. Moreland, 258 U.S. 433 (1922).

[20] Ex parte Wilson, 114 U.S. 417, 426 (1885).

[21] Wong Wing v. United States, 163 U.S. 228, 237 (1896).

[22] Ex parte Wilson, 114 U.S. 417 (1885).

[23] Mackin v. United States, 117 U.S. 348 (1886).

[24] Parkinson v. United States, 121 U.S. 281 (1887).

[25] United States v. DeWalt, 128 U.S. 393 (1888).

[26] Ex parte Wilson, 114 U.S. 417, 426 (1885).

months is a misdemeanor, which can be tried without indictment, even though the punishment exceeds that specified in the statutory definition of "petty offenses." [27]

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. [28] A change in the indictment that does not narrow its scope deprives the court of the power to try the accused. [29] While additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, e.g., a lesser included offense. [30] There being no constitutional requirement that an indictment be presented by a grand jury in a body, an indictment delivered by the foreman in the absence of other grand jurors is valid. [31] If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; it is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury. [32]

The protection of indictment by grand jury extends to all persons except those serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury. [33] The exception's limiting words "when in actual service in time of war or public danger" apply only to members of the militia, not to members of the regular armed forces. In *O'Callahan v. Parker*, the Court in 1969 held that offenses that are not "service connected" may not be punished under

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[27] Duke v. United States, 301 U.S. 492 (1937).

[28] *See* Stirone v. United States, 361 U.S. 212 (1960), wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon charges presented in the indictment.

[29] Ex parte Bain, 121 U.S. 1, 12 (1887). *Ex parte Bain* was overruled in United States v. Miller, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. *Ex parte Bain* was also overruled to the extent that it held that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. United States v. Cotton, 122 S. Ct. 1781 (2002). While a defendant's failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would limited to a "plain error" analysis. 122 S. Ct. at 1784-85.

[30] United States v. Miller, 471 U.S. 130, 144 (1985).

[31] Breese v. United States, 226 U.S. 1 (1912).

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

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

military law, but instead must be tried in the civil courts in the jurisdiction where the acts took place.[34] This decision was overruled, however, in 1987, the Court emphasizing the "plain language" of Art. I, § 8, cl. 14,[35] and not directly addressing any possible limitation stemming from the language of the Fifth Amendment.[36] "The requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[37] Even under the service connection rule, it was held that offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, could be tried by a military commission.[38]

## DOUBLE JEOPARDY

### Development and Scope

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[39] The concept of double jeopardy goes far back in history, but its development was uneven and its

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[34] 395 U.S. 258 (1969); *see also* Relford v. Commandant, 401 U.S. 355 (1971) (offense committed on military base against persons lawfully on base was service connected). But courts-martial of civilian dependents and discharged servicemen have been barred. Id. *See* "Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents" under Article I.

[35] This clause confers power on Congress to "make rules for the government and regulation of the land and naval forces."

[36] Solorio v. United States, 483 U.S. 435 (1987). A 5–4 majority favored overruling *O'Callahan*: Chief Justice Rehnquist's opinion for the Court was joined by Justices White, Powell, O'Connor, and Scalia. Justice Stevens concurred in the judgment but thought it unnecessary to reexamine *O'Callahan*. Dissenting Justice Marshall, joined by Justices Brennan and Blackmun, thought the service connection rule justified by the language of the Fifth Amendment's exception, based on the nature of cases (those "*arising in* the land or naval forces") rather than the status of defendants.

[37] 483 U.S. at 450–51.

[38] Ex parte Quirin, 317 U.S. 1, 43, 44 (1942).

[39] Green v. United States, 355 U.S. 184, 187–88 (1957). The passage is often approvingly quoted by the Court. *E.g.*, Crist v. Bretz, 437 U.S. 28, 35 (1978); United States v. DiFrancesco, 449 U.S. 117, 127–28 (1980). For a comprehensive effort to assess the purposes of application of the clause, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

meaning has varied. The English development, under the influence of Coke and Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.[40] In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction. The rule's elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.[41] Madison's version of the guarantee as introduced in the House of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[42] Opposition in the House proceeded on the proposition that the language could be construed to prohibit a second trial after a successful appeal by a defendant and would therefore either constitute a hazard to the public by freeing the guilty or, more likely, result in a detriment to defendants because appellate courts would be loath to reverse convictions if no new trial could follow, but a motion to strike "or trial" from the clause failed.[43] As approved by the Senate, however, and accepted by the House for referral to the States, the present language of the clause was inserted.[44]

Throughout most of its history, this clause was binding only against the Federal Government. In *Palko v. Connecticut*,[45] the Court rejected an argument that the Fourteenth Amendment incorporated all the provisions of the first eight Amendments as limitations on the States and enunciated the due process theory under which most of those Amendments do now apply to the States. Some guarantees in the Bill of Rights, Justice Cardozo wrote, were so

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

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

[42] 1 ANNALS OF CONGRESS 434 (June 8, 1789).

[43] Id. at 753.

[44] 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1149, 1165 (1971). In Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting), Justice Powell attributed to inadvertence the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being "of academic interest only." Id. at 34 n.10.

[45] 302 U.S. 319 (1937).

fundamental that they are "of the very essence of the scheme of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed."[46] But the double jeopardy clause, like many other procedural rights of defendants, was not so fundamental; it could be absent and fair trials could still be had. Of course, a defendant's due process rights, absent double jeopardy consideration per se, might be violated if the State "creat[ed] a hardship so acute and shocking as to be unendurable," but that was not the case in *Palko*.[47] In *Benton v. Maryland*,[48] however, the Court concluded "that the double jeopardy prohibition . . . represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." Therefore, the double jeopardy limitation now applies to both federal and state governments and state rules on double jeopardy, with regard to such matters as when jeopardy attaches, must be considered in the light of federal standards.[49]

In a federal system, different units of government may have different interests to serve in the definition of crimes and the enforcement of their laws, and where the different units have overlapping jurisdictions a person may engage in conduct that will violate the laws of more than one unit.[50] Although the Court had long accepted in dictum the principle that prosecution by two governments of the same defendant for the same conduct would not constitute double jeopardy,[51] it was not until *United States v. Lanza*[52] that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . Each government in determining what shall be an offense against its peace and dignity is exercising

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[46] 302 U.S. at 325, 326.

[47] 302 U.S. at 328.

[48] 395 U.S. 784, 794–95 (1969).

[49] Crist v. Bretz, 437 U.S. 28, 37–38 (1978). *But see* id. at 40 (Justices Powell and Rehnquist and Chief Justice Burger dissenting) (standard governing States should be more relaxed).

[50] The problem was recognized as early as Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), and the rationale of the doctrine was confirmed within thirty years. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).

[51] Id. *And see* cases cited in Bartkus v. Illinois, 359 U.S. 121, 132 n.19 (1959), and Abbate v. United States, 359 U.S. 187, 192–93 (1959).

[52] 260 U.S. 377 (1922).

its own sovereignty, not that of the other." [53] The "dual sovereignty" doctrine is not only tied into the existence of two sets of laws often serving different federal-state purposes and the now overruled principle that the double jeopardy clause restricts only the national government and not the States, [54] but it also reflects practical considerations that undesirable consequences could follow an overruling of the doctrine. Thus, a State might preempt federal authority by first prosecuting and providing for a lenient sentence (as compared to the possible federal sentence) or acquitting defendants who had the sympathy of state authorities as against federal law enforcement. [55] The application of the clause to the States has therefore worked no change in the "dual sovereign" doctrine. [56] Of course, when in fact two different units of the government are subject to the same sovereign, the double jeopardy clause does bar separate prosecutions by them for the same offense. [57] The dual sovereignty doctrine has also been applied to permit successive prosecutions by two states for the same conduct. [58]

The clause speaks of being put in "jeopardy of life or limb," which as derived from the common law, generally referred to the

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[53] 260 U.S. at 382. *See also* Hebert v. Louisiana, 272 U.S. 312 (1924); Screws v. United States, 325 U.S. 91, 108 (1945); Jerome v. United States, 318 U.S. 101 (1943).

[54] Benton v. Maryland, 395 U.S. 784 (1969), extended the clause to the States.

[55] Reaffirmation of the doctrine against double jeopardy claims as to the Federal Government and against due process claims as to the States occurred in Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121 (1959), both cases containing extensive discussion and policy analyses. The Justice Department follows a policy of generally not duplicating a state prosecution brought and carried out in good faith, *see* Petite v. United States, 361 U.S. 529, 531 (1960); Rinaldi v. United States, 434 U.S. 22 (1977), and several provisions of federal law forbid a federal prosecution following a state prosecution. *E.g.*, 18 U.S.C.§§ 659, 660, 1992, 2117. The Brown Commission recommended a general statute to this effect, preserving discretion in federal authorities to proceed upon certification by the Attorney General that a United States interest would be unduly harmed if there were no federal prosecution. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 707 (1971).

[56] United States v. Wheeler, 435 U.S. 313 (1978) (dual sovereignty doctrine permits federal prosecution of an Indian for statutory rape following his plea of guilty in a tribal court to contributing to the delinquency of a minor, both charges involving the same conduct; tribal law stemmed from the retained sovereignty of the tribe and did not flow from the Federal Government).

[57] Grafton v. United States, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court); Waller v. Florida, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court). It was assumed in an early case that refusal to answer questions before one House of Congress could be punished as a contempt by that body and by prosecution by the United States under a misdemeanor statute, In re Chapman, 166 U.S. 661, 672 (1897), but there had been no dual proceedings in that case and it seems highly unlikely that the case would now be followed. *Cf.* Colombo v. New York, 405 U.S. 9 (1972).

[58] Heath v. Alabama, 474 U.S. 82 (1985) (defendant crossed state line in course of kidnap murder, was prosecuted for murder in both states).

possibility of capital punishment upon conviction, but it is now settled that the clause protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute."[59] Despite the Clause's literal language, it can apply as well to sanctions that are civil in form if they clearly are applied in a manner that constitutes "punishment."[60] Ordinarily, however, civil *in rem* forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis.[61] and the same is true of civil commitment following expiration of a prison term.[62]

Because one prime purpose of the clause is the protection against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling, a rare exception to the general rule prohibiting appeals from nonfinal orders.[63]

During the 1970s especially, the Court decided an uncommonly large number of cases raising double jeopardy claims.[64] Instead of the clarity that often emerges from intense consideration of a particular issue, however, double jeopardy doctrine has descended into

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

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

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

[62] Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (commitment under State's Sexually Violent Predator Act).

[63] Abney v. United States, 431 U.S. 651 (1977).

[64] *See* United States v. DiFrancesco, 449 U.S. 117, 126–27 (1980) (citing cases).

a state of "confusion," with the Court acknowledging that its decisions "can hardly be characterized as models of consistency and clarity."[65] In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, some Justices have expressed the belief that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had early in our jurisprudence become confused with the double jeopardy clause. While they accept the present understanding, they do so as part of the Court's superintending of the federal courts and not because the understanding is part and parcel of the clause; in so doing, of course, they are likely to find more prosecutorial discretion in the trial process.[66] Others have expressed the view that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials, which would also enhance the ability of government to convict.[67] Still other Justices have engaged in a form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability.[68] Thus, the basic area of disagreement, though far from the only one, centers on the trial from the attachment of jeopardy to the final judgment.

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[65] Burks v. United States, 437 U.S. 1, 9, 15 (1978). One result is instability in the law. Thus, *Burks* overruled, to the extent inconsistent, four cases decided between 1950 and 1960, and United States v. Scott, 437 U.S. 82 (1978), overruled a case decided just three years earlier, United States v. Jenkins, 420 U.S. 358 (1975).

[66] *See* Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting opinion). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that with the double jeopardy clause so interpreted the due process clause could be relied on to prevent prosecutorial abuse during the trial designed to abort the trial and obtain a second one. Id. at 50. All three have joined, indeed, in some instances, have authored, opinions adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse. *E.g.*, United States v. Scott, 437 U.S. 82, 92–94 (1978); Oregon v. Kennedy, 456 U.S. 667 (1982) (but narrowing scope of concept).

[67] United States v. Scott, 437 U.S. 82, 101 (1978) (dissenting opinion) (Justices Brennan, White, Marshall, and Stevens).

[68] Thus, Justice Blackmun has enunciated positions recognizing a broad right of defendants much like the position of the latter three Justices, Crist v. Bretz, 437 U.S. 28, 38 (1978) (concurring), and he joined Justice Stevens' concurrence in Oregon v. Kennedy, 456 U.S. 667, 681 (1982), but he also joined the opinions in United States v. Scott, 437 U.S. 82 (1978), and Arizona v. Washington, 434 U.S. 497 (1978) (Justice Blackmun concurring only in the result).

**Reprosecution Following Mistrial**

The common law generally required that the previous trial must have ended in a judgment, of conviction or acquittal, but the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented.[69] Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred.[70] The reasons the Court has given for fixing the attachment of jeopardy at a point prior to judgment and thus making some terminations of trials before judgment final insofar as the defendant is concerned is that a defendant has a "valued right to have his trial completed by a particular tribunal."[71] The reason the defendant's right is so "valued" is that he has a legitimate interest in completing the trial "once and for all" and "conclud[ing] his confrontation with society,"[72] so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense.[73] These reasons both

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[69] The rule traces back to United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). *See also* Kepner v. United States, 195 U.S. 100 (1904); Downum v. United States, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In Crist v. Bretz, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was "at the core" of the clause and it therefore binds the States. *But see* id. at 40 (Justice Powell dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, Collins v. Loisel, 262 U.S. 426 (1923), by an indictment which is quashed, Taylor v. United States, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment. Bassing v. Cady, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. *E.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial *de novo* and thus set aside the first conviction); Swisher v. Brady, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).

[70] *Cf.* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Arizona v. Washington, 434 U.S. 497, 503–05 (1978).

[71] Wade v. Hunter, 336 U.S. 684, 689 (1949).

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

[73] Arizona v. Washington, 434 U.S. 497, 503–05 (1978); Crist v. Bretz, 437 U.S. 28, 35–36 (1978). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 86–97.

inform the determination when jeopardy attaches and the evaluation of the permissibility of retrial depending upon the reason for a trial's premature termination.

A mistrial may be the result of "manifest necessity,"[74] such as where, for example, the jury cannot reach a verdict[75] or circumstances plainly prevent the continuation of the trial.[76] Answers become more difficult, however, when the doctrine of "manifest necessity" has been called upon to justify a second trial following a mistrial granted by the trial judge because of some event within the prosecutor's control or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant's right in having the trial completed against the public interest in fair trials designed to end in just judgments.[77] Thus, when, after jeopardy attached, a mistrial was granted because of a defective indictment, the Court held that retrial was not barred; a trial judge "properly exercises his discretion" in cases in which an impartial verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error. "If an error could make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."[78] On the other hand, when, after jeopardy attached, a prosecutor successfully moved for a mistrial because a key witness had inadvertently not been served and could not be found, the Court held a retrial barred, because the prosecutor knew prior to the selection and swearing of the jury that the witness was unavailable.[79] Although this case appeared to establish the principle that an error of the prosecutor or of the judge leading to a mistrial could not constitute a "manifest necessity" for terminating the trial, *Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation, in being the sort of instance which the prosecutor could use to abort a trial that was not pro-

[74] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[75] Id.; Logan v. United States, 144 U.S. 263 (1892).

[76] Simmons v. United States, 142 U.S. 148 (1891) (juror's impartiality became questionable during trial); Thompson v. United States, 155 U.S. 271 (1884) (discovery during trial that one of the jurors had served on the grand jury which indicted defendant and was therefore disqualified); Wade v. Hunter, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).

[77] Illinois v. Somerville, 410 U.S. 458, 463 (1973).

[78] 410 U.S. at 464.

[79] Downum v. United States, 372 U.S. 734 (1963).

ceeding successfully and to obtain a new trial in which his advantage would be increased.[80]

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona v. Washington*,[81] defense counsel in his opening statement made prejudicial comments about the prosecutor's past conduct, and the prosecutor's motion for a mistrial was granted over defendant's objections. The Court ruled that retrial was not barred by double jeopardy. Granting that in a strict, literal sense, mistrial was not "necessary" because the trial judge could have given limiting instructions to the jury, the Court held that the highest degree of respect should be given to the trial judge's evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as support for a mistrial order can be found in the trial record, no specific statement of "manifest necessity" need be made by the trial judge.[82]

Emphasis upon the trial judge's discretion has an impact upon the cases in which it is the judge's error, in granting *sua sponte* a mistrial or granting the prosecutor's motion. The cases are in doctrinal disarray. Thus, in *Gori v. United States*,[83] the Court permitted retrial of the defendant when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought the judge's action was an abuse of discretion, it approved retrial on the conclusion that the judge's decision had been taken for defendant's benefit. This rationale was disapproved in the next case, in which the trial judge discharged the jury erroneously and in abuse of his discretion, because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of

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[80] Illinois v. Somerville, 410 U.S. 458, 464–65, 468–69 (1973).

[81] 434 U.S. 497 (1978).

[82] "Manifest necessity" characterizes the burden the prosecutor must shoulder in justifying retrial. 434 U.S. at 505–06. But "necessity" cannot be interpreted literally; it means rather a "high degree" of necessity, and some instances, such as hung juries, easily meet that standard. Id. at 506–07. In a situation like that presented in this case, great deference must be paid to the trial judge's decision because he was in the best position to determine the extent of the possible bias, having observed the jury's response, and to respond by the course he deems best suited to deal with it. Id. at 510–14. Here, "the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. [H]e exercised 'sound discretion'. . . ." Id. at 516.

[83] 367 U.S. 364 (1961). *See also* United States v. Tateo, 377 U.S. 463 (1964) (reprosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

their constitutional rights.[84] Refusing to permit retrial, the Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[85] The later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly." But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.[86]

Of course, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error."[87] "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."[88] In *United States v. Dinitz*,[89] the trial judge had excluded defendant's principal attorney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel. Holding that the defendant could be retried after he chose a mistrial, the Court reasoned that, while the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal. The defendant's choice, even though difficult, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring the defendant to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal, which if successful would lead to a new trial, and neither

[84] United States v. Jorn, 400 U.S. 470, 483 (1971).

[85] 400 U.S. at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the Government's appeal.

[86] Arizona v. Washington, 434 U.S. 497, 514, 515–16 (1978). *See also* Illinois v. Somerville, 410 U.S. 458, 462, 465–66, 469–71 (1973) (discussing *Gori* and *Jorn*.)

[87] United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion).

[88] United States v. Scott, 437 U.S. 82, 93 (1978).

[89] 424 U.S. 600 (1976). *See also* Lee v. United States, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

the public interest nor defendant's interests would thereby be served.

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred. It was unclear what prosecutorial or judicial misconduct would constitute such overreaching,[90] but in *Oregon v. Kennedy*,[91] the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

**Reprosecution Following Acquittal**

That a defendant may not be retried following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence."[92] "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'"[93] While in other areas of double jeopardy doctrine consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, "no matter how erroneous," no matter even if they were "egregiously erroneous."[94]

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[90] *Compare* United States v. Dinitz, 424 U.S. 600, 611 (1976), *with* United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

[91] 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that reprosecution would be barred. Id. at 676–77. The defendant had moved for mistrial after the prosecutor had asked a key witness a prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court's reaching the broader issue and to its narrowing the exception. Id. at 681.

[92] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[93] United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)). For the conceptually related problem of trial for a "separate" offense arising out of the same "transaction," *see* discussion under "The 'Same Transaction' Problem," infra.

[94] Burks v. United States, 437 U.S. 1, 16 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality, and rejection of all such interests save the right

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*,[95] which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge's decision, and enter a judgment of conviction.[96] Previously, under the due process clause, there was no barrier to state provision for prosecutorial appeals from acquittals.[97] But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rulings,[98] but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the double jeopardy clause prohibits further prosecution.[99] In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

***Acquittal by Jury***.—Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecu-

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of the jury to acquit against the evidence and the trial judge's ability to temper legislative rules with leniency, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122–37.

[95] 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 346 n.15 (1975); United States v. DiFrancesco, 449 U.S. 117, 113 n.13 (1980).

[96] In dissent, Justice Holmes, joined by three other Justices, propounded a theory of "continuing jeopardy," so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. 195 U.S. at 134. The Court has numerous times rejected any concept of "continuing jeopardy." *E.g.*, Green v. United States, 355 U.S. 184, 192 (1957); United States v. Wilson, 420 U.S. 332, 351–53 (1975); Breed v. Jones, 421 U.S. 519, 533–35 (1975).

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

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

[99] Title III of the Omnibus Crime Control Act, Pub. L. No. 91–644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statute requires constitutional interpretation as well. United States v. Wilson, 420 U.S. 332, 337 (1974). *See* Sanabria v. United States, 437 U.S. 54, 69 n.23 (1978), and id. at 78 (Justice Stevens concurring).

tion, place the defendant on trial again.[100] Thus, the Court early held that, when the results of a trial are set aside because the first indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.[101]

***Acquittal by the Trial Judge***.—Similarly, when a trial judge acquits a defendant, that action concludes the matter.[102] There is no possibility of retrial for the same offense.[103] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or was a dismissal or some other action which the prosecution may be able to appeal. The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[104] Thus, an appeal by the Government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the Government had not proved facts constituting the offense.[105] Even if, as happened in *Sanabria v. United States*,[106] the trial judge erroneously excludes evidence and

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

[101] In United States v. Ball, 163 U.S. 662 (1896), three defendants were placed on trial, Ball was acquitted and the other two were convicted, the two appealed and obtained a reversal on the ground that the indictment had been defective, and all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause; the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the Government could not take such action. Similarly, in Benton v. Maryland, 395 U.S. 784 (1969), the defendant was convicted of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the double jeopardy clause. On the doctrine of "constructive acquittals" by conviction of a lesser included offense, *see* discussion infra under "Reprosecution After Reversal on Defendant's Appeal."

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

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

[104] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[105] 430 U.S. at 570–76. *See also* United States v. Scott, 437 U.S. 82, 87–92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[106] 437 U.S. 54 (1978).

then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.

Some limited exceptions do exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the due process clause is the prevention of successive trials and not of prosecution appeals *per se*, it is apparently the case that if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the jury's verdict and judgment thereon.[107] Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.[108]

***Trial Court Rulings Terminating Trial Before Verdict***.— If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial;[109] if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite defense such as insanity or entrapment, the defendant is not subject to retrial.[110] However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as

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

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

[109] *See* "Reprosecution After Reversal on Defendant's Appeal," supra.

[110] *See* "Acquittal by the Trial Judge," supra.

prejudicial preindictment delay.[111] The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime Control Act in 1971.[112] That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.[113] In the second place, because the Justices have such differing views about the policies underlying the double jeopardy clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute;[114] if further proceedings, such as continuation of the trial or some further factfinding, was necessary, appeal was not permitted.[115] Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determination related to the defendant's factual guilt or innocence.[116] Such dismissals relating to guilt or innocence

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

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

[113] *Cf.* Lee v. United States, 432 U.S. 23 (1977).

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

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

[116] United States v. Scott, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. The defendant chose to move to

are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

**Reprosecution Following Conviction**

A basic purpose of the double jeopardy clause is to protect a defendant "against a second prosecution for the same offense after conviction."[117] It is "settled" that "no man can be twice lawfully punished for the same offense."[118] Of course, the defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment.[119] The situation involving reprosecution ordinarily arises, therefore, only in the context of successful defense appeals and controversies over punishment.

***Reprosecution After Reversal on Defendant's Appeal.***— Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, the assumption being made in the first case on the subject that, by appealing, a defendant has "waived" his objection to further prosecution by challenging the original conviction.[120] Although it has characterized the "waiver" theory as "totally unsound and indefensible,"[121] the Court has been hesitant in formulating a new theory in maintaining the practice.[122]

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terminate the proceedings and, having made a voluntary choice, is bound to the consequences, including the obligation to continue in further proceedings. Id. at 95–101. The four dissenters would have followed *Jenkins*, and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, "safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials." Id. at 101, 104 (Justices Brennan, White, Marshall, and Stevens). They would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

[117] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[118] Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873).

[119] A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf.* Ciucci v. Illinois, 356 U.S. 571 (1958) (under due process clause, double jeopardy clause not then applying to States).

[120] United States v. Ball, 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances, and circuit Justice Story adopted that view. United States v. Gilbert, 25 Fed. Cas. 1287 (No. 15,204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Frankfurter's dissent in Green v. United States, 355 U.S. 184, 200–05 (1957).

[121] Green v. United States, 355 U.S. 184, 197 (1957). The more recent cases continue to reject a "waiver" theory. *E.g.*, United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976); United States v. Scott, 437 U.S. 82, 99 (1978).

[122] Justice Holmes in dissent in Kepner v. United States, 195 U.S. 100, 134 (1904), rejected the "waiver" theory and propounded a theory of "continuing jeopardy," which also continues to be rejected. *See* discussion, supra. In some cases, a

An exception to full application of the retrial rule exists, however, when defendant on trial for an offense is convicted of a lesser offense and succeeds in having that conviction set aside. Thus, in *Green v. United States*,[123] the defendant had been placed on trial for first degree murder but convicted of second degree murder; the Court held that, following reversal of that conviction, he could not be tried again for first degree murder, although he certainly could be for second degree murder, on the theory that the first verdict was an implicit acquittal of the first degree murder charge.[124] Even though the Court thought the jury's action in the first trial was clearly erroneous, the double jeopardy clause required that the jury's implicit acquittal be respected.[125]

Still another exception arises out of appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*,[126] the appellate court set aside the defendant's conviction on the basis that the prosecution had failed to rebut defendant's proof of insanity. In directing that the defendant could not be retried, the Court observed that if the trial court "had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. . . . [I]t should make no difference that the reviewing court, rather than the trial court, determined

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concept of "election" by the defendant has been suggested, United States v. Scott, 437 U.S. 82, 93 (1978); Jeffers v. United States, 432 U.S. 137, 152–54 (1977), but it is not clear how this formulation might differ from "waiver." Chief Justice Burger has suggested that "probably a more satisfactory explanation" for permissibility of retrial in this situation "lies in analysis of the respective interests involved," Breed v. Jones, 421 U.S. 519, 533–35 (1975), and a determination that on balance the interests of both prosecution and defense are well served by the rule. *See* United States v. Tateo, 377 U.S. 463, 466 (1964); Tibbs v. Florida, 457 U.S. 31, 39–40 (1982).

[123] 355 U.S. 184 (1957).

[124] The decision necessarily overruled Trono v. United States, 199 U.S. 521 (1905), although the Court purported to distinguish the decision. Green v. United States, 355 U.S. 184, 194–97 (1957). *See also* Brantley v. Georgia, 217 U.S. 284 (1910) (no due process violation where defendant is convicted of higher offense on second trial).

[125] *See also* Price v. Georgia, 398 U.S. 323 (1970). The defendant was tried for murder and was convicted of involuntary manslaughter. He obtained a reversal, was again tried for murder, and again convicted of involuntary manslaughter. Acknowledging that, after reversal, Price could have been tried for involuntary manslaughter, the Court nonetheless reversed the second conviction because he had been subjected to the hazard of twice being tried for murder, in violation of the double jeopardy clause, and the effect on the jury of the murder charge being pressed could have prejudiced him to the extent of the second conviction. *But cf.* Morris v. Mathews, 475 U.S. 237 (1986) (inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated murder to non-jeopardy-barred conviction for first degree murder). "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." Id. at 247.

[126] 437 U.S. 1 (1978).

the evidence to be insufficient." [127] The policy underlying the clause of not allowing the prosecution to make repeated efforts to convict forecloses giving the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, if a reviewing court reverses a jury conviction because of its disagreement on the *weight* rather than the *sufficiency* of the evidence, retrial is permitted; the appellate court's decision does not mean that acquittal was the only proper course, hence the deference required for acquittals is not merited. [128] Also, the *Burks* rule does not bar reprosecution following a reversal based on erroneous admission of evidence, even if the remaining properly admitted evidence would be insufficient to convict. [129]

***Sentence Increases***.—The double jeopardy clause protects against imposition of multiple punishment for the same offense. [130] The application of the principle leads, however, to a number of complexities. In a simple case, it was held that where a court inadvertently imposed both a fine and imprisonment for a crime for which the law authorized one or the other but not both, it could not, after the fine had been paid and the defendant had entered his short term of confinement, recall the defendant and change its judgment by sentencing him to imprisonment only. [131] But the Court has held that the imposition of a sentence does not from the moment of imposition have the finality that a judgment of acquittal has. Thus, it has long been recognized that in the same term of court and before the defendant has begun serving the sentence the

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[127] Id. at 10–11. *See also* Greene v. Massey, 437 U.S. 19 (1978) (remanding for determination whether appellate majority had reversed for insufficient evidence or whether some of the majority had based decision on trial error); Hudson v. Louisiana, 450 U.S. 40 (1981) (*Burks* applies where appellate court finds some but insufficient evidence adduced, not only where it finds no evidence). *Burks* was distinguished in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), holding that a defendant who had elected to undergo a bench trial with no appellate review but with right of trial *de novo* before a jury (and with appellate review available) could not bar trial *de novo* and reverse his bench trial conviction by asserting that the conviction had been based on insufficient evidence. The two-tiered system in effect gave the defendant two chances at acquittal; under those circumstances jeopardy was not terminated by completion of the first entirely optional stage.

[128] Tibbs v. Florida, 457 U.S. 31 (1982). The decision was 5-to-4, the dissent arguing that weight and insufficiency determinations should be given identical double jeopardy clause treatment. Id. at 47 (Justices White, Brennan, Marshall, and Blackmun).

[129] Lockhart v. Nelson, 488 U.S. 33 (1988) (state may reprosecute under habitual offender statute even though evidence of a prior conviction was improperly admitted; at retrial, state may attempt to establish other prior convictions as to which no proof was offered at prior trial).

[130] Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1874); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[131] Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).

court may recall him and increase his sentence.[132] Moreover, a defendant who is retried after he is successful in overturning his first conviction is not protected by the double jeopardy clause against receiving a greater sentence upon his second conviction.[133] An exception exists with respect to capital punishment, the Court having held that government may not again seek the death penalty on retrial when on the first trial the jury had declined to impose a death sentence.[134]

Applying and modifying these principles, the Court narrowly approved the constitutionality of a statutory provision for sentencing of "dangerous special offenders," which authorized prosecution appeals of sentences and permitted the appellate court to affirm, reduce, or increase the sentence.[135] The Court held that the provision did not offend the double jeopardy clause. Sentences had never carried the finality that attached to acquittal, and its precedents indicated to the Court that imposition of a sentence less than the maximum was in no sense an "acquittal" of the higher sentence. Appeal resulted in no further trial or other proceedings to which a defendant might be subjected, only the imposition of a new sentence. An increase in a sentence would not constitute multiple punishment, the Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase. Simi-

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[132] Bozza v. United States, 330 U.S. 160 (1947). *See also* Pollard v. United States, 352 U.S. 354, 359–60 (1957) (imposition of prison sentence two years after court imposed an invalid sentence of probation approved). Dicta in some cases had cast doubt on the constitutionality of the practice. United States v. Benz, 282 U.S. 304, 307 (1931). However, United States v. DiFrancesco, 449 U.S. 117, 133–36, 138–39 (1980), upholding a statutory provision allowing the United States to appeal a sentence imposed on a "dangerous special offender," removes any doubt on that score. The Court there reserved decision on whether the government may appeal a sentence that the defendant has already begun to serve.

[133] North Carolina v. Pearce, 395 U.S. 711, 719–21 (1969). *See also* Chaffin v. Stynchcombe, 412 U.S. 17, 23–24 (1973). The principle of implicit acquittal of an offense drawn from Green v. United States, 355 U.S. 184 (1957), does not similarly apply to create an implicit acquittal of a higher sentence. Pearce does hold that a defendant must be credited with the time served against his new sentence. 395 U.S. at 717–19.

[134] Bullington v. Missouri, 451 U.S. 430 (1981). Four Justices dissented. Id. at 447 (Justices Powell, White, Rehnquist, and Chief Justice Burger). The Court disapproved Stroud v. United States, 251 U.S. 15 (1919), although formally distinguishing it. *Bullington* was followed in Arizona v. Rumsey, 467 U.S. 203 (1984), also involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. *Rumsey* was decided by 7–2 vote, with only Justices White and Rehnquist dissenting. In Monge v. California, 524 U.S. 721 (1998), the Court refused to extend the "narrow" *Bullington* exception outside the area of capital punishment.

[135] United States v. DiFrancesco, 449 U.S. 117 (1980). Four Justices dissented. Id. at 143, 152 (Justices Brennan, White, Marshall, and Stevens).

larly upheld as within the allowable range of punishment contemplated by the legislature was a remedy for invalid multiple punishments under consecutive sentences: a shorter felony conviction was vacated, and time served was credited to the life sentence imposed for felony-murder. Even though the first sentence had been commuted and hence fully satisfied at the time the trial court revised the second sentence, the resulting punishment was "no greater than the legislature intended," hence there was no double jeopardy violation.[136]

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an "offense" that must be proved beyond a reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. "Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction."[137]

**"For the Same Offence"**

Sometimes as difficult as determining when a defendant has been placed in jeopardy is determining whether he was placed in jeopardy for the same offense. As noted previously, the same conduct may violate the laws of two different sovereigns, and a defendant may be proceeded against by both because each may have different interests to serve.[138] The same conduct may transgress two or more different statutes, because laws reach lesser and greater parts of one item of conduct, or may violate the same statute more than once, as when one robs several people in a group at the same time.

***Legislative Discretion as to Multiple Sentences***.—It frequently happens that one activity of a criminal nature will violate

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[136] Jones v. Thomas, 491 U.S. 376, 381–82 (1989).

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

[138] *See* discussion supra under "Development and Scope."

one or more laws or that one or more violations may be charged.[139] Although the question is not totally free of doubt, it appears that the double jeopardy clause does not limit the legislative power to split a single transaction into separate crimes so as to give the prosecution a choice of charges that may be tried in one proceeding, thereby making multiple punishments possible for essentially one transaction.[140] "Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and . . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial."[141]

The clause does, however, create a rule of construction, a presumption against the judiciary imposing multiple punishments for the same transaction unless Congress has "spoken in language that is clear and definite"[142] to pronounce its intent that multiple punishments indeed be imposed. The commonly used test in determining whether Congress would have wanted to punish as separate offenses conduct occurring in the same transaction, absent otherwise clearly expressed intent, is the "same evidence" rule. The rule,

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[139] There are essentially two kinds of situations here. There are "double-description" cases in which criminal law contains more than one prohibition for conduct arising out of a single transaction. *E.g.*, Gore v. United States, 357 U.S. 386, 392–93 (1958) (one sale of narcotics resulted in three separate counts: (1) sale of drugs not in pursuance of a written order, (2) sale of drugs not in the original stamped package, and (3) sale of drugs with knowledge that they had been unlawfully imported). And there are "unit-of-prosecution" cases in which the same conduct may violate the same statutory prohibition more than once. *E.g.*, Bell v. United States, 349 U.S. 81 (1955) (defendant who transported two women across state lines for an immoral purpose in one trip in same car indicted on two counts of violating Mann Act). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111–22.

[140] Albernaz v. United States, 450 U.S. 333, 343–44 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana, both charges relating to the same marijuana.) The concurrence objected that the clause does preclude multiple punishments for separate statutory offenses unless each requires proof of a fact that the others do not. Id. at 344. Inasmuch as the case involved separate offenses which met this test, *Albernaz* strictly speaking is not a square holding and previous dicta is otherwise, but *Albernaz* is well-considered dicta in view of the positions of at least four of its Justices who have objected to the dicta in other cases suggesting a constitutional restraint by the clause. Whalen v. United States, 445 U.S. 684, 695, 696, 699 (1980) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger).

[141] Missouri v. Hunter, 459 U.S. 359 (1983) (separate offenses of "first degree robbery," defined to include robbery under threat of violence, and "armed criminal action"). Only Justices Marshall and Stevens dissented, arguing that the legislature should not be totally free to prescribe multiple punishment for the same conduct, and that the same rules should govern multiple prosecutions and multiple punishments.

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

announced in *Blockburger v. United States*,[143] "is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Thus, in *Gore v. United States*,[144] the Court held that defendant's one act of selling narcotics had violated three distinct criminal statutes, each of which required proof of a fact not required by the others; prosecuting him on all three counts in the same proceeding was therefore permissible.[145] So too, the same evidence rule does not upset the "established doctrine" that, for double jeopardy purposes, "a conspiracy to commit a crime is a separate offense from the crime itself,"[146] or the related principle that Congress may prescribe that predicate offenses and "continuing criminal enterprise" are separate offenses.[147] On the other hand, in *Whalen v. United States*,[148] the Court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape, because it is not the case that each statute requires proof of a fact that the other does not, and no indication existed in the statutes and the legislative history that Congress wanted

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[143] 284 U.S. 299, 304 (1932). This case itself was not a double jeopardy case, but it derived the rule from Gavieres v. United States, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* Carter v. McClaughry, 183 U.S. 365 (1902); Morgan v. Devine, 237 U.S. 632 (1915); Albrecht v. United States, 273 U.S. 1 (1927); Pinkerton v. United States, 328 U.S. 640 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Michener, 331 U.S. 789 (1947); Pereira v. United States, 347 U.S. 1 (1954); Callanan v. United States, 364 U.S. 587 (1961).

[144] 357 U.S. 386 (1958).

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

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

[147] Garrett v. United States, 471 U.S. 773 (1985) ("continuing criminal enterprise" is a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

[148] 445 U.S. 684 (1980).

the separate offenses punished.[149] In this as in other areas, a guilty plea ordinarily precludes collateral attack.[150]

***Successive Prosecutions for "the Same Offense"***.—Successive prosecutions raise fundamental double jeopardy concerns extending beyond those raised by enhanced and multiple punishments. It is more burdensome for a defendant to face charges in separate proceedings, and if those proceedings are strung out over a lengthy period the defendant is forced to live in a continuing state of uncertainty. At the same time, multiple prosecutions allow the state to hone its trial strategies through successive attempts at conviction.[151] In *Brown v. Ohio*,[152] the Court, apparently for the first time, applied the same evidence test to bar successive prosecutions in state court for different statutory offenses involving the same conduct. The defendant had been convicted of "joyriding," defined as operating a motor vehicle without the owner's consent, and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court observed that each offense required the same proof and for double jeopardy purposes met the *Blockburger* test. The second conviction was overturned.[153] Application of the same principles resulted in a holding that a prior conviction of failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter, inasmuch as failing to reduce speed was not a necessary element of the statutory offense of manslaughter, unless the prosecution in the second trial had to prove failing to reduce speed to establish this particular offense.[154] In 1990, the Court modified the *Brown* approach, stating that the

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

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

[151] *See* Grady v. Corbin, 495 U.S. 508, 518–19 (1990).

[152] 432 U.S. 161 (1977). *Cf.* In re Nielson, 131 U.S. 176 (1889) (prosecution of Mormon for adultery held impermissible following his conviction for cohabiting with more than one woman, even though second prosecution required proof of an additional fact—that he was married to another woman).

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

[154] Illinois v. Vitale, 447 U.S. 410 (1980).

appropriate focus is on same conduct rather than same evidence.[155] That interpretation held sway only three years, however, before being repudiated as "wrong in principle [and] unstable in application."[156] The *Brown* Court had noted some limitations applicable to its holding,[157] and more have emerged subsequently. Principles appropriate in the "classically simple" lesser-included-offense and related situations are not readily transposible to "multilayered conduct" governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that "a substantive crime and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes."[158] For double jeopardy purposes, a defendant is "punished . . . only for the offense of which [he] is convicted"; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.[159] Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the "same" prior offense, but instead is a stiffened penalty for the later crime.[160]

***The "Same Transaction" Problem***.—The same conduct may also give rise to multiple offenses in a way that would satisfy the

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

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

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

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

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

[160] Monge v. California, 524 U.S. 721, 728 (1998).

*Blockburger* test if that conduct victimizes two or more individuals, and therefore constitutes a separate offense as to each of them. In *Hoag v. New Jersey*,[161] before the double jeopardy clause was applied to the States, the Court found no due process problem in successive trials arising out of a tavern hold-up in which five customers were robbed. *Ashe v. Swenson*,[162] however, presented the Court with the *Hoag* fact situation directly under the double jeopardy clause. The defendant had been acquitted at trial of robbing one player in a poker game; the defense offered no testimony and did not contest evidence that a robbery had taken place and that each of the players had lost money. A second trial was held on a charge that the defendant had robbed a second of the seven poker players, and on the basis of stronger identification testimony the defendant was convicted. Reversing the conviction, the Court held that the doctrine of collateral estoppel[163] was a constitutional rule made applicable to the States through the double jeopardy clause. Because the only basis upon which the jury could have acquitted the defendant at his first trial was a finding that he was not present at the robbery, hence was not one of the robbers, the State could not relitigate that issue; with that issue settled, there could be no conviction.[164] Several Justices would have gone further and required a compulsory joinder of all charges against a defendant growing out of a single criminal act, occurrence, episode, or transaction, except where a crime is not discovered until prosecution arising from the same transaction has begun or where the same jurisdiction does not have cognizance of all the crimes.[165] But the Court has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause."[166]

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[161] 356 U.S. 464 (1958). *See also* Ciucci v. Illinois, 356 U.S. 571 (1958).

[162] 397 U.S. 436 (1970).

[163] "'Collateral estoppel' is an awkward phrase . . . [which] means simply that when an issue of ultimate fact has once been determined by a final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. First developed in civil litigation, the doctrine was applied in a criminal case in United States v. Oppenheimer, 242 U.S. 85 (1916). *See also* Sealfon v. United States, 332 U.S. 575 (1948).

[164] Ashe v. Swenson, 397 U.S. 436, 466 (1970). *See also* Harris v. Washington, 404 U.S. 55 (1971); Turner v. Arkansas, 407 U.S. 366 (1972). *Cf.* Dowling v. United States, 493 U.S. 342 (1990), in which the Court concluded that the defendant's presence at an earlier crime for which he had been acquitted had not necessarily been decided in his acquittal. *Dowling* is distinguishable from *Ashe*, however, because in *Dowling* the evidence relating to the first conviction was not a necessary element of the second offense.

[165] Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Justices Brennan, Douglas, and Marshall concurring). Justices Brennan and Marshall adhered to their position in Brown v. Ohio, 432 U.S. 161, 170 (1977) (concurring); and Thompson v. Oklahoma, 429 U.S. 1053 (1977) (dissenting from denial of certiorari).

[166] Garrett v. United States, 471 U.S. 773, 790 (1985). Earlier, the approach had been rejected by Chief Justice Burger in Ashe v. Swenson, 397 U.S. 436, 468 (1970)

## SELF-INCRIMINATION

### Development and Scope

The source of the self-incrimination clause was the maxim "*nemo tenetur seipsum accusare*," that "no man is bound to accuse himself." The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial and the inquisitorial. In the accusatorial system, which predated the reign of Henry II but was expanded and extended by him, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others, and in the early years through examination of the defendant as well. The inquisitorial system, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath *ex officio*. Under the oath, an official had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all matters about which he would be questioned; before administration of the oath the person was not advised of the nature of the charges against him, or whether he was accused of crime, and was also not informed of the nature of the questions to be asked.[167]

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with opposition to the ecclesiastical oath *ex officio*, led over a long period of time to general acceptance of the principle that a person could not be required to accuse himself under oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or a court of common law.[168] The precedents in the colonies are few in number, but following the Revolution six states had embodied the privilege against self-incrimination in their constitutions,[169] and the privi-

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(dissenting), by him and Justice Blackmun in Harris v. Washington, 404 U.S. 55, 57 (1971) (dissenting), and, perhaps, by Justice Rehnquist in Turner v. Arkansas, 407 U.S. 366, 368 (1972) (dissenting).

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

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

[169] 3 F. Thorpe, *The Federal and State Constitutions*, reprinted in H. DOC. NO. 357, 59th Congress, 2d Sess. 1891 (1909) (Massachusetts); 4 id. at 2455 (New Hamp-

lege was one of those recommended by several state ratifying conventions for inclusion in a federal bill of rights.[170] Madison's version of the clause read "nor shall be compelled to be a witness against himself," but a House amendment inserted "in any criminal case" into the provision.[171]

The historical studies cited demonstrate that in England and the colonies the privilege was narrower than the interpretation now prevailing, a common situation reflecting the gradual expansion, or occasional contracting, of constitutional guarantees based on the judicial application of the policies underlying the guarantees in the context of new factual patterns and practices. The difficulty is that the Court has generally failed to articulate the policy objectives underlying the privilege, usually citing a "complex of values" when it has attempted to state the interests served by it.[172] Commonly mentioned in numerous cases was the assertion that the privilege was designed to protect the innocent and to further the search for truth.[173] It appears now, however, that the Court has rejected both of these as inapplicable and has settled upon the principle that the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.[174] In

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shire); 5 id. at 2787 (North Carolina), 3038 (Pennsylvania); 6 id. at 3741 (Vermont); 7 id. at 3813 (Virginia).

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

[171] Id. at 753 (August 17, 1789).

[172] "It reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, . . .'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . . , our distrust of self-deprecatory statement; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1954). A dozen justifications have been suggested for the privilege. 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 2251 (J. McNaughton rev. 1961).

[173] *E.g.*, Twining v. New Jersey, 211 U.S. 78, 91 (1908); Ullmann v. United States, 350 U.S. 422, 426 (1956); Quinn v. United States, 349 U.S. 155, 162–63 (1955).

[174] "[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the

order to protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts." [175]

"The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." [176] Thus, a judge who would deny a claim of the privilege must be "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." [177] The witness must have reasonable cause to apprehend danger from an answer, but he may not be the sole judge of the validity of his claim. While the trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory, he must determine whether there is a reasonable apprehension of incrimi-

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integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' . . ."

"The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone." Tehan v. United States ex rel. Shott, 382 U.S. 406, 415, 416 (1966); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Schmerber v. California, 384 U.S. 757, 760–765 (1966). *See also* California v. Byers, 402 U.S. 424, 448–58 (1971) (Justice Harlan concurring). For a critical modern view of the privilege, *see* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

[175] Ullmann v. United States, 350 U.S. 422, 438–39 (1956).

[176] Hoffman v. United States, 341 U.S. 479, 486–87 (1951). *See also* Emspak v. United States, 349 U.S. 190 (1955); Blau v. United States, 340 U.S. 159 (1950); Blau v. United States, 340 U.S. 332 (1951).

[177] 341 U.S. at 488 (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)). For an application of these principles, *see* Malloy v. Hogan, 378 U.S. 1, 11–14 (1964), and id. at 33 (Justices White and Stewart dissenting). Where government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf.* California v. Byers, 402 U.S. 424 (1971) (plurality opinion).

nation by considering the circumstances of the case, his knowledge of matters surrounding the inquiry, and the nature of the evidence which is demanded from the witness.[178] The fact that a witness has previously asserted her innocence of any wrongdoing does not obviate the right, as truthful responses of an innocent witness may provide the government with incriminating evidence.[179] The witness must explicitly claim her privilege, however, or she will be deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.[180]

The privilege against self-incrimination is a personal one and cannot be utilized by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution.[181] Neither may a corporate official with custody of corporate documents which incriminate him personally resist their compelled production on the assertion of his personal privilege.[182]

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to

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[178] Hoffman v. United States, 341 U.S. 479 (1951); Mason v. United States, 244 U.S. 362 (1917).

[179] Ohio v. Reiner, 523 U.S. 17 (2001).

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

[181] United States v. White, 322 U.S. 694, 701 (1944); Baltimore & O.R.R. v. ICC, 221 U.S. 612, 622 (1911); Hale v. Henkel, 201 U.S. 43, 69–70, 74–75 (1906).

[182] United States v. White, 322 U.S. 694, 699–700 (1944); Wilson v. United States, 221 U.S. 361, 384–385 (1911). But the government may make no evidentiary use of the act of production in proceeding individually against the corporate custodian. Braswell v. United States, 487 U.S. 99 (1988). *Cf.* George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); United States v. Rylander, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

uncover other evidence against him.[183] Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.[184] Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature.[185] The Court in recent years has also applied the privilege to situations, such as police interrogation of suspects, in which there is no *legal* compulsion to speak.[186]

What the privilege protects against is compulsion of "testimonial" disclosures. Thus, the clause is not offended by such non-testimonial compulsions as requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood.[187] A person may be compelled to produce specific

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

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

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

[186] Miranda v. Arizona, 384 U.S. 436 (1966).

[187] Schmerber v. California, 384 U.S. 757, 764 (1966); United States v. Wade, 388 U.S. 218, 221–23 (1967); Holt v. United States, 218 U.S. 245, 252 (1910). In California v. Byers, 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not involve testimonial compulsion and therefore the privilege was inapplicable, id. at 431–34 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, id. at 434 (concurring), and Justices Black, Douglas, Brennan, and Marshall, id. at 459, 464 (dissenting), disagreed. In South Dakota v. Neville, 459 U.S. 553 (1983), the Court indicated as well that a State may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit, but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on absence of coercion,

documents even though they contain incriminating information.[188] If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.[189] Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual's income, employment, and professional relationships.[190]

The protection is against "compulsory" incrimination, and traditionally the Court has treated within the clause only those compulsions which arise from legally enforceable obligations, culminating in imprisonment for refusal to testify or to produce documents.[191] The compulsion need not be imprisonment, but can also

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preferring not to apply the sometimes difficult distinction between testimonial and physical evidence. In another case, involving roadside videotaping of a drunk driving suspect, the Court found that the slurred nature of the suspect's speech, as well as his answers to routine booking questions as to name, address, weight, height, eye color, date of birth, and current age, were not testimonial in nature. Pennsylvania v. Muniz, 496 U.S. 582 (1990). On the other hand, the suspect's answer to a request to identify the date of his sixth birthday was considered testimonial. Id. Two Justices recently challenged the interpretation limiting application to "testimonial" disclosures, claiming that the original understanding of the word "witness" was not limited to someone who gives testimony, but included someone who gives any kind of evidence. United States v. Hubbell, 530 U.S. 27, 49 (2000) (Justice Thomas, joined by Justice Scalia, concurring).

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

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

[190] United States v. Hubbell, 530 U.S. 27 (2000).

[191] *E.g.*, Marchetti v. United States, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); Malloy v. Hogan, 378 U.S. 1 (1964) (contempt citation on refusal to testify). *See also* South Dakota v. Neville, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect's

be termination of public employment [192] or disbarment of a lawyer [193] as a legal consequence of a refusal to make incriminating admissions. The degree of coercion may also prove decisive, the Court having ruled that moving a prisoner from a medium security unit to a maximum security unit was insufficient to compel him to incriminate himself in spite of the attendant loss of privileges and the harsher living conditions. [194] However, while it appears that prisoners [195] and probationers [196] have less protection than others, the Court has not yet developed a clear doctrinal explanation to identify the differences between permissible and impermissible coercion. [197]

It has long been the rule that a defendant who takes the stand in his own behalf does so voluntarily, and cannot then claim the privilege to defeat cross-examination on matters reasonably related to the subject matter of his direct examination, [198] and that such

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refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

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

[193] Spevack v. Klein, 385 U.S. 511 (1967).

[194] McKune v. Lile, 122 S. Ct. 2017 (2002). The transfer was mandated for refusal to participate in a sexual abuse treatment program that required revelation of sexual history and admission of responsibility. The plurality declared that rehabilitation programs are permissible if the adverse consequences for non-participation are "related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." 122 S. Ct. at 2027 (opinion of Justice Kennedy). Concurring Justice O'Connor stated her belief that the "minor" change in living conditions seemed "very unlikely to actually compel [the prisoner] to participate." Id. at 2034.

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

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

[197] The Court in *McKune v. Lile* was split 5–4, with no opinion of the Court.

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

a defendant may be impeached by proof of prior convictions.[199] But in *Griffin v. California*,[200] the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the stand in his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and "[i]t cuts down on the privilege by making its assertion costly."[201] Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[202] Neither may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.[203] But where the defendant took the stand and testified, the Court permitted the impeachment use of his pre-arrest silence when that silence had in no way been officially encouraged, through a *Miranda* warning or otherwise.[204]

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

[200] 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. *See* Wilson v. United States, 149 U.S. 60 (1893). In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that the self-incrimination clause required a State, upon defendant's request, to give a cautionary instruction to the jurors that they must disregard defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. Bruno v. United States, 308 U.S. 287 (1939). In Lakeside v. Oregon, 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant's objection. Carter v. Kentucky was applied in James v. Kentucky, 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

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

[202] Chapman v. California, 386 U.S. 18 (1967); United States v. Hasting, 461 U.S. 499 (1983).

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

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

Further, the Court held inadmissible at the subsequent trial a defendant's testimony at a hearing to suppress evidence wrongfully seized, since use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.[205] The Court also proscribed the introduction at a second trial of the defendant's testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree," and had been "coerced" from the defendant through use of the confession.[206] Most potentially far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea; the statute "needlessly encourage[d]" waivers of defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.[207]

While this "needless encouragement" test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in the system requiring the choice, the Court soon devolved another test stressing the voluntariness of the choice. A guilty plea entered by a defendant who correctly understands the consequences of the plea is voluntary unless coerced or obtained under false pretenses; moreover, there is no impermissible coercion where the defendant has the effective assistance of counsel.[208] The Court in an opinion by Justice Harlan then formulated still another test in holding that a defendant in a capital case in which the jury in one process decides both guilt and sentence could be put to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence. The pressure to take the stand in response to the sentencing issue, said the Court, was not so great as to impair the policies underlying the self-incrimination clause, policies described in this instance as proscription of coercion and of cruelty in putting the defendant to an undeniably "hard" choice.[209]

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

[206] Harrison v. United States, 392 U.S. 219 (1968).

[207] Jackson v. United States, 390 U.S. 570, 583 (1968).

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

[209] McGautha v. California, 402 U.S. 183, 210–20 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment, and represented no withdrawal from the position described here.

Similarly, it has been held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the clause.[210] Neither does it violate a defendant's self-incrimination privilege to create a presumption upon the establishment of certain basic facts which the jury may utilize to infer defendant's guilt unless he rebuts the presumption.[211]

The obligation to testify is not relieved by this clause, if, regardless of whether incriminating answers are given, a prosecution is precluded,[212] or if the result of the answers is not incrimination, but rather harm to reputation or exposure to infamy or disgrace.[213] The clause does not prevent a public employer from discharging an employee who, in an investigation specifically and narrowly di-

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*Cf.* Corbitt v. New Jersey, 439 U.S. 212 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

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

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

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

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

rected at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination.[214] But it is unclear under what other circumstances a public employer may discharge an employee who has claimed his privilege before another investigating agency.[215]

Finally, the rules established by the clause and the judicial interpretations are applicable against the States to the same degree that they apply to the Federal Government,[216] and neither sovereign can compel discriminatory admissions which would incriminate the person in the other jurisdiction.[217] There is no "cooperative internationalism" that parallels the cooperative federalism and cooperative prosecution on which application against states is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.[218]

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

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

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

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

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

[218] United States v. Balsys, 524 U.S. 666 (1998).

**The Power To Compel Testimony and Disclosure**

***Immunity***.—"Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible [with the values of the self-incrimination clause]. Rather they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[219] Apparently the first immunity statute was enacted by Parliament in 1710[220] and it was widely copied in the colonies. The first federal immunity statute was enacted in 1857, and immunized any person who testified before a congressional committee from prosecution for any matter "touching which" he had testified.[221]

Revised in 1862 so as merely to prevent the use of the congressional testimony at a subsequent prosecution of any congressional witness,[222] the statute was soon rendered unenforceable by the ruling in *Counselman v. Hitchcock*[223] that an analogous limited immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. *Counselman* was ambiguous with regard to its grounds because it identified two faults in the statute: it did not proscribe "derivative" evidence[224] and it prohibited only future use of the compelled testimony.[225] The latter language accentuated a division between adherents of "transactional" immunity and of "use" immunity which has continued to the present.[226] In any event, following *Counselman*, Congress enacted a statute which conferred transactional immunity as

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[219] Kastigar v. United States, 406 U.S. 441, 445–46 (1972). It has been held that the Fifth Amendment itself precludes the use as criminal evidence of compelled admissions, Garrity v. New Jersey, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may "waive" though inadvertently the privilege and be required to testify and incriminate oneself. Rogers v. United States, 340 U.S. 367 (1951).

[220] 9 Anne, c. 14, 3–4 (1710). *See* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

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

[222] Ch. 11, 12 Stat. 333 (1862).

[223] 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

[224] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892). *And see* id. at 586.

[225] 142 U.S. at 585–86.

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

the price for being able to compel testimony,[227] and the Court sustained this law in a five-to-four decision.[228]

"The 1893 statute has become part of our constitutional fabric and has been included 'in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.'"[229] So spoke Justice Frankfurter in 1956, broadly reaffirming *Brown v. Walker* and upholding the constitutionality of a federal immunity statute.[230] Because all but one of the immunity acts passed after *Brown v. Walker* were transactional immunity statutes,[231] the question of the constitutional sufficiency of use immunity did not arise, although dicta in cases dealing with immunity continued to assert the necessity of the former type of grant.[232] But beginning in 1964, when it applied the self-incrimination clause to the States, the Court was faced with the problem which arose because a State could grant immunity only in its own courts and not in the courts of another State or of the United States.[233] On the

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[227] Ch. 83, 27 Stat. 443 (1893).

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

[229] Ullmann v. United States, 350 U.S. 422, 438 (1956), (quoting Shapiro v. United States, 335 U.S. 1, 6 (1948)).

[230] "[The] sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts'. . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." 350 U.S. at 438–39. The internal quotation is from Boyd v. United States, 116 U.S. 616, 634 (1886).

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

[232] *E.g.*, Hale v. Henkel, 201 U.S. 43, 67 (1906); United States v. Monia, 317 U.S. 424, 425, 428 (1943); Smith v. United States, 337 U.S. 137, 141, 146 (1949); United States v. Murdock, 284 U.S. 141 149 (1931); Adams v. Maryland, 347 U.S. 179, 182 (1954). In Ullmann v. United States, 350 U.S. 422, 436–37 (1956), Justice Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence.

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

other hand, to foreclose the States from compelling testimony because they could not immunize a witness in a subsequent "foreign" prosecution would severely limit state law enforcement efforts. Therefore, the Court emphasized the "use" restriction rationale of *Counselman* and announced that as a "constitutional rule, a state witness could not be compelled to incriminate himself under federal law unless federal authorities were precluded from using either his testimony or evidence derived from it," and thus formulated a use restriction to that effect.[234] Then, while refusing to adopt the course because of statutory interpretation reasons, the Court indicated that use restriction in a federal regulatory scheme requiring the reporting of incriminating information was "in principle an attractive and apparently practical resolution of the difficult problem before us," citing *Murphy* with apparent approval.[235]

Congress thereupon enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only.[236] Soon tested, this statute was sustained in *Kastigar v. United States*.[237] "[P]rotection coextensive with the privilege is the degree of protection which the Constitution requires," wrote Justice Powell for the Court, "and is all that the Constitution requires. . . ."[238] "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this

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

[235] Marchetti v. United States, 390 U.S. 39, 58 (1968).

[236] Organized Crime Control Act of 1970, Pub. L. No. 91–452, § 201(a), 84 Stat. 922, 18 U.S.C. §§ 6002–03. Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply "constructive" use immunity absent compliance with the statute's procedures. United States v. Doe, 465 U.S. 605 (1984).

[237] 406 U.S. 441 (1972). A similar state statute was sustained in Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

[238] Kastigar v. United States, 406 U.S. 441, 459 (1972). *See also* United States v. Hubbell, 530 U.S. 27 (2000) (because the statute protects against derivative use of compelled testimony, a prosecution cannot be based on incriminating evidence revealed only as the result of compliance with an extremely broad subpoena).

protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."[239]

***Required Records Doctrine***.—While the privilege is applicable to an individual's papers and effects,[240] it does not extend to corporate persons, hence corporate records, as has been noted, are subject to compelled production.[241] In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the "required records" doctrine. That is, it has held "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"[242] This exception developed out of, as Justice Frankfurter showed in dissent, the rule that documents which are part of the official records of government are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that

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[239] 406 U.S. at 453. Joining Justice Powell in the opinion were Justices Stewart, White, and Blackmun, and Chief Justice Burger. Justices Douglas and Marshall dissented, contending that a ban on use could not be enforced even if a use ban was constitutionally adequate. Id. at 462, 467. Justices Brennan and Rehnquist did not participate but Justice Brennan's views that transactional immunity was required had been previously stated. Piccirillo v. New York, 400 U.S. 548, 552 (1971) (dissenting). *See also* New Jersey v. Portash, 440 U.S. 451 (1979) (prosecution use of defendant's immunized testimony to impeach him at trial violates self-incrimination clause). Neither the clause nor the statute prevents the perjury prosecution of an immunized witness or the use of all his testimony to prove the commission of perjury. United States v. Apfelbaum, 445 U.S. 115 (1980). *See also* United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976). Because use immunity is limited, a witness granted use immunity for grand jury testimony may validly invoke his Fifth Amendment privilege in a civil deposition proceeding when asked whether he had "so testified" previously, the deposition testimony not being covered by the earlier immunity. Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

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

[241] *See* discussion supra under "Development and Scope."

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

government could always scrutinize them without hindrance from the record-keeper. "If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume." [243]

"It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself." [244] But the only limit which the Court suggested in *Shapiro* was that there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." [245] That there are limits established by the self-incrimination clause itself rather than by a subject matter jurisdiction test is evident in the Court's consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

***Reporting and Disclosure***.—The line of cases begins with *United States v. Sullivan* [246] in which a unanimous Court held that the Fifth Amendment did not privilege a bootlegger in not filing an income tax return because the filing would have disclosed the illegality in which he was engaged. "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." Justice Holmes stated for the Court.

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[243] 335 U.S. at 51.
[244] 335 U.S. at 32.
[245] 335 U.S. at 32
[246] 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in Garner v. United States, 424 U.S. 648 (1976), holding that a taxpayer's privilege against self-incrimination was not violated when he failed to claim his privilege on his tax returns, and instead gave incriminating information leading to conviction. One must assert one's privilege to alert the Government to the possibility that it is seeking to obtain incriminating material. It is not coercion forbidden by the clause that upon a claim of the privilege the Government could seek an indictment for failure to file, since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, irrespective of whether a good-faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.

However, "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . ." Utilizing its taxing power to reach gambling activities over which it might not have had jurisdiction otherwise,[247] Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages, and coupled the tax with an annual registration requirement under which each gambler must file with the IRS a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a complete failure to file, (2) since the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) since registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.[248]

Constitutional limitations appeared, however, in *Albertson v. SACB*,[249] which struck down under the self-incrimination clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime."[250]

The gambling tax reporting scheme was next struck down by the Court.[251] Because of the pervasiveness of state laws prohibiting

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[247] The expansion of the commerce power would now obviate reliance on the taxing power.

[248] United States v. Kahriger, 345 U.S. 22 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[249] 382 U.S. 70 (1965).

[250] 382 U.S. at 79. The decision was unanimous, Justice White not participating. The same issue had been held not ripe for adjudication in Communist Party v. SACB, 367 U.S. 1, 105–10 (1961).

[251] Marchetti v. United States, 390 U.S. 39 (1968) (occupational tax); Grosso v. United States, 390 U.S. 62 (1968) (wagering excise tax). In Haynes v. United States, 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm that it was illegal to possess. The following Term on the same grounds the Court voided a statute prohibiting the possession of marijuana without having paid a transfer tax and registering. Leary v. United States, 395 U.S. 6 (1969); United States v. Covington, 395 U.S. 57 (1969). However, a statute was upheld which prohibited the sale of narcotics to a person who did not have a written order on a pre-

gambling, said Justice Harlan for the Court, "the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination."[252] Overruling *Kahriger* and *Lewis*, the Court rejected its earlier rationales. Registering *per se* would have exposed a gambler to dangers of state prosecution, so *Sullivan* did not apply.[253] Any contention that the voluntary engagement in gambling "waived" the self-incrimination claim, because there is "no constitutional right to gamble," would nullify the privilege.[254] And the privilege was not governed by a "rigid chronological distinction" so that it protected only past or present conduct, but also reached future self-incrimination the danger of which is not speculative and insubstantial.[255] Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the "required records" doctrine of *Shapiro*. "First, petitioner . . . was not . . . obliged to keep and preserve records 'of the same kind as he has customarily kept'; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony . . . . Second, whatever 'public aspects' there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information

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scribed form, since the requirement caused the self-incrimination of the buyer but not the seller, the Court viewing the statute as actually a flat proscription on sale rather than a regulatory measure. Minor v. United States, 396 U.S. 87 (1969). The congressional response was reenactment of the requirements coupled with use immunity. United States v. Freed, 401 U.S. 601 (1971).

[252] Marchetti v. United States, 390 U.S. 39, 48 (1968).

[253] "Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'" 390 U.S. at 50.

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

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

known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in 'an essentially non-criminal and regulatory area of inquiry' while those here are directed to a 'selective group inherently suspect of criminal activities.' The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*." [256]

Most recent of this line of cases is *California v. Byers*, [257] which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. *Byers* sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that a driver who reasonably believed that compliance with the statute would result in self-incrimination could refuse to comply. A plurality of the Court, however, determined that *Sullivan* and *Shapiro* applied and not the *Albertson- Marchetti* line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, and because the statute was directed to all drivers and not to a group which was either "highly selective" or "inherently suspect of criminal activities." The combination of a noncriminal motive with the general character of the requirement made too slight for reliance the possibility of incrimination. [258] Justice Harlan concurred to make up the majority on the disposition of the case, disagreeing with the plurality's conclusion that the stop and identification requirement did not compel incrimination. [259]

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[256] Marchetti v. United States, 390 U.S. 39, 57 (1968).

[257] 402 U.S. 424 (1971)

[258] 402 U.S. at 427–31 (Chief Justice Burger and Justices Stewart, White, and Blackmun).

[259] "The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer . . . . [I]t must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are 'real' and not 'imagi-

However, the Justice thought that where there is no governmental purpose to enforce a criminal law and instead government is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government's interest and the individual's interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan voted to sustain the statute.[260] *Byers* was applied in *Baltimore Dep't of Social Services v. Bouknight*[261] to uphold a juvenile court's order that the mother of a child under the court's supervision produce the child. Although in this case the mother was suspected of having abused or murdered her child, the order was justified for "compelling reasons unrelated to criminal law enforcement": concern for the child's safety.[262] Moreover, because the mother had custody of her previously abused child only as a result of the juvenile court's order, the Court analogized to the required records cases to conclude that the mother had submitted to the requirements of the civil regulatory regime as the child's "custodian."

### Confessions: Police Interrogation, Due Process, and Self-Incrimination

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[263] This language in an 1897 case marked a

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nary' risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* . . . start from an assumption of a non-prosecutorial governmental purpose in the decision to tax gambling revenues; those cases go on to apply what in another context I have called the 'real danger v. imaginary possibility standard . . . .' A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the 'inherently-suspect-class' factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view." 402 U.S. at 437–38.

[260] 402 U.S. at 448–58. The four dissenters argued that it was unquestionable that Byers would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. Id. at 459, 464 (Justices Black, Douglas, Brennan, and Marshall).

[261] 493 U.S. 549 (1990).

[262] 493 U.S. at 561. By the same token, the Court concluded that the targeted group—persons who care for children pursuant to a juvenile court's custody order—is not a group "inherently suspect of criminal activities" in the *Albertson-Marchetti* sense.

[263] Bram v. United States, 168 U.S. 532, 542 (1897).

sharp if unacknowledged break with the doctrine of previous cases in which the Court had applied the common-law test of voluntariness to determine the admissibility of confessions, and, while the language was never expressly disavowed in subsequent cases, the Court seems nevertheless to have proceeded along due process standards rather than self-incrimination analysis. Because the self-incrimination clause for most of this period was not applicable to the States, the admissibility of confessions in state courts was determined under due process standards developed from common-law voluntariness principles. It was only after the Court extended the self-incrimination clause to the States that a divided Court reaffirmed and extended the 1897 ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.[264] Though recent research tends to treat as oversimplified Wigmore's conclusion that "there never was any historical connection . . . between the constitutional clause and the confession-doctrine,"[265] the fact is that the contention, coupled with the inapplicability of the self-incrimination clause to the States, was apparently the basis until recently for the Supreme Court's adjudication of confession cases.

***The Common Law Rule***.—Not until the latter part of the eighteenth century did courts develop a rule excluding coerced confessions from admission at trial; prior to that time, even confessions obtained by torture were admissible. As the rule developed in England and in early United States jurisprudence, the rationale was the unreliability of the confession's contents when induced by a promise of benefit or a threat of harm.[266] In its first decision on the admissibility of confessions, the Court adopted the common-law rule, stressing that while a "voluntary confession of guilt is among the most effectual proofs in the law, from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution." "[T]he presumption upon which weight is given to

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[264] Miranda v. Arizona, 384 U.S. 436 (1966).

[265] 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823, at 250 n.5 (3d ed. 1940); *see also* vol. 8 id. at § 2266 (McNaughton rev. 1961). It appears that while the two rules did develop separately, they did stem from some of the same considerations, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT—THE RIGHT AGAINST SELF-INCRIMINATION 325–32, 495 n.43 (1968). *See also* Culombe v. Connecticut, 367 U.S. 568, 581–84, especially 583 n.25 (1961) (Justice Frankfurter announcing judgment of the Court).

[266] 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823 (3d ed. 1940); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954–59 (1966).

such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law." [267] Subsequent cases followed essentially the same line of thought. [268] Then, in *Bram v. United States*, [269] the Court assimilated the common-law rule thus mentioned as a command of the Fifth Amendment and indicated that henceforth a broader standard for judging admissibility was to be applied. [270] Though this rule [271] and the case itself were subsequently approved in several cases, [272] the Court could hold within a few years that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent, [273] and more than once later Courts could doubt "whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy. . . ." [274]

***McNabb-Mallory Doctrine***.—Perhaps one reason the Court did not squarely confront the application of the self-incrimination clause to police interrogation and the admissibility of confessions in federal courts was that in *McNabb v. United States* [275] it promulgated a rule excluding confessions obtained after an "unnecessary

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

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

[269] 168 U.S. 532 (1897). "[T]he generic language of the [Fifth] Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted. . . ." Id. at 543.

[270] 168 U.S. at 549.

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

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

[273] Powers v. United States, 223 U.S. 303 (1912).

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

[275] 318 U.S. 332 (1943). *See also* Anderson v. United States, 318 U.S. 350 (1943).

delay" in presenting a suspect for arraignment after arrest.[276] This rule, developed pursuant to the Court's supervisory power over the lower federal courts[277] and hence not applicable to the States as a constitutional rule would have been,[278] was designed to implement the guarantees assured to a defendant by the Federal Rules of Criminal Procedure,[279] and was clearly informed with concern over incommunicado interrogation and coerced confessions.[280] While the Court never attempted to specify a minimum time after which delay in presenting a suspect for arraignment would invalidate confessions, Congress in 1968 legislated to set a six-hour period for interrogation following arrest before the suspect must be presented.[281]

***State Confession Cases***.—In its first encounter with a confession case arising from a state court, the Supreme Court set aside a conviction based solely on confessions of the defendants which had been extorted from them through repeated whippings with ropes and studded belts.[282] For some thirty years thereafter the Court attempted through a consideration of the "totality of the cir-

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[276] In Upshaw v. United States, 335 U.S. 410 (1948), the Court rejected lower court interpretations that delay in arraignment was but one factor in determining the voluntariness of a confession, and held that a confession obtained after a thirty-hour delay was inadmissible per se. Mallory v. United States, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. United States v. Mitchell, 322 U.S. 65 (1944).

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

[278] Gallegos v. Nebraska, 342 U.S. 55, 60, 63–64, 71–73 (1951); Stein v. New York, 346 U.S. 156, 187–88 (1953); Culombe v. Connecticut, 367 U.S. 568, 599–602 (1961) (Justice Frankfurter announcing judgment of the Court).

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

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

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

[282] Brown v. Mississippi, 297 U.S. 278 (1936). "[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter. . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Id. at 285, 286.

cumstances" surrounding interrogation to determine whether a confession was "voluntary" and admissible or "coerced" and inadmissible. During this time, the Court was balancing, in Justice Frankfurter's explication, a view that police questioning of suspects was indispensable in solving many crimes, on the one hand, with the conviction that the interrogation process is not to be used to overreach persons who stand helpless before it.[283] "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[284] Obviously, a court seeking to determine whether the making of a confession was voluntary operated under a severe handicap, inasmuch as the interrogation process was in secret with only police and the suspect witness to it, and inasmuch as the concept of voluntariness referred to the defendant's mental condition.[285] Despite, then, a bountiful number of cases, binding precedents were few.

On the one hand, many of the early cases disclosed rather clear instances of coercion of a nature that the Court could little doubt produced involuntary confessions. Not only physical torture,[286] but other overtly coercive tactics as well have been condemned. *Chambers v. Florida*[287] held that five days of prolonged questioning following arrests without warrants and incommunicado detention made the subsequent confessions involuntary. *Ashcraft v. Tennessee*[288] held inadmissible a confession obtained near the end

[283] Culombe v. Connecticut, 367 U.S. 568, 570–602 (1961) (announcing judgment of the Court).

[284] 367 U.S. at 602.

[285] "The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances." 367 U.S. at 603. *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 973–82 (1966).

[286] Brown v. Mississippi, 297 U.S. 278 (1936).

[287] 309 U.S. 227 (1940).

[288] 322 U.S. 143 (1944). Dissenting, Justices Jackson, Frankfurter, and Roberts protested that "interrogation *per se* is not, while violence *per se* is, an outlaw." A confession made after interrogation was not truly "voluntary" because all questioning is "inherently coercive," because it puts pressure upon a suspect to talk. Thus, in evaluating a confession made after interrogation, the Court must, they insisted, determine whether the suspect was in possession of his own will and self-

of a 36-hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators, and highly trained lawyers. Similarly, *Ward v. Texas*,[289] voided a conviction based on a confession obtained from a suspect who had been arrested illegally in one county and brought some 100 miles away to a county where questioning began, and who had then been questioned continuously over the course of three days while being driven from county to county and being told falsely of a danger of lynching. "Since *Chambers v. State of Florida*, . . . this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.' A prolonged interrogation of the accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror."[290]

While the Court would not hold that prolonged questioning by itself made a resultant confession involuntary,[291] it did increasingly find coercion present even in intermittent questioning over a period of days of incommunicado detention.[292] In *Stein v. New York*,[293] however, the Court affirmed convictions of experienced

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control and not look alone to the length or intensity of the interrogation. They accused the majority of "read[ing] an indiscriminating hostility to mere interrogation into the Constitution" and preparing to bar all confessions made after questioning. Id. at 156. A possible result of the dissent was the decision in Lyons v. Oklahoma, 322 U.S. 596 (1944), which stressed deference to state-court factfinding in assessing the voluntariness of confessions.

[289] 316 U.S. 547 (1942). *See also* Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Vernon v. Alabama, 313 U.S. 540 (1941).

[290] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

[291] Lisenba v. California, 314 U.S. 219 (1941).

[292] Watts v. Indiana, 338 U.S. 49 (1949) (Suspect held incommunicado without arraignment for seven days without being advised of his rights. He was held in solitary confinement in a cell with no place to sleep but the floor and questioned each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights. He was questioned by relays of officers for periods briefer than in Watts during both days and nights); Harris v. South Carolina, 338 U.S. 68 (1949) (Suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, and held incommunicado. He was questioned for three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft). Justice Jackson dissented in the latter two cases, willing to hold that a confession obtained under lengthy and intensive interrogation should be admitted short of a showing of violence or threats of it and especially if the truthfulness of the confession may be corroborated by independent means. 338 U.S. at 57.

[293] 346 U.S. 156 (1953).

criminals who had confessed after twelve hours of intermittent questioning over a period of thirty-two hours of incommunicado detention. While the questioning was less intensive than in the prior cases, Justice Jackson for the majority stressed that the correct approach was to balance "the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[294] But by the time *Haynes v. Washington*[295] was decided, holding inadmissible a confession made by an experienced criminal because of the "unfair and inherently coercive context" in which the statement was made, it was clear that the Court was adhering to a rule which found coercion in the fact of prolonged interrogation without regard to the individual characteristics of the suspect.[296] However, the age and intelligence of suspects have been repeatedly cited by the Court in appropriate cases as demonstrating the particular susceptibility of the suspects to even mild coercion.[297] But a suspect's mental state alone—even insanity—is insufficient to establish involuntariness absent some coercive police activity.[298]

Where, however, interrogation was not so prolonged that the Court would deem it "inherently coercive," the "totality of the circumstances" was looked to in determining admissibility. Although in some of the cases a single factor may well be thought to stand out as indicating the involuntariness of the confession,[299] generally

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[294] 346 U.S. at 185.

[295] 373 U.S. 503 (1963) (confession obtained some 16 hours after arrest but interrogation over this period consumed little more than two hours; he was refused in his requests to call his wife and told that his cooperation was necessary before he could communicate with his family).

[296] 373 U.S. at 514. *See also* Spano v. New York, 360 U.S. 315 (1959). (After eight hours of almost continuous questioning, suspect was induced to confess by rookie policeman who was a childhood friend and who played on suspect's sympathies by falsely stating that his job as a policeman and the welfare of his family was at stake); Rogers v. Richmond, 365 U.S. 534 (1961) (suspect resisted questioning for six hours but yielded when officers threatened to bring his invalid wife to headquarters). More recent cases include Davis v. North Carolina, 384 U.S. 737 (1966) (escaped convict held incommunicado 16 days but periods of interrogation each day were about an hour each); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Darwin v. Connecticut, 391 U.S. 346 (1968).

[297] Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958); Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961). The suspect in Spano v. New York, 360 U.S. 315 (1959), was a 25-year-old foreigner with a history of emotional instability. The fact that the suspect was a woman was apparently significant in Lynumn v. Illinois, 372 U.S. 528 (1963), in which officers threatened to have her children taken from her and to have her taken off the welfare relief rolls.

[298] Colorado v. Connelly, 479 U.S. 157 (1986).

[299] *E.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (confession obtained by psychiatrist trained in hypnosis from a physically and emotionally exhausted suspect who had

the recitation of factors, including not only the age and intelligence of the suspect but also such things as the illegality of the arrest, the incommunicado detention, the denial of requested counsel, the denial of access to friends, the employment of trickery, and other things, seemed not to rank any factor above the others.[300] Of course, confessions may be induced through the exploitation of some illegal action, such as an illegal arrest[301] or an unlawful search and seizure,[302] and when that occurs the confession is inadmissible. Where police obtain a subsequent confession after obtaining one that is inadmissible as involuntary, the Court will not assume that the subsequent confession was similarly involuntary, but will independently evaluate whether the coercive actions which produced the first continued to produce the later confession.[303]

***From the Voluntariness Standard to Miranda***.—Invocation by the Court of a self-incrimination standard for judging the fruits of police interrogation was no unheralded novelty in *Miranda v. Arizona*.[304] The rationale of the confession cases changed over time to one closely approximating the foundation purposes the Court has attributed to the self-incrimination clause. Historically, the basis of the rule excluding coerced and involuntary confessions was their untrustworthiness, their unreliability.[305] It appears that this basis informed the Court's judgment in the early state confession cases[306] as it had in earlier cases from the lower federal courts.[307] But in *Lisenba v. California*,[308] Justice Roberts drew a distinction between the confession rule and the standard of due process. "[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim

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already been subjected to three days of interrogation); Townsend v. Sain, 372 U.S. 293 (1963) (suspect was administered drug with properties of "truth serum" to relieve withdrawal pains of narcotics addiction, although police probably were not aware of drug's side effects).

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

[301] Wong Sun v. United States, 371 U.S. 471 (1963).

[302] Fahy v. Connecticut, 375 U.S. 85 (1963).

[303] United States v. Bayer, 331 U.S. 532 (1947); Lyons v. Oklahoma, 322 U.S. 596 (1944); Leyra v. Denno, 347 U.S. 556 (1954); Darwin v. Connecticut, 391 U.S. 346 (1968).

[304] 384 U.S. 436 (1966).

[305] 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 882, at 246 (3d ed. 1940).

[306] Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940).

[307] Hopt v. Utah, 110 U.S. 574 (1884); Wilson v. United States, 162 U.S. 613 (1896).

[308] 314 U.S. 219, 236 (1941).

of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Over the next several years, while the Justices continued to use the terminology of voluntariness, the Court accepted at different times the different rationales of trustworthiness and constitutional fairness.[309]

Ultimately, however, those Justices who chose to ground the exclusionary rule on the latter consideration predominated, so that in *Rogers v. Richmond*[310] Justice Frankfurter spoke for six other Justices in writing: "Our decisions under that [Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth." Nevertheless, the Justice said in another case, "[n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved."[311] Three years later, however, in *Malloy v. Hogan*,[312] in the process of applying the self-incrimination clause to the States, Justice Brennan for the Court reinterpreted the line

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[309] *Compare* Ashcraft v. Tennessee, 322 U.S. 143 (1944), *with* Lyons v. Oklahoma, 322 U.S. 596 (1944), *and* Malinski v. New York, 324 U.S. 401 (1945). In Watts v. Indiana, 338 U.S. 49 (1949), Harris v. South Carolina, 338 U.S. 68 (1949), and Turner v. Pennsylvania, 338 U.S. 62 (1949), five Justices followed the due process-fairness standard while four adhered to a trustworthiness rationale. *See* 338 U.S. at 57 (Justice Jackson concurring and dissenting). In Stein v. New York, 346 U.S. 156, 192 (1953), the trustworthiness rationale had secured the adherence of six Justices. The primary difference between the two standards is the admissibility under the trustworthiness standard of a coerced confession if its trustworthiness can be established, if, that is, it can be corroborated.

[310] 365 U.S. 534, 540–41 (1961). Similar expressions may be found in Spano v. New York, 360 U.S. 315 (1959), and Blackburn v. Alabama, 361 U.S. 199 (1960). *See also* Culombe v. Connecticut, 367 U.S. 568, 583 n.25 (1961), in which Justice Frankfurter, announcing the judgment of the Court, observed that "the conceptions underlying the rule excluding coerced confessions and the privilege again self-incrimination have become, to some extent, assimilated."

[311] Culombe v. Connecticut, 367 U.S. 568, 601 (1961). The same thought informs the options of the Court in Haynes v. Washington, 373 U.S. 503 (1963).

[312] 378 U.S. 1 (1964).

of cases since *Brown v. Mississippi* [313] to conclude that the Court had initially based its rulings on the common-law confession rationale, but that beginning with *Lisenba v. California*, [314] a "federal standard" had been developed. The Court had engaged in a "shift [which] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." Today, continued Justice Brennan, "the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897," when *Bram v. United States* had announced that the self-incrimination clause furnished the basis for admitting or excluding evidence in federal courts. [315]

One week after the decision in *Malloy v. Hogan*, the Court defined the rules of admissibility of confessions in different terms; while it continued to emphasize voluntariness, it did so in self-incrimination terms rather than in due process terms. In *Escobedo v. Illinois*, [316] it held inadmissible the confession obtained from a suspect in custody who had repeatedly requested and had repeatedly been refused an opportunity to consult with his retained counsel, who was present at the police station seeking to gain access to Escobedo. [317] While *Escobedo* appeared in the main to be a Sixth Amendment right-to-counsel case, the Court at several points emphasized, in terms that clearly implicated self-incrimination considerations, that the suspect had not been warned of his constitutional rights. [318]

***Miranda v. Arizona***.—The Sixth Amendment holding of *Escobedo* was deemphasized and the Fifth Amendment self-incrimi-

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[313] 297 U.S. 278 (1936).

[314] 314 U.S. 219 (1941).

[315] Malloy v. Hogan, 378 U.S. 1, 6–7 (1964). Protesting that this was "*post facto* reasoning at best," Justice Harlan contended that the "majority is simply wrong" in asserting that any of the state confession cases represented anything like a self-incrimination basis for the conclusions advanced. Id. at 17–19. Bram v. United States, 168 U.S. 532 (1897), is discussed under "Confessions: Police Interrogation, Due Process, and Self-Incrimination," supra.

[316] 378 U.S. 478 (1964). Joining Justice Goldberg in the majority were Chief Justice Warren and Justices Black, Douglas, and Brennan. Justices Clark, Harlan, Stewart, and White dissented. Id. at 492, 493, 495.

[317] Previously, it had been held that a denial of a request to consult counsel was but one of the factors to be considered in assessing voluntariness. Crooker v. California, 357 U.S. 433 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958). Chief Justice Warren and Justices Black, Douglas, and Brennan were prepared in these cases to impose a requirement of right to counsel per se. Post-indictment interrogation without the presence of counsel seemed doomed after Spano v. New York, 360 U.S. 315 (1959), and this was confirmed in Massiah v. United States, 377 U.S. 201 (1964). *See* discussion of "Custodial Interrogation" under Sixth Amendment, infra.

[318] Escobedo v. Illinois, 378 U.S. 478, 485, 491 (1964) (both pages containing assertions of the suspect's "absolute right to remain silent" in the context of police warnings prior to interrogation).

nation rule made preeminent in *Miranda v. Arizona*,[319] in which the Court summarized its holding as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. 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. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. 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 of refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

The basis for the Court's conclusions was the determination that police interrogation as conceived and practiced was inherently coercive and that this compulsion, though informal and legally sanctionless, was contrary to the protection assured by the self-incrimination clause, the protection afforded in a system of criminal justice which convicted a defendant on the basis of evidence independently secured and not out of his own mouth. In the Court's view, this had been the law in the federal courts since 1897, and the application of the clause to the States in 1964 necessitated the application of the principle in state courts as well. Therefore, the clause requires that police interrogation practices be so structured as to secure to suspects that they not be stripped of the ability to

[319] 384 U.S. 436, 444–45 (1966). In Johnson v. New Jersey, 384 U.S. 719 (1966), the Court held that neither *Escobedo* nor *Miranda* was to be applied retroactively. In cases where trials commenced after the decisions were announced, the due process "totality of circumstances" test was to be the key. *Cf.* Davis v. North Carolina, 384 U.S. 737 (1966).

make a free and rational choice between speaking and not speaking. The warnings and the provision of counsel were essential, the Court said, to this type of system.[320] "In these cases," said Chief Justice Warren, "we might not find the defendants' statements to have been involuntary in traditional terms."[321] The acknowledgment that the decision considerably expanded upon previous doctrine, even if the assimilation of self-incrimination values by the confession-exclusion rule be considered complete, was more clearly made a week after *Miranda* when, in denying retroactivity to that case and to *Escobedo*, the Court asserted that law enforcement officers had relied justifiably upon prior cases, "now no longer binding," which treated the failure to warn a suspect of his rights or the failure to grant access to counsel as one of the factors to be considered.[322] It was thus not the application of the self-incrimination clause to police interrogation in *Miranda* that constituted a major change from precedent but rather the series of warnings and guarantees which the Court imposed as security for the observance of the privilege.

While the Court's decision rapidly became highly controversial and the source of much political agitation, including a prominent role in the 1968 presidential election, the Court has continued to adhere to it,[323] albeit not without considerable qualification. For years, the constitutional status of the *Miranda* warnings was clouded in uncertainty. Had the Court announced a constitutional rule, or merely set forth supervisory rules that could be superseded by statutory rules? The fact that *Miranda* itself applied the rules to a state court proceeding, and that the Court in subsequent cases consistently applied the warnings to state proceedings, was strong evidence of constitutional moorings. In 1968, however, Congress en-

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

[321] 384 U.S. at 457. For the continuing recognition of the difference between the traditional involuntariness test and the *Miranda* test, *see* Michigan v. Tucker, 417 U.S. 433, 443–46 (1974); Mincey v. Arizona, 437 U.S. 385, 396–402 (1978).

[322] Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

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

acted a statute designed to set aside *Miranda* in the federal courts and to reinstate the traditional voluntariness test.[324] The statute lay unimplemented, for the most part, due to constitutional doubts about it. The Court also created exceptions to the *Miranda* warnings over the years, and referred to the warnings as "prophylactic"[325] and "not themselves rights protected by the Constitution."[326] There were even hints that some Justices might be willing to overrule the decision.

In *Dickerson v. United States*,[327] the Court resolved the basic issue, holding that *Miranda* was a constitutional decision that could not be overturned by statute, and consequently that 18 U.S.C. § 3501 was unconstitutional. Application of *Miranda* warnings to state proceedings necessarily implied a constitutional base, the Court explained, since federal courts "hold no supervisory authority over state judicial proceedings."[328] Moreover, *Miranda* itself had purported to "give concrete constitutional guidance to law enforcement agencies and courts to follow."[329] That the *Miranda* rules are constitution-based does not mean that they are "immutable," however. The Court repeated its invitation for legislative action that would be "at least as effective" in protecting a suspect's right to remain silent during custodial interrogation. Section 3501, however, merely reinstated the "totality-of-the-circumstances" rule held inadequate in *Miranda*, so that provision could not be considered as effective as the *Miranda* warnings.

The *Dickerson* Court also rejected a request to overrule *Miranda*. "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance," Chief Justice Rehnquist wrote for a seven-Justice majority, "the principles of stare decisis weigh heavily against overruling it now." There was no special justification for overruling the decision; subsequent cases had not undermined the decision's doctrinal underpinnings, but rather had "reaffirm[ed]" its "core ruling." Moreover, *Miranda* warnings had "become so embedded in routine police practice [that they] have become part of our national culture."[330]

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

[325] New York v. Quarles, 467 U.S. 549, 653 (1984).

[326] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[327], 530 U.S. 428 (2000).

[328] 530 U.S. at 438.

[329] 530 U.S. at 439 (quoting from Miranda, 384 U.S. at 441-42).

[330] 530 U.S. at 443.

Although the Court had suggested in 1974 that most *Miranda* claims could be disallowed in federal *habeas corpus* cases,[331] such a course was squarely rejected in 1993. The *Stone v. Powell*[332] rule, precluding federal *habeas corpus* review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner's *Miranda* claim, the Court ruled in *Withrow v. Williams*.[333] The *Miranda* rule differs from the *Mapp v. Ohio*[334] exclusionary rule denied enforcement in *Stone*, the Court explained. While both are prophylactic rules, *Miranda* unlike *Mapp*, safeguards a fundamental trial right, the privilege against self-incrimination. *Miranda* also protects against the use at trial of unreliable statements, hence, unlike *Mapp*, relates to the correct ascertainment of guilt.[335] A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal *habeas* review of state convictions, since most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions.[336]

In any event, the Court has established several lines of decisions interpreting *Miranda*.

First, persons who are questioned while they are in *custody* must be given the *Miranda* warnings. *Miranda* applies to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[337] Clearly, a suspect detained in jail is in custody, even if the detention is for some offense other than the one about which he is questioned.[338] If he is placed under arrest, even if he is in his own home, the questioning is custodial.[339]

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

[332] 428 U.S. 465 (1976).

[333] 507 U.S. 680 (1993).

[334] 367 U.S. 643 (1961).

[335] 507 U.S. at 691–92.

[336] 507 U.S. at 693.

[337] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[338] Mathis v. United States, 391 U.S. 1 (1968) (suspect in state jail questioned by federal officer about a federal crime). But even though a suspect is in jail, hence in custody "in a technical sense," a conversation with an undercover agent does not create a coercive, police-dominated environment and does not implicate *Miranda* if the suspect does not know that he is conversing with a government agent. Illinois v. Perkins, 496 U.S. 292 (1990).

[339] Orozco v. Texas, 394 U.S. 324 (1969) (four policemen entered suspect's bedroom at 4 a.m. and questioned him; though not formally arrested, he was in custody).

But the fact that a suspect may be present in a police station does not, in the absence of indicia that he was in custody, mean that the questioning is custodial,[340] and the fact that he is in his home or other familiar surroundings will ordinarily lead to a conclusion that the inquiry was noncustodial.[341] As with investigative stops under the Fourth Amendment, there is a wide variety of police-citizen contacts, and the Supreme Court has not explored at any length the application of *Miranda* to questioning on the street and elsewhere in situations in which the police have not asserted authority sufficient to place the citizen in custody.[342] Whether a person is "in custody" is an objective test assessed in terms of how a reasonable person in the suspect's shoes would perceive his or her freedom to leave; a police officer's subjective and undisclosed view that a person being interrogated is a suspect is not relevant for *Miranda* purposes.[343]

Second, persons who are *interrogated* while they are in custody must be given the *Miranda* warnings. It is not necessary under *Miranda* that the police squarely ask a question. The breadth of the interrogation concept is demonstrated in *Rhode Island v. Innis*.[344] There, police had apprehended the defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, the defendant, who had been given the *Miranda* warnings and had asserted he wished to consult a lawyer before submitting to questioning, was not asked questions by the officers. However, the officers engaged in conversation among themselves, in which they indicated that a school for handicapped children was near the crime scene and that they

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[340] Oregon v. Mathiason, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit, questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime). *See also* Minnesota v. Murphy, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation).

[341] Beckwith v. United States, 425 U.S. 341 (1976) (IRS agents' interview with taxpayer in private residence was not a custodial interrogation, although inquiry had "focused" on him).

[342] *Cf.* United States v. Mendenhall, 446 U.S. 544 (1980); Reid v. Georgia, 448 U.S. 438 (1980); Brown v. Texas, 443 U.S. 47 (1979); Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (roadside questioning of a motorist stopped for traffic violation is not custodial interrogation until his "freedom of action is curtailed to a 'degree associated with formal arrest'").

[343] Stansbury v. California, 511 U.S. 318 (1994).

[344] 446 U.S. 291 (1980). A remarkably similar factual situation was presented in Brewer v. Williams, 430 U.S. 387 (1977), which was decided under the Sixth Amendment. In *Brewer*, and also in Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Court has had difficulty in expounding on what constitutes interrogation for Sixth Amendment counsel purposes. The *Innis* Court indicated that the definitions are not the same for each Amendment. 446 U.S. at 300 n.4.

hoped the weapon was found before a child discovered it and was injured. The defendant then took them to the weapon's hiding place.

Unanimously rejecting a contention that *Miranda* would have been violated only by express questioning, the Court said: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." [345] A divided Court then concluded that the officers' conversation did not amount to a functional equivalent of questioning and that the evidence was admissible. [346]

In *Estelle v. Smith*, [347] the Court held that a court-ordered jailhouse interview with the defendant by a psychiatrist seeking to determine his competency to stand trial, when the defense had raised no issue of insanity or incompetency, constituted interrogation for *Miranda* purposes; the psychiatrist's conclusions about the defendant's dangerousness were inadmissible at the capital sentencing phase of the trial because the defendant had not been given his *Miranda* warnings prior to the interview. That the defendant had been questioned by a psychiatrist designated to conduct a neutral competency examination, rather than by a police officer, was "immaterial," the Court concluded, since the psychiatrist's testimony at the penalty phase changed his role from one of neutrality to that of an agent of the prosecution. [348] Other instances of questioning in less formal contexts in which the issues of custody and interroga-

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

[346] 446 U.S. at 302–04. Justices Marshall, Brennan, and Stevens dissented, id. at 305, 307. Similarly, the Court found no functional equivalent of interrogation when police allowed a suspect's wife to talk to him in the presence of a police officer who openly tape recorded the conversation. Arizona v. Mauro, 481 U.S. 520 (1987). *See also* Illinois v. Perkins, 496 U.S. 292 (1990) (absence of coercive environment makes *Miranda* inapplicable to jail cell conversation between suspect and police undercover agent).

[347] 451 U.S. 454 (1981).

[348] 451 U.S. at 467.

tion intertwine, e.g., in on-the-street encounters, await explication by the Court.

Third, before a suspect in custody is interrogated, he must be given *full* warnings, or the *equivalent*, of his *rights. Miranda*, of course, required express warnings to be given to an in-custody suspect of his right to remain silent, that anything he said may be used as evidence against him, that he has a right to counsel, and that if he cannot afford counsel he is entitled to an appointed attorney.[349] The Court recognized that "other fully effective means" could be devised to convey the right to remain silent,[350] but it was firm that the prosecution was not permitted to show that an unwarned suspect knew of his rights in some manner.[351] But it is not necessary that the police give the warnings as a verbatim recital of the words in the *Miranda* opinion itself, so long as the words used "fully conveyed" to a defendant his rights.[352]

Fourth, once a warned suspect asserts his *right* to *silence* and requests *counsel*, the police must scrupulously respect his assertion of right. The *Miranda* Court strongly stated that once a warned suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Further, if the suspect indicates he wishes the assistance of counsel before interrogation, the questioning must cease until he has counsel.[353] At least with respect to counsel, the Court has created practically a *per se* rule barring the police from continuing or from reinitiating interrogation with a suspect requesting counsel until counsel is present, save only that the suspect himself may initiate further proceedings. Thus, in *Edwards v. Arizona*,[354] the Court ruled that *Miranda* had been violated when police reinitiated questioning after the suspect had requested counsel. Questioning had ceased as soon as the suspect had requested counsel, and the suspect had been returned to his cell. Questioning had resumed the following day only after different police officers had confronted the suspect and again warned him of his rights; the suspect agreed to talk and thereafter incriminated himself. Nonetheless, the Court held, "when an accused has invoked his right to

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[349] Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See* id. at 469–73.

[350] 384 U.S. at 444.

[351] 384 U.S. at 469.

[352] California v. Prysock, 453 U.S. 355 (1981). Rephrased, the test is whether the warnings "*reasonably* conveyed" a suspect's rights, the Court adding that reviewing courts "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (upholding warning that included possibly misleading statement that a lawyer would be appointed "if and when you go to court").

[353] Miranda v. Arizona, 384 U.S. 436, 472, 473–74 (1966).

[354] 451 U.S. 477 (1981).

have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of this rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[355] The *Edwards* rule bars police-initiated questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested.[356]

However, the suspect must specifically ask for counsel; if he requests the assistance of someone else he thinks may be helpful to him, that is not a valid assertion of *Miranda* rights.[357] Moreover, the rigid *Edwards* rule is not applicable to other aspects of the warnings. That is, if the suspect asserts his right to remain silent, the questioning must cease, but officers are not precluded from subsequently initiating a new round of interrogation, provided only that they again give the *Miranda* warnings.[358]

Fifth, a properly warned suspect may *waive* his *Miranda* rights and submit to custodial interrogation. *Miranda* recognized that a suspect may voluntarily and knowingly give up his rights and re-

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[355] 451 U.S. at 484–85. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. Id. at 487, 488 (Chief Justice Burger and Justices Powell and Rehnquist). In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. Connecticut v. Barrett, 479 U.S. 523 (1987). The Court has held that *Edwards* should not be applied retroactively to a conviction that had become final, Solem v. Stumes, 465 U.S. 638 (1984), but that *Edwards* does apply to cases pending on appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51 (1985).

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

[357] Fare v. Michael C., 442 U.S. 707 (1979) (juvenile requested to see his parole officer, rather than counsel). Also, waivers signed by the accused following *Miranda* warnings are not vitiated by police having kept from the accused information that an attorney had been retained for him by a relative. Moran v. Burbine, 475 U.S. 412 (1986).

[358] Michigan v. Mosley, 423 U.S. 96 (1975) (suspect given *Miranda* warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new *Miranda* warning, and suspect made incriminating admission; since police "scrupulously honored" suspect's request, admission valid).

spond to questioning, but the Court cautioned that the prosecution bore a "heavy burden" to establish that a valid waiver had occurred.[359] While the waiver need not be express in order for it to be valid,[360] neither may a suspect's silence or similar conduct constitute a waiver.[361] It must be shown that the suspect was competent to understand and appreciate the warning and to be able to waive his rights.[362] Essentially, resolution of the issue of waiver "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"[363] After a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly requests an attorney.[364]

Sixth, the admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. A confession or other incriminating admissions obtained in violation of *Miranda* may not, of course, be introduced against him at trial for purposes of establishing guilt[365] or for determining the sentence, at least in bifurcated trials in capital cases,[366] and neither may the "fruits" of such a confession or admission be used.[367]

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[359] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[360] North Carolina v. Butler, 441 U.S. 369 (1979).

[361] 441 U.S. at 373. But silence, "coupled with an understanding of his rights and a course of conduct indicating waiver," may support a conclusion of waiver. Id.

[362] Tague v. Louisiana, 444 U.S. 469 (1980). A knowing and intelligent waiver need not be predicated on complete disclosure by police of the intended line of questioning, hence an accused's signed waiver following arrest for one crime is not invalidated by police having failed to inform him of intent to question him about another crime. Colorado v. Spring, 479 U.S. 564 (1987).

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

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

[365] Miranda v. Arizona, 384 U.S. 436, 479 (1966).

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

[367] *Cf.* Harrison v. United States, 392 U.S. 219 (1968) (after confessions obtained in violation of *McNabb-Mallory* were admitted against him, defendant took the stand to rebut them and made damaging admissions; after his first conviction was reversed, he was retried without the confessions, but the prosecutor introduced his rebuttal testimony from the first trial; Court reversed conviction because testimony was tainted by the admission of the confessions). *But see* Michigan v. Tucker, 417 U.S. 433 (1974). Confessions may be the poisonous fruit of other constitutional viola-

The Court, in opinions which bespeak a sense of necessity to narrowly construe *Miranda*, has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.[368] Thus, in *Harris v. New York*,[369] the Court held that the prosecution could use statements, obtained in violation of *Miranda*, to impeach the defendant's testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon v. Hass*,[370] the Court permitted impeachment use of a statement made by the defendant after police had ignored his request for counsel following his *Miranda* warning. Such impeachment material, however, must still meet the standard of voluntariness associated with the pre-*Miranda* tests for the admission of confessions and statements.[371]

The Court has created a "public safety" exception to the *Miranda* warning requirement, but has refused to create another exception for misdemeanors and lesser offenses. In *New York v. Quarles*,[372] the Court held admissible a recently apprehended suspect's response in a public supermarket to the arresting officer's demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice Rehnquist,[373] declined to place officers in the "untenable position" of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that re-

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tions, such as illegal searches or arrests. *E.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

[368] Under Walter v. United States, 347 U.S. 62 (1954), the defendant not only denied the offense of which he was accused (sale of drugs), but also asserted he had never dealt in drugs. The prosecution was permitted to impeach him concerning heroin seized illegally from his home two years before. The Court observed that the defendant could have denied the offense without making the "sweeping" assertions, as to which the government could impeach him.

[369] 401 U.S. 222 (1971). The defendant had denied only the commission of the offense. The Court observed that it was only "speculative" to think that impermissible police conduct would be encouraged by permitting such impeachment, a resort to deterrence analysis being contemporaneously used to ground the Fourth Amendment exclusionary rule, whereas the defendant's right to testify was the obligation to testify truthfully and the prosecution could impeach him for committing perjury. *See also* United States v. Havens, 446 U.S. 620 (1980) (Fourth Amendment).

[370] 420 U.S. 714 (1975). By contrast, a defendant may not be impeached by evidence of his silence after police have warned him of his right to remain silent. Doyle v. Ohio, 426 U.S. 610 (1976).

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

[372] 467 U.S. 649 (1984).

[373] The Court's opinion was joined by Chief Justice Burger and by Justices White, Blackmun, and Powell. Justice O'Connor would have ruled inadmissible the suspect's response, but not the gun retrieved as a result of the response, and Justices Marshall, Brennan, and Stevens dissented.

sulting evidence will be excluded at trial. While acknowledging that the exception itself will "lessen the desirable clarity of the rule," the Court predicted that confusion would be slight: "[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." [374] No such compelling justification was offered for a *Miranda* exception for lesser offenses, however, and protecting the rule's "simplicity and clarity" counseled against creating one. [375] "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." [376]

**The Operation of the Exclusionary Rule**

***Supreme Court Review***.—The Court's review of the question of admissibility of confessions or other incriminating statements is designed to prevent the foreclosure of the very question to be decided by it, the issue of voluntariness under the due process standard, the issue of the giving of the requisite warnings and the subsequent waiver, if there is one, under the *Miranda* rule. Recurring to Justice Frankfurter's description of the inquiry as a "three-phased process" in due process cases at least, [377] it can be seen that the Court's self-imposed rules of restraint on review of lower-court factfinding greatly influenced the process. The finding of facts surrounding the issue of coercion—the length of detention, circumstances of interrogation, use of violence or of tricks and ruses, et cetera—is the proper function of the trial court which had the advantage of having the witnesses before it. "This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat*, necessarily, that we are not to be bound by findings wholly lacking support in evidence." [378]

However, the conclusions of the lower courts as to how the accused reacted to the circumstances of his interrogation, and as to the legal significance of how he reacted, are subject to open review.

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[374] 467 U.S. at 658–59.

[375] Berkemer v. McCarty, 468 U.S. 420, 432 (1984).

[376] 468 U.S. at 434.

[377] Culombe v. Connecticut, 367 U.S. 568, 603–06 (1961).

[378] 367 U.S. at 603. *See* Ashcraft v. Tennessee, 322 U.S. 143, 152–53 (1944); Lyons v. Oklahoma, 322 U.S. 596, 602–03 (1944); Watts v. Indiana, 338 U.S. 49, 50–52 (1949); Gallegos v. Nebraska, 342 U.S. 55, 60–62 (1951); Stein v. New York, 346 U.S. 156, 180–82 (1953); Payne v. Arkansas, 356 U.S. 560, 561–62 (1958).

"No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply be declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate . . . that the state court's determination should control. But where, on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State judgment that the confession was voluntary cannot stand."[379] *Miranda*, of course, does away with the judgments about the effect of lack of warnings, and the third phase, the legal determination of the interaction of the first two phases, is determined solely by two factual determinations: whether the warnings were given and if so whether there was a valid waiver. Presumably, supported determinations of these two facts by trial courts would preclude independent review by the Supreme Court. Yet, the Court has been clear that it may and will independently review the facts when the factfinding has such a substantial effect on constitutional rights.[380]

In *Withrow v. Williams*,[381] the Court held that the rule of *Stone v. Powell*,[382] precluding federal *habeas corpus* review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*.

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[379] Culombe v. Connecticut, 367 U.S. 568, 605 (1961). *See* Watts v. Indiana, 338 U.S. 49, 51 (1949); Malinski v. New York, 324 U.S. 401, 404, 417 (1945).

[380] "In cases in which there is a claim of denial of rights under the Federal Constitution this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), and cases cited therein.

[381] 507 U.S. 680 (1993).

[382] 428 U.S. 465 (1976). *See* discussion of *Stone v. Powell* under the Fourth Amendment, *infra*.

***Procedure in the Trial Courts***.—The Court has placed constitutional limitations upon the procedures followed by trial courts for determining the admissibility of confessions and other incriminating admissions. Three procedures were developed over time to deal with the question of admissibility when involuntariness was claimed. By the orthodox method, the trial judge heard all the evidence on voluntariness in a separate and preliminary hearing, and if he found the confession involuntary the jury never received it, while if he found it voluntary the jury received it with the right to consider its weight and credibility, which consideration included the circumstances of its making. By the New York method, the judge first reviewed the confession under a standard leading to its exclusion only if he found it not possible that "reasonable men could differ over the [factual] inferences to be drawn" from it; otherwise, the jury would receive the confession with instructions to first determine its voluntariness and to consider it if it were voluntary and to disregard it if it were not. By the Massachusetts method, the trial judge himself determined the voluntariness question and if he found the confession involuntary the jury never received it; if he found it to have been voluntarily made he permitted the jury to receive it with instructions that the jurors should make their own independent determination of voluntariness.[383]

The New York method was upheld against constitutional attack in *Stein v. New York*,[384] but eleven years later a five-to-four decision in *Jackson v. Denno*,[385] found it inadequate to protect the due process rights of defendants. The procedure did not, the Court held, ensure a "reliable determination on the issue of voluntariness" and did not sufficiently guarantee that convictions would not be grounded on involuntary confessions. Since there was only a general jury verdict of guilty, it was impossible to determine whether the jury had first focused on the issue of voluntariness and then either had found the confession voluntary and considered it on the question of guilt or had found it involuntary, disregarded it, and reached a conclusion of guilt on wholly independent evidence. It was doubtful that a jury could appreciate the values

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[383] Jackson v. Denno, 378 U.S. 368, 410–23 (1964) (appendix to opinion of Justice Black concurring in part and dissenting in part).

[384] 346 U.S. 156, 170–79 (1953). Significant to the Court's conclusion on this matter was the further conclusion of the majority that coerced confessions were inadmissible solely because of their unreliability; if their trustworthiness could be established the utilization of an involuntary confession violated no constitutional prohibition. This conception was contrary to earlier cases and was subsequently repudiated. *See* Jackson v. Denno, 378 U.S. 368, 383–87 (1964).

[385] 378 U.S. 368 (1964). On the sufficiency of state court determinations, *see* Swenson v. Stidham, 409 U.S. 224 (1972); La Vallee v. Della Rose, 410 U.S. 690 (1973).

served by the exclusion of involuntary confessions and put out of mind the content of the confession no matter what was determined with regard to its voluntariness. The rule was reiterated in *Sims v. Georgia*,[386] in which the Court voided a state practice permitting the judge to let the confession go to the jury for the ultimate decision on voluntariness, upon an initial determination merely that the prosecution had made out a prima facie case that the confession was voluntary. The Court has interposed no constitutional objection to utilization of either the orthodox or the Massachusetts method for determining admissibility.[387] It has held that the prosecution bears the burden of establishing voluntariness by a preponderance of the evidence, rejecting a contention that it should be determined only upon proof beyond a reasonable doubt,[388] or by clear and convincing evidence.[389]

## DUE PROCESS

### History and Scope

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just."[390] The content of due process is "a historical product"[391] that traces all the way back to chapter 39 of Magna Carta, in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[392] The phrase "due process of law" first appeared in a

[386] 385 U.S. 538 (1967).

[387] Jackson v. Denno, 378 U.S. 368 and n.8 (1964); Lego v. Twomey, 404 U.S. 477, 489–90 (1972) (rejecting contention that jury should be required to pass on voluntariness following judge's determination).

[388] Lego v. Twomey, 404 U.S. 477 (1972).

[389] Colorado v. Connelly, 479 U.S. 157 (1986).

[390] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[391] Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[392] Text and commentary on this chapter may be found in W. MCKECHNIE, MAGNA CARTA—A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375–95 (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. Id. at 504, *and see* 139–59. As expanded, it read: "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." *See also* J. HOLT, MAGNA CARTA 226–29 (1965). The 1225 reissue also

statutory rendition of this chapter in 1354. "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[393] Though Magna Carta was in essence the result of a struggle over interest between the King and his barons,[394] this particular clause over time transcended any such limitation of scope, and throughout the fourteenth century parliamentary interpretation expanded far beyond the intention of any of its drafters.[395] The understanding which the founders of the American constitutional system, and those who wrote the due process clauses, brought to the subject they derived from Coke, who in his *Second Institutes* expounded the proposition that the term "by law of the land" was equivalent to "due process of law," which he in turn defined as "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by writ original of the Common Law."[396] The significance of both terms was procedural, but there was in Coke's writings on chapter 29 a rudimentary concept of substantive restrictions, which did not develop in England because of parliamentary supremacy, but which was to flower in the United States.

The term "law of the land" was early the preferred expression in colonial charters and declarations of rights, which gave way to the term "due process of law," although some state constitutions continued to employ both terms. Whichever phraseology was used, the expression seems generally to have occurred in close association with precise safeguards of accused persons, but, as is true of the Fifth Amendment here under consideration, the provision also suggests some limitations on substance because of its association with the guarantee of just compensation upon the taking of private property for public use.[397]

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added to chapter 29 the language of chapter 40 of the original text: "To no one will we sell, to no one will we deny or delay right or justice." This 1225 reissue became the standard text thereafter.

[393] 28 Edw. III, c. 3. *See* F. THOMPSON, MAGNA CARTA—ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629, 86–97 (1948), recounting several statutory reconfirmations. Note that the limitation of "free man" had given way to the all-inclusive delineation.

[394] W. MCKECHNIE, MAGNA CARTA—A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (Glasgow, 2d rev. ed. 1914); J. HOLT, MAGNA CARTA (1965).

[395] F. THOMPSON, MAGNA CARTA—ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629 (1948).

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

[397] The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the "law of the land" phrase in a separate article, 3 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59th

***Scope of the Guaranty***.—Standing by itself, the phrase "due process" would seem to refer solely and simply to procedure, to process in court, and therefore to be so limited that "due process of law" would be what the legislative branch enacted it to be. But that is not the interpretation which has been placed on the term. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law' by its mere will."[398] All persons within the territory of the United States are entitled to its protection, including corporations,[399] aliens,[400] and presumptively citizens seeking readmission to the United States,[401] but States as such are not so entitled.[402] It is effective in the District of Columbia[403] and in territories which are part of the United States,[404] but it does not apply of its own force to unincorporated territories.[405] Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[406]

Early in our judicial history, a number of jurists attempted to formulate a theory of natural rights—natural justice, which would limit the power of government, especially with regard to the property rights of persons.[407] State courts were the arenas in which this struggle was carried out prior to the Civil War. Opposing the "vested rights" theory of protection of property were jurists who argued first, that the written constitution was the supreme law of the State and that judicial review could look only to that document in scrutinizing legislation and not to the "unwritten law" of "natural

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Congress, 2d Sess. 1688 (1909), whereas Virginia used the clause in a section of guarantees of procedural rights in criminal cases. 7 id. at 3813. New York in its constitution of 1821 was the first State to pick up "due process of law" from the United States Constitution. 5 id. at 2648.

[398] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). Webster had made the argument as counsel in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). *And see* Chief Justice Shaw's opinion in Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857).

[399] Sinking Fund Cases, 99 U.S. 700, 719 (1879).

[400] Wong Wing v. United States, 163 U.S. 228, 238 (1896).

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

[402] South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

[403] Wight v. Davidson, 181 U.S. 371, 384 (1901).

[404] Lovato v. New Mexico, 242 U.S. 199, 201 (1916).

[405] Public Utility Comm'rs v. Ynchausti & Co., 251 U.S. 401, 406 (1920).

[406] Johnson v. Eisentrager, 339 U.S. 763 (1950); In re Yamashita, 327 U.S. 1 (1946). Justices Rutledge and Murphy in the latter case argued that the due process clause applies to every human being, including enemy belligerents.

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

rights," and second, that the "police power" of government enabled legislatures to regulate the use and holding of property in the public interest, subject only to the specific prohibitions of the written constitution. The "vested rights" jurists thus found in the "law of the land" and the "due process" clauses of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether.[408] Thus, Chief Justice Taney was not innovating when in his opinion in the *Dred Scott* case he pronounced, without elaboration, that one of the reasons the Missouri Compromise was unconstitutional was that an act of Congress which deprived "a citizen 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."[409] Following the War, with the ratification of the Fourteenth Amendment's due process clause, substantive due process interpretations were urged on the Supreme Court with regard to state legislation; first resisted, the arguments came in time to be accepted, and they imposed upon both federal and state legislation a firm judicial hand which was not to be removed until the crisis of the 1930's, and which today in non-economic legislation continues to be reasserted.

"It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. While the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."[410] The most obvious difference between the two due process clauses is that the Fifth Amendment clause as it binds the Federal Government coexists with a number of other express provisions in the Bill of Rights guaranteeing fair procedure and non-arbitrary action, such as jury trials, grand jury indictments, and nonexcessive bail and fines, as well as just compensation, whereas the Fourteenth Amendment clause as it binds the States has been held to contain implicitly not only the standards of fair-

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

[409] Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

[410] French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901).

ness and justness found within the Fifth Amendment's clause but also to contain many guarantees that are expressly set out in the Bill of Rights. In that sense, the two clauses are not the same thing, but insofar as they do impose such implicit requirements of fair trials, fair hearings, and the like, which exist separately from, though they are informed with, express constitutional guarantees, the interpretation of the two clauses is substantially if not wholly the same. Save for areas in which the particularly national character of the Federal Government requires separate treatment, discussion of the meaning of due process is largely reserved for the section on the Fourteenth Amendment. Finally, it should be noted that some Fourteenth Amendment interpretations have been carried back to broaden interpretations of the Fifth Amendment's due process clause, such as, e.g., the development of equal protection standards as an aspect of Fifth Amendment due process.

**Procedural Due Process**

In 1855, the Court first attempted to assess its standards for judging what was due process. At issue was the constitutionality of summary proceedings under a distress warrant to levy on the lands of a government debtor. The Court first ascertained that Congress was not free to make any process "due process." "To what principles, then are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." A survey of history disclosed that the law in England seemed always to have contained a summary method for recovering debts owned the Crown not unlike the law in question. Thus, "tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law. . . ."[411]

This formal approach to the meaning of due process could obviously have limited both Congress and the state legislatures in the

[411] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276–77, 280 (1856). A similar approach was followed in Fourteenth Amendment due process interpretation in Davidson v. City of New Orleans, 96 U.S. 97 (1878), and Munn v. Illinois, 94 U.S. 113 (1877).

development of procedures unknown to English law. But when California's abandonment of indictment by grand jury was challenged, the Court refused to be limited by the fact that such proceeding was the English practice and that Coke had indicated that it was a proceeding required as "the law of the land." The meaning of the Court in *Murray's Lessee s* was "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law." To hold that only historical, traditional procedures can constitute due process, the Court said, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."[412] Therefore, in observing the due process guarantee, it was concluded, the Court must look "not [to] particular forms of procedures, but [to] the very substance of individual rights to life, liberty, and property." The due process clause prescribed "the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."[413]

***Generally***.—The phrase "due process of law" does not necessarily imply a proceeding in a court or a plenary suit and trial by jury in every case where personal or property rights are involved.[414] "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."[415] What is unfair in one situation may be fair in another.[416] "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—

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[412] Hurtado v. California, 110 U.S. 516, 528–29 (1884).

[413] 110 U.S. at 531–32, 535, 537. This flexible approach has been the one followed by the Court. *E.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).

[414] Davidson v. City of New Orleans, 96 U.S. 97, 102 (1878); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904).

[415] Ex parte Wall, 107 U.S. 265, 289 (1883).

[416] *Compare* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), *with* Ng Fung Ho v. White, 259 U.S. 276 (1922).

these are some of the considerations that must enter into the judicial judgment."[417]

***Administrative Proceedings: A Fair Hearing***.—With respect to action taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before the final order becomes effective.[418] In *Bowles v. Willingham*,[419] the Court sustained orders fixing maximum rents issued without a hearing at any stage, saying "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." But where, after consideration of charges brought against an employer by a complaining union, the National Labor Relations Board undertook to void an agreement between an employer and another independent union, the latter was entitled to notice and an opportunity to participate in the proceedings.[420] Although a taxpayer must be afforded a fair opportunity for hearing in connection with the collection of taxes,[421] collection by distraint of personal property is lawful if the taxpayer is allowed a hearing thereafter.[422]

When the Constitution requires a hearing it requires a fair one, held before a tribunal which meets currently prevailing standards of impartiality.[423] A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon the proposal before the final command is issued.[424] But a variance between the charges

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[417] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Justice Frankfurter concurring).

[418] Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 153 (1941).

[419] 321 U.S. 503, 521 (1944).

[420] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

[421] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907); Lipke v. Lederer, 259 U.S. 557 (1922).

[422] Phillips v. Commissioner, 283 U.S. 589 (1931). *Cf.* Springer v. United States, 102 U.S. 586, 593 (1881); Passavant v. United States, 148 U.S. 214 (1893). The collection of taxes is, however, very nearly a wholly unique area. *See* Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (Justice Brennan concurring in part and dissenting in part). On the limitations on private prejudgment collection, *see* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[423] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). *But see* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (Justice Powell), 196–99 (Justice White) (1974) (hearing before probably-partial officer at pretermination stage).

[424] Margan v. United States, 304 U.S. 1, 18–19 (1938). The Court has experienced some difficulty with application of this principle to administrative hearings and subsequent review in selective service cases. *Compare* Gonzales v. United

and findings will not invalidate administrative proceedings where the record shows that at no time during the hearing was there any misunderstanding as to the basis of the complaint.[425] The mere admission of evidence which would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.[426] A provision that such a body shall not be controlled by rules of evidence does not, however, justify orders without a foundation in evidence having rational probative force. Hearsay may be received in an administrative hearing and may constitute by itself substantial evidence in support of an agency determination, provided that there are present factors which assure the underlying reliability and probative value of the evidence and, at least in the case at hand, where the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them with regard to the evidence.[427] While the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[428] it has refused to lay down a general rule that would cover all cases.[429]

In the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command, and applicable Navy regulations which confirm this authority, together with a stipulation in the contract between a restaurant concessionaire and the Naval Gun Factory forbidding em-

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States, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with* United States v. Nugent, 346 U.S. 1 (1953) (in auxiliary hearing which culminated in Justice Department's report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the "imperative needs of mobilization and national vigilance" mandate a minimum of "litigious interruption"), *and* Gonzales v. United States, 364 U.S. 59 (1960) (five-to-four decision finding no due process violation when petitioner (1) at departmental proceedings was not permitted to rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board, nor (2) at trial was denied access to hearing officer's notes and report, because he failed to show any need and did have Department recommendations).

[425] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 349–50 (1938).

[426] Western Chem. Co. v. United States, 271 U.S. 268 (1926). *See also* United States v. Abilene & So. Ry., 265 U.S. 274, 288 (1924).

[427] Richardson v. Perales, 402 U.S. 389 (1971).

[428] Londoner v. Denver, 210 U.S. 373 (1908).

[429] FCC v. WJR, 337 U.S. 265, 274–77 (1949). *See also* Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C §§ 1001–1011. *Cf.* Link v. Wabash R.R., 370 U.S. 626, 637, 646 (1962), wherein the majority rejected Justice Black's dissenting thesis that the dismissal with prejudice of a damage suit without notice to the client and grounded upon the dilatory tactics of his attorney, and the latter's failure to appear at a pretrial conference, amounted to a taking of property without due process of law.

ployment on the premises of any person not meeting security requirements, due process was not denied by the summary exclusion on security grounds of the concessionaire's cook, without hearing or advice as to the basis for the exclusion. The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest.[430] Since the Civil Rights Commission acts solely as an investigative and fact-finding agency and makes no adjudications, the Court, in *Hannah v. Larche*,[431]

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[430] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 900–01 (1961). Four dissenters, Justices Brennan, Black, Douglas, and Chief Justice Warren, emphasized the inconsistency between the Court's acknowledgment that the cook had a right not to have her entry badge taken away for arbitrary reasons, and its rejection of her right to be told in detail the reasons for such action. The case has subsequently been cited as involving an "extraordinary situation." Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Goldberg v. Kelly, 397 U.S. 254, 264 n.10 (1970).

Manifesting a disposition to adjudicate on non-constitutional grounds dismissals of employees under the Federal Loyalty Program, the Court, in Peters v. Hobby, 349 U.S. 331 (1955), invalidated, as in excess of its delegated authority, a finding of reasonable doubt as to the loyalty of the petitioner by a Loyalty Review Board which, on its own initiative, reopened his case after he had twice been cleared by his Agency Loyalty Board, and arrived at its conclusion on the basis of adverse information not offered under oath and supplied by informants, not all of whom were known to the Review Board and none of whom was disclosed to petitioner for cross-examination by him. The Board was found not to possess any power to review on its own initiative. Concurring, Justices Douglas and Black condemned as irreconcilable with due process and fair play the use of faceless informers whom the petitioner is unable to confront and cross-examine.

In Cole v. Young, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, there is an intimation that grave due process issues would be raised by the application to federal employees, not occupying sensitive positions, of a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In Service v. Dulles, 354 U.S. 363 (1957), and Vitarelli v. Seaton, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established rule of administrative law to the effect that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than are required by Congress or that the agency action is discretionary in nature. In both of the last cited decisions, dismissals of employees as security risks were set aside by reason of the failure of the employing agency to conform the dismissal to its established security regulations. *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

Again avoiding constitutional issues, the Court, in Greene v. McElroy, 360 U.S. 474 (1959), invalidated the security clearance procedure required of defense contractors by the Defense Department as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order which sanctioned a comparable department security clearance program, under which a defense contractor's employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Frankfurter, Harlan, and Whittaker concurred without passing on the validity of such procedure, if authorized. Justice Clark dissented. *See also* the dissenting opinions of Justices Douglas and Black in Beard v. Stahr, 370 U.S. 41, 43 (1962), and in Williams v. Zuckert, 371 U.S. 531, 533 (1963).

[431] 363 U.S. 420, 493, 499 (1960). Justices Douglas and Black dissented on the ground that when the Commission summons a person accused of violating a federal

upheld supplementary rules of procedure adopted by the Commission, independently of statutory authorization, under which state electoral officials and others accused of discrimination and summoned to appear at its hearings, are not apprised of the identity of their accusers, and witnesses, including the former, are not accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings. Such procedural rights, the Court maintained, have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations in no way determining private rights.

***Aliens: Entry and Deportation***.—To aliens who have never been naturalized or acquired any domicile or residence in the United States, the decision of an executive or administrative officer, acting within powers expressly conferred by Congress, with regard to whether or not they shall be permitted to enter the country, is due process of law.[432] Since the status of a resident alien returning from abroad is equivalent to that of an entering alien, his exclusion by the Attorney General without a hearing, on the basis of secret, undisclosed information, also is deemed consistent with due process.[433] The complete authority of Congress in the

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election law with a view to ascertaining whether the accusation may be sustained, it acts in lieu of a grand jury or a committing magistrate, and therefore should be obligated to afford witnesses the procedural protection herein denied. Congress subsequently amended the law to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person, before the evidence or testimony is released, must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. Pub. L. No. 91–521, § 4, 84 Stat. 1357 (1970), 42 U.S.C. § 1975a(e). *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969).

[432] United States v. Ju Toy, 198 U.S. 253, 263 (1905). *See also* The Japanese Immigrant Case, 189 U.S. 86, 100 (1903). *Cf.* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[433] Shaughnessy v. United States ex rel. Mezel, 345 U.S. 206 (1953). The long continued detention on Ellis Island of a non-deportable alien does not change his status or give rise to any right of judicial review. In dissent, Justices Black and Douglas maintained that the protracted confinement on Ellis Island without a hearing could not be reconciled with due process. Also dissenting, Justices Frankfurter and Jackson contended that when indefinite commitment on Ellis Island becomes the means of enforcing exclusion, due process requires that a hearing precede such deprivation of liberty.

*Cf.* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953), wherein the Court, after acknowledging that resident aliens held for deportation are entitled to procedural due process, ruled that as a matter of law the Attorney General must accord notice of the charges and a hearing to a resident alien seaman who is sought to be "expelled" upon his return from a voyage overseas. The *Knauff* case was distinguished on the ground that the seaman's status was not that of an entrant, but

matter of admission of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the owner of the vessel bringing any such alien into the country a money penalty, collectible before and as a condition of the grant of clearance.[434] If the person seeking admission claims American citizenship, the decision of the Secretary of Labor may be made final, but it must be made after a fair hearing, however summary, and must find adequate support in the evidence. A decision based upon a record from which relevant and probative evidence has been omitted is not a fair hearing.[435] Where the statute made the decision of an immigration inspector final unless an appeal was taken to the Secretary of the Treasury, a person who failed to take such an appeal did not, by an allegation of citizenship, acquire a right to a judicial hearing on habeas corpus.[436]

Deportation proceedings are not criminal prosecutions within the meaning of the Bill of Rights.[437] The authority to deport is drawn from the power of Congress to regulate the entrance of aliens and impose conditions upon their continued liberty to reside within the United States. Findings of fact reached by executive officers after a fair, though summary deportation hearing may be made conclusive.[438] In *Wong Yang Sung v. McGrath*,[439] however,

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rather that of a resident alien. *And see* Leng May Ma v. Barber, 357 U.S. 185 (1958).

[434] Oceanic Navig. Co. v. Stranahan, 214 U.S. 320 (1909).

[435] Kwock Jan Fat v. White, 253 U.S. 454, 457 (1920). *See also* Chin Yow v. United States, 208 U.S. 8 (1908).

[436] United States v. Sing Tuck, 194 U.S. 161 (1904). *See also* Quon Quon Poy v. Johnson, 273 U.S. 352, 358 (1927).

[437] Harisiades v. Shaughnessy, 342 U.S. 580 (1952). But this fact does not mean that a person may be deported on the basis of judgment reached on the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Court has held, a deportation order may only be entered if it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Woodby v. INS, 385 U.S. 276 (1966). *Woodby*, and similar rulings, were the result of statutory interpretation and were not constitutionally compelled. Vance v. Terrazas, 444 U.S. 252, 266–67 (1980).

[438] Zakonaite v. Wolf, 226 U.S. 272 (1912). *See* Jay v. Boyd, 351 U.S. 345 (1956), wherein the Court emphasized that suspension of deportation is not a matter of right, but of grace, like probation or parole, and accordingly an alien is not entitled to a hearing which contemplates full disclosure of the considerations, specifically, information of a confidential nature pertaining to national security, which induced administrative officers to deny suspension. In four dissenting opinions, Chief Justice Warren, together with Justices Black, Frankfurter, and Douglas, found irreconcilable with a fair hearing and due process the delegation by the Attorney General of his discretion to an inferior officer and the vesting of the latter with power to deny a suspension on the basis of undisclosed evidence which may amount to no more than uncorroborated hearsay.

[439] 339 U.S. 33 (1950). *See also* Kimm v. Rosenberg, 363 U.S. 405, 408, 410, 415 (1960), wherein the Court ruled that when, at a hearing on his petition for suspension of a deportation order, an alien invoked the Fifth Amendment in response to questions as to Communist Party membership, and contended that the burden of

the Court intimated that a hearing before a tribunal which did not meet the standards of impartiality embodied in the Administrative Procedure Act[440] might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus.[441] In contrast with the decision in *United States v. Ju Toy*[442] that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to a day in court if he denies that he is an alien.[443] Because aliens within the United States are protected by due process, Congress must give "clear indication" of an intent to authorize indefinite detention of illegal aliens, and probably must also cite "special justification," as, e.g., for "suspected terrorists."[444] A closely divided Court has ruled that in time of war the deportation of an enemy alien may be ordered summarily by executive action; due process of law does not require the courts to determine the sufficiency of any hearing which is gratuitously afforded to the alien.[445]

***Judicial Review of Administrative Proceedings***.—To the extent that constitutional rights are involved, due process of law

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proving such affiliation was on the Government, it was incumbent on the alien to supply the information inasmuch as the Government had no statutory discretion to suspend deportation of a Communist. Justices Douglas, Black, Brennan, and Chief Justice Warren dissented on the ground that exercise of the privilege is a neutral act, supporting neither innocence nor guilt and may not be utilized as evidence of dubious character. Justice Brennan also thought the Government was requiring the alien to prove non-membership when no one had intimated that he was a Communist.

[440] 5 U.S.C. §§ 551 et seq.

[441] Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927). *See also* Mahler v. Eby, 264 U.S. 32, 41 (1924).

Although in Heikkila v. Barber, 345 U.S. 229 (1953), the Court held that a deportation order under the Immigration Act of 1917 might be challenged only by habeas corpus, in Shaughnessy v. Pedreiro, 349 U.S. 48 (1955), it established that, under the Immigration Act of 1952, 8 U.S.C. § 1101, the validity of a deportation order also may be contested in an action for declaratory judgment and injunctive relief. Also, a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order has been denied. United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[442] 198 U.S. 253 (1905).

[443] Ng Fung Ho v. White, 259 U.S. 276, 281 (1922).

[444] Zadvydas v. Davis, 533 U.S. 678, 691 (2001) (construing a statute so as to avoid a "serious constitutional threat" (id. at 699), and recognizing a "presumptively reasonable" detention period of six months for removable aliens).

[445] Ludecke v. Watkins, 335 U.S. 160 (1948). Three of the four dissenting Justices, Douglas, Murphy, and Rutledge, argued that even an enemy alien could not be deported without a fair hearing.

imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as questions of law are concerned, but the extent to which the courts should and will go in reviewing determinations of fact has been a highly controversial issue. In *St. Joseph Stock Yards Co. v. United States*,[446] the Court held that upon review of an order of the Secretary of Agriculture establishing maximum rates for services rendered by a stockyard company, due process required that the court exercise its independent judgment upon the facts to determine whether the rates were confiscatory.[447] Subsequent cases sustaining rate orders of the Federal Power Commission have not dealt explicitly with this point.[448] The Court has said simply that a person assailing such an order "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[449]

There has been a division of opinion in the Supreme Court with regard to what extent, if at all, proceedings before military tribunals should be reviewed by the courts for the purpose of determining compliance with the due process clause. In *In re Yamashita*,[450] the majority denied a petition for certiorari and petitions for writs of habeas corpus to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. It held that since the military commission, in admitting evidence to which objection was made, had not violated any act of Congress, a treaty, or a military command defining its authority, its ruling on evidence and on the mode of conducting the proceedings were not reviewable by the courts. Again, in *Johnson v. Eisentrager*,[451] the Court overruled a lower court decision, which in reliance upon the dissenting opinion in the *Yamashita* case, had held that the due process clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of habeas corpus.

Without dissent, the Court, in *Hiatt v. Brown*,[452] reversed the judgment of a lower court which had discharged a prisoner serving a sentence imposed by a court-martial because of errors whereby the prisoner had been deprived of due process of law. The Court

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[446] 298 U.S. 38 (1936).

[447] 298 U.S. at 51–54. Justices Brandeis, Stone, and Cardozo, while concurring in the result, took exception to this proposition.

[448] FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942); FPC v. Hope Gas Co., 320 U.S. 591 (1944).

[449] FPC v. Hope Gas Co., 320 U.S. 591, 602 (1944).

[450] 327 U.S. 1 (1946).

[451] 339 U.S. 763 (1950). Justices Douglas, Black, and Burton dissented.

[452] 339 U.S. 103 (1950).

held that the court below had erred in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."[453] Similarly, in *Burns v. Wilson*,[454] the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam wherein the petitioners asserted that their imprisonment resulted from proceedings violative of their basic constitutional rights. Four Justices, with whom Justice Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners' allegations, and does not embrace an opportunity "to prove de novo" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

**Substantive Due Process**

Justice Harlan, dissenting in *Poe v. Ullman*,[455] observed that one view of due process, "ably and insistently argued . . . , sought to limit the provision to a guarantee of procedural fairness." But, he continued, due process "in the consistent view of this Court has ever been a broader concept . . . . Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"

***Discrimination***.—"Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guar-

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[453] 339 U.S. at 111.

[454] 346 U.S. 137, 140–41, 146, 147, 148, 150, 153 (1953).

[455] 367 U.S. 497, 540, 541 (1961). The internal quotation is from Hurtado v. California, 110 U.S. 516, 532 (1884). Development of substantive due process is briefly noted, above under "Scope of the Guaranty" and is treated more extensively under the Fourteenth Amendment.

anty against discriminatory legislation by Congress."[456] At other times, however, the Court assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."[457] The theory that was to prevail seems first to have been enunciated by Chief Justice Taft, who observed that the due process and equal protection clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law."[458] Thus, in *Bolling v. Sharpe*,[459] a companion case to *Brown v. Board of Education*,[460] the Court held that segregation of pupils in the public schools of the District of Columbia violated the due process clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper govern-

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

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

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

[459] 347 U.S. 497, 499–500 (1954).

[460] 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the equal protection clause if the cases had come from the States. *E.g.*, Hurd v. Hodge, 334 U.S. 24 (1948); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Railroad Trainmen v. Howard, 343 U.S. 768 (1952). *See also* Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

mental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

"In view of our decision 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."

"Equal protection analysis in the Fifth Amendment area, is the same as that under the Fourteenth Amendment."[461] So saying, the court has applied much of its Fourteenth Amendment jurisprudence to strike down sex classifications in federal legislation,[462] reached classifications with an adverse impact upon illegitimates,[463] and invalidated some welfare assistance provisions with some interesting exceptions.[464] However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the equal protection clause itself does not outlaw "reasonable" classifications, neither is the due process clause any more intolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing.[465] Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving the rights of property of a private person.[466] A veterans' law which extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, it being rational for Congress to have determined that the disruption caused by military service was qualitatively and quantitatively dif-

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[461] Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214-18 (1995).

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

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

[464] Department of Agriculture v. Murry, 413 U.S. 508 (1973). *See also* Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

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

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

ferent from that caused by alternative service, and for Congress to have so provided to make military service more attractive.[467]

"The federal sovereign, like the States, must govern impartially. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."[468] The paramount federal power over immigration and naturalization is the principal example, although there are undoubtedly others, of the national government being able to classify upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them. The instances may be relatively few, but they do exist.

***Congressional Police Measures***.—Numerous regulations of a police nature, imposed under powers specifically granted to the Federal Government, have been sustained over objections based on the due process clause. Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the expense of hospitalizing such persons.[469] It may prohibit the transportation in interstate commerce of filled milk[470] or the importation of convict-made goods into any State where their receipt, possession, or sale is a violation of local law.[471] It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by law, to reinstate employees discharged in violation of law, and to permit use of a company-owned hall for union meet-

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[467] Johnson v. Robison, 415 U.S. 361 (1974). *See also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women). Wayte v. United States, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection, there being no showing that these men were selected for prosecution because of their protest activities).

[468] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). Thus, the power over immigration and aliens permitted federal discrimination on the basis of alienage, *Hampton*, supra (employment restrictions like those previously voided when imposed by States), durational residency, Mathews v. Diaz, 426 U.S. 67 (1976) (similar rules imposed by States previously voided), and illegitimacy, Fiallo v. Bell, 430 U.S. 787 (1977) (similar rules by States would be voided). Racial preferences and discriminations in immigration have had a long history, *e.g.*, The Chinese Exclusion Cases, 130 U.S. 581 (1889), and the power continues today, *e.g.*, Dunn v. INS, 499 F.2d 856, 858 (9th Cir.), cert. denied, 419 U.S. 1106 (1975); Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980), although Congress has removed most such classifications from the statute books.

[469] United States v. New York S.S. Co., 269 U.S. 304 (1925).

[470] United States v. Carolene Products Co., 304 U.S. 144 (1938); Carolene Products Co. v. United States, 323 U.S. 18 (1944).

[471] Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937).

ings.[472] Subject to First Amendment considerations, Congress may regulate the postal service to deny its facilities to persons who would use them for purposes contrary to public policy.[473]

***Congressional Regulation of Public Utilities***.—Inasmuch as Congress, in giving federal agencies jurisdiction over various public utilities, usually has prescribed standards substantially identical with those by which the Supreme Court has tested the validity of state action, the review of agency orders seldom has turned on constitutional issues. In two cases, however, maximum rates prescribed by the Secretary of Agriculture for stockyard companies were sustained only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.[474] A few years later, in *FPC v. Hope Gas Co.*,[475] the Court adopted an entirely different approach. It took the position that the validity of the Commission's order depended upon whether the impact or total effect of the order is just and reasonable, rather than upon the method of computing the rate base. Rates which enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.

Orders prescribing the form and contents of accounts kept by public utility companies,[476] and statutes requiring a private carrier to furnish the Interstate Commerce Commission with information for valuing its property[477] have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directed to a single common carrier by water requir-

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

[473] Ex parte Jackson, 96 U.S. 727 (1878); Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

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

[475] 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Justice Stone in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to the use of any single formula or combination of formulas in determining rates.

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

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

ing it to file a summary of its books and records pertaining to its rates was also held not to violate the Fifth Amendment.[478]

***Congressional Regulation of Railroads***.—Legislation or administrative orders pertaining to railroads have been challenged repeatedly under the due process clause but seldom with success. Orders of the Interstate Commerce Commission establishing through routes and joint rates have been sustained,[479] as has its division of joint rates to give a weaker group of carriers a greater share of such rates where the proportion allotted to the stronger group was adequate to avoid confiscation.[480] The recapture of one half of the earnings of railroads in excess of a fair net operating income, such recaptured earnings to be available as a revolving fund for loans to weaker roads, was held valid on the ground that any carrier earning an excess held it as trustee.[481] An order enjoining certain steam railroads from discriminating against an electric railroad by denying it reciprocal switching privileges did not violate the Fifth Amendment even through its practical effect was to admit the electric road to a part of the business being adequately handled by the steam roads.[482] Similarly, the fact that a rule concerning the allotment of coal cars operated to restrict the use of private cars did not amount to a taking of property.[483] Railroad companies were not denied due process of law by a statute forbidding them to transport in interstate commerce commodities which have been manufactured, mined or produced by them.[484] An order approving a lease of one railroad by another, upon condition that displaced employees of the lessor should receive partial compensation for the loss suffered by reason of the lease[485] is consonant with due process of law. A law prohibiting the issuance of free passes was held constitutional even as applied to abolish rights created by a prior agreement whereby the carrier bound itself to issue such passes annually for life, in settlement of a claim for personal injuries.[486] A non-arbitrary Interstate Commerce Commission order establishing a non-compensatory rate for carriage of certain commodities does not violate the due process or just compensation clauses as

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[478] Isbrandtsen-Moller Co. v. United States, 300 U.S. 146 (1937).
[479] St. Louis S.W. Ry. v. United States, 245 U.S. 136, 143 (1917).
[480] New England Divisions Case, 261 U.S. 184 (1923).
[481] Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 481, 483 (1924).
[482] Chicago, I. & L. Ry. v. United States, 270 U.S. 287 (1926). *Cf.* Seaboard Air Line Ry. v. United States, 254 U.S. 57 (1920).
[483] Assigned Car Cases, 274 U.S. 564, 575 (1927).
[484] United States v. Delaware & Hudson Co., 213 U.S. 366, 405, 411, 415 (1909).
[485] United States v. Lowden, 308 U.S. 225 (1939).
[486] Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911).

long as the public interest thereby is served and the rates as a whole yield just compensation.[487]

Occasionally, however, regulatory action has been held invalid under the due process clause. An order issued by the Interstate Commerce Commission relieving short line railroads from the obligation to pay the usual fixed sum per day rental for cars used on foreign roads for a space of two days was held to be arbitrary and invalid.[488] A retirement act which made eligible for pensions all persons who had been in the service of any railroad within one year prior to the adoption of the law, counted past unconnected service of an employee toward the requirement for a pension without any contribution therefor, and treated all carriers as a single employer and pooled their assets, without regard to their individual obligations, was held unconstitutional.[489]

***Taxation***.—In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the States by the Fourteenth. The Federal Government may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,[490] and it may tax the income of a citizen resident abroad, which is derived from property located at his residence.[491] The difference is explained by the fact that protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the State's borders. The Supreme Court has said that, in the absence of an equal protection clause, "a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment. . . ."[492] It has sustained, over charges of unfair differentiation between persons, a graduated income tax,[493] a higher tax on oleomargarine than on butter,[494] an excise tax on "puts" but not on "call,"[495] a tax on the income of business operated by corporations but not on similar enterprises carried on by individuals,[496] an income tax on foreign corporations, based on their income from sources within the United States, while domestic corporations are

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[487] Baltimore & Ohio R.R. v. United States, 345 U.S. 146 (1953).

[488] Chicago, R.I. & P. Ry. v. United States, 284 U.S. 80 (1931).

[489] Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). *But cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[490] United States v. Bennett, 232 U.S. 299, 307 (1914).

[491] Cook v. Tait, 265 U.S. 47 (1924).

[492] Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941). *But see* discussion of "Discrimination" supra.

[493] Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1916).

[494] McCray v. United States, 195 U.S. 27, 61 (1904).

[495] Treat v. White, 181 U.S. 264 (1901).

[496] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

taxed on income from all sources,[497] a tax on foreign-built but not upon domestic yachts,[498] a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service,[499] a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums,[500] an Alaska statute imposing license taxes only on nonresident fisherman,[501] an act which taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal,[502] an excess profits tax which defined "invested capital" with reference to the original cost of the property rather than to its present value,[503] an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers,[504] an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor's moiety,[505] and a tax on nonprofit mutual insurers although such insurers organized before a certain date were exempt inasmuch as a continuing exemption for all insurers would have led to their multiplication to the detriment of other federal programs.[506]

***Retroactive Taxes***.—It has been customary from the beginning for Congress to give some retroactive effect to its tax laws, usually making them effective from the beginning of the tax year or from the date of introduction of the bill that became the law.[507] Application of an income tax statute to the entire calendar year in which enactment took place has never, barring some peculiar circumstance, been deemed to deny due process.[508] "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of gov-

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[497] National Paper Co. v. Bowers, 266 U.S. 373 (1924).

[498] Billings v. United States, 232 U.S. 261, 282 (1914).

[499] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[500] Bromley v. McCaughn, 280 U.S. 124 (1929).

[501] Haavik v. Alaska Packers' Ass'n, 263 U.S. 510 (1924).

[502] Alaska Fish Co. v. Smith, 255 U.S. 44 (1921).

[503] LaBelle Iron Works v. United States, 256 U.S. 377 (1921).

[504] Helvering v. Northwest Steel Mills, 311 U.S. 46 (1940).

[505] Fernandez v. Wiener, 326 U.S. 340 (1945); *cf.* Coolidge v. Long, 282 U.S. 582 (1931).

[506] United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970).

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

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

ernment among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."[509] A special income tax on profits realized by the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress, was held valid.[510] An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.[511] Retroactive assessment of penalties for fraud or negligence,[512] or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder,[513] does not deprive the taxpayer of property without due process of law.

An additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the due process clause.[514] Similarly upheld were a transfer tax measured in part by the value of property held jointly by a husband and wife, including that which comes to the joint tenancy as a gift from the decedent spouse[515] and the inclusion in the gross income of the settlor of income accruing to a revocable trust during any period when the settlor had power to revoke or modify it.[516]

Although the Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,[517] those decisions have recently been distinguished, and their precedential

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[509] Welch v. Henry, 305 U.S. 134, 146–47 (1938).

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

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

[512] Helvering v. Mitchell, 303 U.S. 391 (1938).

[513] Helvering v. National Grocery Co., 304 U.S. 282 (1938).

[514] Patton v. Brady, 184 U.S. 608 (1902).

[515] Tyler v. United States, 281 U.S. 497 (1930); United States v. Jacobs, 306 U.S. 363 (1939).

[516] Reinecke v. Smith, 289 U.S. 172 (1933).

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

value limited.[518] In *United States v. Carlton*, the Court declared that "[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation"– retroactive application of legislation must be shown to be "'justified by a rational legislative purpose.'"[519] Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress' purpose was "neither illegitimate nor arbitrary," the Court noted, since Congress had acted "to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Also, "Congress acted promptly and established only a modest period of retroactivity." The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[520]

***Deprivation of Property: Retroactive Legislation***.—Federal regulation of future action, based upon rights previously acquired by the person regulated, is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not ordinarily condemn it. The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating former employees, who had terminated work in the industry before passage of the law, for black lung disabilities contracted in the course of their work, was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who had profited from the fruits of their labor.[521] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must

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

[519] 512 U.S. 26, 30 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

[520] 512 U.S. at 33.

[521] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). *But see* id. at 38 (Justice Powell concurring) (questioning application of retroactive cost-spreading).

take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster. The Court has applied *Turner Elkhorn* in upholding retroactive application of pension plan termination provisions to cover the period of congressional consideration, declaring that the test for retroactive application of legislation adjusting economic burdens is merely whether "the retroactive application . . . is itself justified by a rational legislative purpose."[522]

Rent regulations were sustained as applied to prevent execution of a judgment of eviction rendered by a state court before the enabling legislation was passed.[523] For the reason that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end," no vested right to use housing, built with the aid of FHA mortgage insurance for transient purposes, was acquired by one obtaining insurance under an earlier section of the National Housing Act, which, though silent in this regard, was contemporaneously construed as barring rental to transients, and was later modified by an amendment which expressly excluded such use.[524] An order by an Area Rent Director reducing an unapproved rental and requiring the landlord to refund the excess previously collected, was held, with one dissenting vote, not to be the type of

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[522] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). *Accord*, United States v. Sperry Corp., 493 U.S. 52, 65 (1989) (upholding imposition of user fee on claimants paid by Iran-United States Claims Tribunal prior to enactment of fee statute). Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636–41 (1993) (imposition of multiemployer pension plan withdrawal liability on an employer is not irrational, even though none of its employees had earned vested benefits by the time of withdrawal). In Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), the challenge was to a statutory requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that had placed its mining operations in a wholly owned subsidiary three decades earlier, before labor agreements included an express promise of lifetime benefits. In a fractured opinion, the justices ruled 5–4 that the scheme's severe retroactive effect offended the Constitution, though differing on the governing clause. Four of the majority justices based the judgment solely on takings law, while opining that "there is a question" whether the statute violated due process as well. The remaining majority justice, and the four dissenters, viewed substantive due process as the sole appropriate framework for resolving the case, but disagreed on whether a violation had occurred.

[523] Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

[524] FHA v. The Darlington, Inc., 358 U.S. 84, 89–91, 92–93 (1958). Dissenting, Justices Harlan, Frankfurter, and Whittaker maintained that under the due process clause the United States, in its contractual relations, is bound by the same rules as private individuals unless the action taken falls within the general federal regulatory power.

retroactivity which is condemned by law.[525] The application of a statute providing for tobacco marketing quotas, to a crop planted prior to its enactment, was held not to deprive the producers of property without due process of law since it operated, not upon production, but upon the marketing of the product after the act was passed.[526]

In the exercise of its comprehensive powers over revenue, finance, and currency, Congress may make Treasury notes legal tender in payment of debts previously contracted[527] and may invalidate provisions in private contracts calling for payment in gold coin,[528] but rights against the United States arising out of contract are more strongly protected by the due process clause. Hence, a law purporting to abrogate a clause in government bonds calling for payment in gold coin was invalid,[529] and a statute abrogating contracts of war risk insurance was held unconstitutional as applied to outstanding policies.[530]

The due process clause has been successfully invoked to defeat retroactive invasion or destruction of property rights in a few cases. A revocation by the Secretary of the Interior of previous approval of plats and papers showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property without due process of law.[531] The exception of the period of federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read as prospective only because the limitation was an integral

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[525] Woods v. Stone, 333 U.S. 472 (1948).

[526] Mulford v. Smith, 307 U.S. 38 (1939). An increase in the penalty for production of wheat in excess of quota was valid as applied retroactively to wheat already planted, where Congress concurrently authorized a substantial increase in the amount of the loan that might be made to cooperating farmers upon stored "farm marketing excess wheat." Wickard v. Filburn, 317 U.S. 111 (1942).

[527] Legal Tender Cases (Knox v. Lee ), 79 U.S. (12 Wall.) 457, 551 (1871).

[528] Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935).

[529] Perry v. United States, 294 U.S. 330 (1935).

[530] Lynch v. United States, 292 U.S. 571 (1934). *See also* De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953). Notice that these kinds of cases are precisely the ones that would be condemned under the contract clause, even under the relaxed scrutiny now employed, if the action were taken by a State. *E.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). "Less searching standards" are imposed by the Due Process Clauses than by the Contract Clause. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984). Also, statutory reservation of the right to amend an agreement can defuse most such constitutional issues. Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) (amendment of Social Security Act to prevent termination by state when termination notice already filed). The Court has addressed similar issues under breach of contract theory. United States v. Winstar Corp., 518 U.S. 839 (1996).

[531] Noble v. Union River Logging R.R., 147 U.S. 165 (1893).

part of the liability, not merely a matter of remedy, and would violate the Fifth Amendment if retroactive.[532]

***Bankruptcy Legislation***.—In acting pursuant to its power to enact uniform bankruptcy legislation, Congress has regularly authorized retrospective impairment of contractual obligations,[533] but the due process clause (by itself or infused with takings principles) constitutes a limitation upon Congress' power to deprive persons of more secure forms of property, such as the rights secured creditors have to obtain repayment of a debt. The Court had long followed a rule of construction favoring prospective-only application of bankruptcy laws, absent a clear showing of congressional intent,[534] but it was not until 1935 that the Court actually held unconstitutional a retrospective law. Struck down by the Court was the Frazier-Lemke Act, which by its terms applied only retrospectively, and which authorized a court to stay proceedings for the foreclosure of a mortgage for five years, the debtor to remain in possession at a reasonable rental, with the option of purchasing the property at its appraised value at the end of the stay. The Act offended the Fifth Amendment, the Court held, because it deprived the creditor of substantial property rights acquired prior to the passage of the act.[535] However, a modified law, under which the stay was subject to termination by the court and which continued the right of the creditor to have the property sold to pay the debt, was sustained.[536]

Without violation of the due process clause, the sale of collateral under the terms of a contract may be enjoined, if such sale would hinder the preparation or consummation of a proposed railroad reorganization, provided the injunction does no more than delay the enforcement of the contract.[537] A provision that claims resulting from rejection of an unexpired lease should be treated as

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[532] Danzer Co. v. Gulf R.R., 268 U.S. 633 (1925).

[533] *E.g.*, Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902); Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648, 673–75 (1935).

[534] Holt v. Henley, 232 U.S. 637, 639–40 (1914). *See also* Auffm'ordt v. Rasin, 102 U.S. 620, 622 (1881).

[535] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[536] Wright v. Vinton Branch, 300 U.S. 440 (1937). The relatively small modifications that the Court accepted as making the difference in validity, and the fact that subsequently the Court interpreted the statute so as to make smaller the modifications, John Hancock Mut. Life Ins. Co. v. Bartels, 308 U.S. 180, 184 & n.3 (1939); Wright v. Union Central Ins. Co., 311 U.S. 273, 278–79 (1940), has created differences of opinion with respect to whether *Radford* remains sound law. *Cf.* Helvering v. Griffiths, 318 U.S. 371, 400–01 & n.52 (1943) (suggesting Radford might not have survived Vinton Branch).

[537] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648 (1935).

on a parity with provable debts, but limited to an amount equal to three years rent, was held not to amount to a taking of property without due process of law, since it provided a new and more certain remedy for a limited amount, in lieu of an existing remedy inefficient and uncertain in result.[538] A right of redemption allowed by state law upon foreclosure of a mortgage was unavailing to defeat a plan for reorganization of a debtor corporation where the trial court found that the claims of junior lienholders had no value.[539]

***Right to Sue the Government***.—A right to sue the Government on a contract is a privilege, not a property right protected by the Constitution.[540] The right to sue for recovery of taxes paid may be conditioned upon an appeal to the Commissioner and his refusal to refund.[541] There was no denial of due process when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, having arisen from the mistake of administrative officials in allowing the statute of limitations to run before collecting a tax.[542] The denial to taxpayers of the right to sue for refund of processing and floor stock taxes collected under a law subsequently held unconstitutional, and the substitution of a new administrative procedure for the recovery of such sums, was held valid.[543] Congress may cut off the right to recover taxes illegally collected by ratifying the imposition and collection thereof, where it could lawfully have authorized such exactions prior to their collection.[544]

***Congressional Power to Abolish Common Law Judicial Actions***.—Similarly, it is clearly settled that "[a] person has no property, no vested interest, in any rule of the common law."[545] It follows, therefore, that Congress in its discretion may abolish common law actions, replacing them with other judicial actions or with administrative remedies at its discretion. There is slight intimation in some of the cases that if Congress does abolish a common law action it *must* either duplicate the recovery or provide a reasonable

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[538] Kuchner v. Irving Trust Co., 299 U.S. 445 (1937).

[539] In re 620 Church Street Corp., 299 U.S. 24 (1936). In the context of Congress' plan to save major railroad systems, *see* Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

[540] Lynch v. United States, 292 U.S. 571, 581 (1934).

[541] Dodge v. Osborn, 240 U.S. 118 (1916).

[542] Graham & Foster v. Goodcell, 282 U.S. 409 (1931).

[543] Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937).

[544] United States v. Heinszen & Co., 206 U.S. 370, 386 (1907).

[545] Second Employers' Liability Cases, 223 U.S. 1, 50 (1912). *See also* Silver v. Silver, 280 U.S. 117, 122 (1929) (a state case).

substitute remedy.[546] Such a holding seems only remotely likely,[547] but some difficulties may be experienced with respect to legislation that retrospectively affects rights to sue, such as shortening or lengthening statutes of limitation, and the like, although these have typically risen in state contexts. In one interesting decision, the Court did sustain an award of additional compensation under the Longshoremen's and Harbor Workers' Compensation Act, made pursuant to a private act of Congress passed after expiration of the period for review of the original award, directing the Commission to review the case and issue a new order, the challenge being made by the employer and insurer.[548]

***Deprivation of Liberty: Economic Legislation***.—The proscription of deprivation of liberty without due process, insofar as substantive due process was involved, was long restricted to invocation against legislation deemed to abridge liberty of contract.[549] The two leading cases invalidating federal legislation, however, have both been overruled, as the Court adopted a very restrained standard of review of economic legislation.[550] The Court's "hands-off" policy with regard to reviewing economic legislation is quite pronounced.[551]

## NATIONAL EMINENT DOMAIN POWER

### Overview

"The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[552] Emi-

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[546] The intimation stems from New York Central R.R. v. White, 243 U.S. 188 (1917) (a state case, involving the constitutionality of a workmen's compensation law). While denying any person's vested interest in the continuation of any particular right to sue, id. at 198, the Court did seem twice to suggest that abolition without a reasonable substitute would raise due process problems. Id. at 201. In Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 87–92 (1978), it noticed the contention but passed it by because the law at issue was a reasonable substitute.

[547] It is more likely with respect to congressional provision of a statutory substitute for a cause of action arising directly out of a constitutional guarantee. *E.g.*, Carlson v. Green, 446 U.S. 14, 18–23 (1980).

[548] Paramino Co. v. Marshall, 309 U.S. 370 (1940).

[549] *See* "Liberty of Contract" heading under Fourteenth Amendment, infra.

[550] Adair v. United States, 208 U.S. 161 (1908), overruled in substance by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[551] *E.g.*, United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1981); Schweiker v. Wilson, 450 U.S. 221 (1981).

[552] United States v. Carmack, 329 U.S. 230, 241–42 (1946). The same is true of "just compensation" clauses in state constitutions. Boom Co. v. Patterson, 98 U.S.

nent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."[553] In the early years of the nation the federal power of eminent domain lay dormant,[554] and it was not until 1876 that its existence was recognized by the Supreme Court. In *Kohl v. United States*[555] any doubts were laid to rest, as the Court affirmed that the power was as necessary to the existence of the National Government as it was to the existence of any State. The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power,[556] but once this is conceded the ambit of national powers is so wide-ranging that vast numbers of objects may be effected.[557] This prerogative of the National Government can neither be enlarged nor diminished by a State.[558] Whenever lands in a State are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State.[559]

"Prior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained

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403, 406 (1879). For in-depth analysis of the eminent domain power, *see* 1 NICHOLS' THE LAW OF EMINENT DOMAIN (J. Sackman, 3d rev. ed. 1973); and R. Meltz, *When the United States Takes Property: Legal Principles*, CONGRESSIONAL RESEARCH SERVICE REPORT 91–339 A (1991).

[553] Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).

[554] Prior to this time, the Federal Government pursued condemnation proceedings in state courts and commonly relied on state law. Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Jones, 109 U.S. 513 (1883). The first general statutory authority for proceedings in federal courts was not enacted until 1888. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357. *See* 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 1.24 (J. Sackman, 3d rev. ed. 1973).

[555] 91 U.S. 367 (1876).

[556] United States v. Gettysburg Electric Ry., 160 U.S. 668, 679 (1896).

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

[558] Kohl v. United States, 91 U.S. 367 374 (1876).

[559] Chappell v. United States, 160 U.S. 499, 510 (1896). The fact that land included in a federal reservoir project is owned by a state, or that its taking may impair the state's tax revenue, or that the reservoir will obliterate part of the state's boundary and interfere with the state's own project for water development and conservation, constitutes no barrier to the condemnation of the land by the United States. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941). So too, land held in trust and used by a city for public purposes may be condemned. United States v. Carmack, 329 U.S. 230 (1946).

by any federal authority."[560] The just compensation provision of the Fifth Amendment did not apply to the States,[561] and at first the contention that the due process clause of the Fourteenth Amendment afforded property owners the same measure of protection against the States as the Fifth Amendment did against the Federal Government was rejected.[562] However, within a decade the Court rejected the opposing argument that the amount of compensation to be awarded in a state eminent domain case is solely a matter of local law. On the contrary, the Court ruled, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."[563] While the guarantees of just compensation flow from two different sources, the standards used by the Court in dealing with the issues appear to be identical, and both federal and state cases will be dealt with herein without expressly continuing to recognize the two different bases for the rulings.

It should be borne in mind that while the power of eminent domain, though it is inherent in organized governments, may only be exercised through legislation or through legislative delegation, usually to another governmental body, the power may be delegated as well to private corporations, such as public utilities, railroad and bridge companies, when they are promoting a valid public purpose. Such delegation has long been approved.[564]

**Public Use**

Explicit in the just compensation clause is the requirement that the taking of private property be for a public use; the Court has long accepted the principle that one is deprived of his property in violation of this guarantee if a State takes the property for any reason other than a public use.[565] The question whether a par-

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[560] Green v. Frazier, 253 U.S. 233, 238 (1920).

[561] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

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

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

[564] Noble v. Oklahoma City, 297 U.S. 481 (1936); Luxton v. North River Bridge Co., 153 U.S. 525 (1895). One of the earliest examples is Curtiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cr.) 233 (1810).

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

ticular intended use is a public use is clearly a judicial one,[566] but the Court has always insisted on a high degree of judicial deference to the legislative determination. "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[567] When it is state action being challenged under the Fourteenth Amendment, there is the additional factor of the Court's willingness to defer to the highest court of the State in resolving such an issue.[568] As early as 1908, the Court was obligated to admit that notwithstanding its retention of the power of judicial review, "no case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses . . . ."[569] However, in a 1946 case involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[570] There is some suggestion that "the scope of the judicial power to determine what is a 'public use'" may be different as between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,[571] but it may well be that the case simply stands for the necessity for great judicial restraint.[572] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision, and is not subject to judicial review.[573]

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

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

[568] Green v. Frazier, 253 U.S. 283, 240 (1920); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930). *And see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

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

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

[571] 327 U.S. at 552.

[572] So it seems to have been considered in Berman v. Parker, 348 U.S. 26, 32 (1954).

[573] Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Berman v. Parker, 358 U.S. 26, 33 (1954). "When the

At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But this view was rejected some time ago.[574] The modern conception of public use equates it with the police power in the furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power . . . ." Effectuation of these matters being within the authority of the legislature, the power to achieve them through the exercise of eminent domain is established. "For the power of eminent domain is merely the means to the end."[575] Traditionally, eminent domain has been utilized to facilitate transportation, the supplying of water, and the like,[576] but the use of the power to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.[577]

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legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in federal courts." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

[574] Clark v. Nash, 198 U.S. 361 (1905); Mt. Vernon-Woodberry Cotton Duck Co., v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).

[575] Berman v. Parker, 348 U.S. 26, 32, 33 (1954).

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

[577] *E.g.*, Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. Los Angeles County, 262 U.S. 700

The Supreme Court has approved generally the widespread use of the power of eminent domain by federal and state governments in conjunction with private companies to facilitate urban renewal, destruction of slums, erection of low-cost housing in place of deteriorated housing, and the promotion of aesthetic values as well as economic ones. In *Berman v. Parker*,[578] a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." For "public use," then, it may well be that "public interest" or "public welfare" is the more correct phrase. *Berman* was applied in *Hawaii Housing Auth. v. Midkiff*,[579] upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking."[580] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[581]

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

[578] 348 U.S. 26, 32–33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude." Id. at 33–34 (citations omitted).

[579] 467 U.S. 229, 243 (1984).

[580] 467 U.S. at 243.

[581] 467 U.S. at 240. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

**Just Compensation**

"When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."[582] The Fifth Amendment's guarantee "that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[583]

The just compensation required by the Constitution is that which constitutes "a full and perfect equivalent for the property taken."[584] Originally the Court required that the equivalent be in money, not in kind,[585] but more recently has cast some doubt on this assertion.[586] Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,. . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.'"[587] The general standard thus is the market value of the property, i.e., what a willing buyer would pay a willing seller.[588] If fair market value does not exist or cannot be cal-

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[582] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

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

[584] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. United States ex rel. TVA v. Powelson, 319 U.S. 266, 281 (1943); United States v. Miller, 317 U.S. 369, 375 (1943); Roberts v. New York City, 295 U.S. 264 (1935). The value of the property to the government for its particular use is not a criterion. United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. Dohany v. Rogers, 281 U.S. 362 (1930).

[585] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795); United States v. Miller, 317 U.S. 369, 373 (1943).

[586] Regional Rail Reorganization Act Cases, 419 U.S. 102, 150–51 (1974).

[587] Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 250 (1897); McGovern v. City of New York, 229 U.S. 363, 372 (1913). *See also* Boom Co. v. Patterson, 98 U.S. 403 (1879); McCandless v. United States, 298 U.S. 342 (1936).

[588] United States v. Miller, 317 U.S. 369, 374 (1943); United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943). *See also* United States v. New River Col-

culated, resort must be had to other data which will yield a fair compensation.[589] However, the Court is resistant to alternative standards, having repudiated reliance on the cost of substitute facilities.[590] Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. Holding that the reasons which underlie the rule of market value when a free market exists apply as well where value is measured by a government-fixed ceiling price, the Court permitted owners of cured pork and black pepper to recover only the ceiling price for the commodities, despite findings by the Court of Claims that the replacement cost of the meat exceeded its ceiling price and that the pepper had a "retention value" in excess of that price.[591] By a five-to-four decision, the Court ruled that the Government was not obliged to pay the present market value of a tug when the value had been greatly enhanced as a consequence of the Government's wartime needs.[592]

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases decided by five-to-four votes, one in which compensation was awarded and one in which it was denied. Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land for nearly 50 years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.[593] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land,

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lieries Co., 262 U.S. 341 (1923); Olson v. United States, 292 U.S. 264 (1934); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the Government under a lease was held constitutional. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925).

[589] United States v. Miller, 317 U.S. 369, 374 (1943).

[590] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (condemnation of church-run camp; United States v. 50 Acres of Land, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable.

[591] United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Commodities Trading Corp., 339 U.S. 121 (1950). *And see* Vogelstein & Co. v. United States, 262 U.S. 337 (1923).

[592] United States v. Cors, 337 U.S. 325 (1949). *And see* United States v. Toronto Navigation Co., 338 U.S. 396 (1949).

[593] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id. at 480.

it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.[594]

***Interest***.—Ordinarily, property is taken under a condemnation suit upon the payment of the money award by the condemner, and no interest accrues.[595] If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."[596] If the owner and the Government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[597] Where property of a citizen has been mistakenly seized by the Government and it is converted into money which is invested, the owner is entitled in recovering compensation to an allowance for the use of his property.[598]

***Rights for Which Compensation Must Be Made***.—If real property is condemned the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable "property," but also such lesser interests as easements[599] and leaseholds.[600] If only a portion of a tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.[601] On the other hand, if

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[594] United States v. Fuller, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally created value should apply only when the Government was in fact acting in the use of its own property; here the Government was acting only as a condemnor. Id. at 494.

[595] Danforth v. United States, 308 U.S. 271, 284 (1939); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

[596] United States v. Klamath Indians, 304 U.S. 119, 123 (1938); Jacobs v. United States, 290 U.S. 13, 17 (1933); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

[597] Albrecht v. United States, 329 U.S. 599 (1947).

[598] Henkels v. Sutherland, 271 U.S. 298 (1926); *see also* Phelps v. United States, 274 U.S. 341 (1927).

[599] United States v. Welch, 217 U.S. 333 (1910).

[600] United States v. General Motors, 323 U.S. 373 (1945).

[601] Bauman v. Ross, 167 U.S. 548 (1897); Sharp v. United States, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a pri-

the taking has in fact benefitted the owner, the benefit may be set off against the value of the land condemned,[602] although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.[603] When certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the subsequent erection of a fire station on the property instead was held not to have deprived the owner of any part of his just compensation.[604]

Interests in intangible as well as tangible property are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights,[605] patent rights,[606] and trade secrets.[607] So too, the franchise of a private corporation is property that cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the Government was required to pay for the franchise to take tolls as well as for the tangible property.[608] The frustration of a private contract by the requisitioning of the entire output of a steel manufacturer is not a taking for which compensation is required,[609] but government requisitioning from a power company of all the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.[610] When, upon default of a ship-builder, the Government, pursuant to contract with him, took title to uncompleted boats, the material men, whose liens under state laws had attached when they supplied the shipbuilder, had a compensable interest equal to whatever value these liens had when the Government "took" or destroyed them in perfecting its title.[611] As a general matter, there is no property interest in the continuation of a rule of law.[612] And, even though state participa-

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vate right-of-way, an allowance was properly made for the value of the easement. United States v. Welch, 217 U.S. 333 (1910).

[602] Bauman v. Ross, 167 U.S. 548 (1897).

[603] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[604] Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

[605] Lynch v. United States, 292 U.S. 571, 579 (1934); Omnia Commercial Corp. v. United States, 261 U.S. 502, 508 (1923).

[606] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885).

[607] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[608] Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1983).

[609] Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[610] International Paper Co. v. United States, 282 U.S. 399 (1931).

[611] Armstrong v. United States, 364 U.S. 40, 50 (1960).

[612] Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978).

tion in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agreement with the state.[613] Similarly, there is no right to the continuation of governmental welfare benefits.[614]

***Consequential Damages***.—The Fifth Amendment requires compensation for the taking of "property," hence does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.[615] "Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever, he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."[616] An exception to the general principle has been established by the Court where only a temporary occupancy is assumed; then the taking body must pay the value which a hypothetical long-term tenant in possession would require when leasing to a temporary occupier requiring his removal, including in the market value of the interest the reasonable cost of moving out the personal property stored in the premises, the cost of storage of goods against their sale, and the cost of returning the property to the premises.[617] Another exception to the general rule occurs with

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[613] Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

[614] "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." Bowen v. Gilliard, 483 U.S. 587, 604 (1987).

[615] Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, *see* New Haven Inclusion Cases, 399 U.S. 392, 489–95 (1970).

[616] United States v. General Motors Corp., 323 U.S. 373, 382 (1945).

[617] United States v. General Motors Corp., 323 U.S. 373 (1945). In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Government seized the tenant's plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business for the period of military occupancy; the Court narrowly held that the Government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers built up over the years and for the continued hold of the laundry upon their patronage. *See also* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion ("severance damages") as well as the value of the taken portion.[618]

***Enforcement of Right to Compensation***.—The nature and character of the tribunal to determine compensation is in the discretion of the legislature, and may be a regular court, a special legislative court, a commission, or an administrative body.[619] Proceedings to condemn land for the benefit of the United States are brought in the federal district court for the district in which the land is located.[620] The estimate of just compensation is not required to be made by a jury but may be made by a judge or entrusted to a commission or other body.[621] Federal courts may appoint a commission in condemnation actions to resolve the compensation issue.[622] If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review,[623] although the scope of review may be limited by the legislature.[624] When the judgment of a state court with regard to the amount of compensation is questioned, the Court's review is restricted. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."[625] "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation be-

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[618] United States v. Miller, 317 U.S. 369, 375–76 (1943). "On the other hand," the Court added, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken." Id.

[619] United States v. Jones, 109 U.S. 513 (1883); Bragg v. Weaver, 251 U.S. 57 (1919).

[620] 28 U.S.C. § 1403. On the other hand, inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491(a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States "founded . . . upon the Constitution." *See* Preseault v. ICC, 494 U.S. 1 (1990).

[621] Bauman v. Ross, 167 U.S. 548 (1897). Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes determination of "all issues" other than the precise issue of the amount of compensation, so that the judge decides those matters relating to what is computed in making the calculation. United States v. Reynolds, 397 U.S. 14 (1970).

[622] Rule 71A(h), Fed. R. Civ. P. These commissions have the same powers as a court-appointed master.

[623] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

[624] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897). In federal courts, reports of Rule 71A commissions are to be accepted by the court unless "clearly erroneous." Fed. R. Civ. P. 53(e)(2).

[625] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898).

fore a party can make out that the State has deprived him of his property unconstitutionally."[626] Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a consequence of error therein the property owner received less than he was entitled to.[627]

**When Property Is Taken**

The issue whether one's property has been "taken" with the consequent requirement of just compensation can hardly arise when government institutes condemnation proceedings directed to it. Where, however, physical damage results to property because of government action, or where regulatory action limits activity on the property or otherwise deprives it of value, whether there has been a taking in the Fifth Amendment sense becomes critical.

***Government Activity Not Directed at the Property***.—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to "direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[628] Accordingly, a variety of consequential injuries were held not to constitute takings: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;[629] similar deprivations, lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street.[630] Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[631] or by a landowner in raising the height of the dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.[632]

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[626] McGovern v. City of New York, 229 U.S. 363, 370–71 (1913).

[627] 229 U.S. at 371. *And see* Provo Bench Canal Co. v. Tanner, 239 U.S. 323 (1915); Appleby v. City of Buffalo, 221 U.S. 524 (1911).

[628] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals," the Court explained.

[629] Meyer v. City of Richmond, 172 U.S. 82 (1898).

[630] Sauer v. City of New York, 206 U.S. 536 (1907). *But see* the litigation in the state courts cited by Justice Cardozo in Roberts v. City of New York, 295 U.S. 264, 278–82 (1935).

[631] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[632] Manigault v. Springs, 199 U.S. 473 (1905).

But the Court also decided long ago that land can be "taken" in the constitutional sense by physical invasion or occupation by the government, as occurs when government floods land.[633] A later formulation was that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."[634] It was thus held that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired the guns at the fort across the land and had established a fire control service there.[635] In two major cases, the Court held that the lessees or operators of airports were required to compensate the owners of adjacent land when the noise, glare, and fear of injury occasioned by the low altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it.[636] Eventually, the term "inverse condemnation" came to be used to refer to such cases where the government has not instituted formal condemnation proceedings, but instead the property owner has sued for just compensation, claiming that governmental action or regulation has "taken" his property.[637]

***Navigable Waters***.—The repeated holdings that riparian ownership is subject to the power of Congress to regulate commerce constitute an important reservation to the developing law of liability in the taking area. When damage results consequentially from an improvement to a river's navigable capacity, or from an improvement on a nonnavigable river designed to affect navigability elsewhere, it is generally not a taking of property but merely an exercise of a servitude to which the property is always subject.[638]

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[633] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872).

[634] United States v. Dickinson, 331 U.S. 745, 748 (1947).

[635] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). *Cf.* Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1 (1919); Peabody v. United States, 231 U.S. 530 (1913).

[636] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in a suit by one whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

[637] "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Justice Brennan dissenting). *See also* United States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

[638] Gibson v. United States, 166 U.S. 269 (1897); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Appalachian Power Co., 311 U.S. 377 (1940);

This exception does not apply to lands above the ordinary high-water mark of a stream,[639] hence is inapplicable to the damage the Government may do to such "fast lands" by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements.[640] And, when previously nonnavigable waters are made navigable by private investment, government may not, without paying compensation, simply assert a navigation servitude and direct the property owners to afford public access.[641]

***Regulatory Takings***.—While it is established that government may take private property, with compensation, to promote the public interest, that interest also may be served by regulation of property use pursuant to the police power, and for years there was broad dicta that no one may claim damages due to a police regulation designed to secure the common welfare, especially in the area of health and safety regulations.[642] "The distinguishing characteristic between eminent domain and the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest."[643] But regulation may deprive an owner of most or all beneficial use of his property and may destroy the values of the property for the purposes to which it is suited.[644] The older cases flatly denied the possibility of compensation for this diminu-

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United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

[639] United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628 (1961).

[640] United States v. Lynah, 188 U.S. 445 (1903); United States v. Cress, 243 U.S. 316 (1917); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Kansas City Ins. Co., 339 U.S. 799 (1950); United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961).

[641] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979).

[642] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). *See also* The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 255 (1897); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935).

[643] 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 1.42 (J. Sackman, 3d rev. ed. 1973).

[644] *E.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance upheld restricting owner of brick factory from continuing his use after residential growth surrounding factory made use noxious, even though value of property was reduced by more than 90%); Miller v. Schoene, 276 U.S. 272 (1928) (no compensation due owner's loss of red cedar trees ordered destroyed because they were infected with rust that threatened contamination of neighboring apple orchards: preferment of public interest in saving cash crop to property interest in ornamental trees was rational).

tion of property values,[645] but the Court in 1922 established as a general principle that "if regulation goes too far it will be recognized as a taking."[646]

In the *Mahon* case, Justice Holmes for the Court, over Justice Brandeis' vigorous dissent, held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased by deeds that reserved to the coal companies ownership of subsurface mining rights and that held the companies harmless for damage caused by subsurface mining operations. The statute thus gave the homeowners more than they had been able to obtain through contracting, and at the same time deprived the coal companies of the entire value of their subsurface estates. The Court observed that "[f]or practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying it."[647] The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far."[648] However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests.[649]

The Court had been early concerned with the imposition upon one or a few individuals of the costs of furthering the public interest.[650] But it was with respect to zoning, in the context of substantive due process, that the Court first experienced some difficulty in this regard. The Court's first zoning case involved a real estate company's challenge to a comprehensive municipal zoning

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[645] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (ban on manufacture of liquor greatly devalued plaintiff's plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare).

[646] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of *all* beneficial use of his property requires compensation, unless the owner's proposed use is one prohibited by background principles of property or nuisance law existing at the time the property was acquired).

[647] 260 U.S. at 414–15.

[648] 260 U.S. at 415. In dissent, Justice Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. Id. at 416.

[649] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[650] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). *See also* Panhandle Eastern Pipe Line Co. v. State Comm'n, 294 U.S. 613 (1935); Atchison, T. & S. F. Ry. v. Public Utility Comm'n, 346 U.S. 346 (1953), *and compare* the Court's two decisions in Georgia Ry. & Electric Co. v. City of Decatur, 295 U.S. 165 (1935), *and* 297 U.S. 620 (1936).

ordinance, alleging that the ordinance prevented development of its land for industrial purposes and thereby reduced its value from $10,000 an acre to $2,500 an acre.[651] Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the constitutional standards applied to exercises of the police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregation of incompatible land uses and the ordinance was thus valid on its face; whether its application to diminish property values in any particular case was also valid would depend, the Court said, upon a finding that it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[652] A few years later the Court, again relying on due process rather than taking law, did invalidate the application of a zoning ordinance to a tract of land, finding that the tract would be rendered nearly worthless and that to exempt the tract would impair no substantial municipal interest.[653] But then the Court withdrew from the land-use scene until the 1970s, giving little attention to States and their municipalities as they developed more comprehensive zoning techniques.[654]

As governmental regulation of property has expanded over the years—in terms of zoning and land use controls, environmental regulations, and the like—the Court never developed, as it admitted, a "set formula to determine where regulation ends and taking begins."[655] Rather, as one commentator remarked, its decisions constitute a "crazy quilt pattern" of judgments.[656] Nonetheless, the Court has now formulated general principles that guide many of its decisions in the area.

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[651] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[652] 272 U.S. at 395. *See also* Zahn v. Board of Public Works, 274 U.S. 325 (1927).

[653] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[654] Initially, the Court's return to the land-use area involved substantive due process, not takings. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining single-family zoning as applied to group of college students sharing a house); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (voiding single-family zoning so strictly construed as to bar a grandmother from living with two grandchildren of different children). *See also* City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).

[655] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The phrase appeared first in Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

[656] Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, SUP. CT. REV. 63 (1962). For an effort to ground taking jurisprudence in its philosophical precepts, *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967).

In *Penn Central Transportation Co. v. City of New York*,[657] the Court, while cautioning that regulatory takings cases require "essentially ad hoc, factual inquiries," nonetheless laid out general guidance for determining whether a regulatory taking has occurred. "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[658]

At issue in *Penn Central* was the City's landmarks preservation law, as applied to deny approval to construct a 53-story office building atop Grand Central Terminal. The Court upheld the landmarks law against Penn Central's takings claim through application of the principles set forth above. The economic impact on Penn Central was considered: the Company could still make a "reasonable return" on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right that mitigated the burden otherwise to be suffered by the owner. As for the character of the governmental regulation, the Court found the landmarks law to be an economic regulation rather than a governmental appropriation of property, the preservation of historic sites being a permissible goal and one that served the public interest.[659]

Justice Holmes began his analysis in *Mahon* with the observation that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law,"[660] and *Penn Central's* economic impact standard also leaves ample room for recognition of this principle. Thus, the Court can easily hold that a mere permit requirement does not amount to a taking,[661] nor does a simple rec-

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[657] 438 U.S. 104 (1978). Justices Rehnquist and Stevens and Chief Justice Burger dissented. Id. at 138.

[658] 438 U.S. at 124 (citations omitted).

[659] 438 U.S. at 124–28, 135–38.

[660] 260 U.S. at 413.

[661] United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (requirement that permit be obtained for filling privately-owned wetlands is not a taking, although permit denial resulting in prevention of economically viable use of land may be).

ordation requirement.[662] The tests become more useful, however, when compliance with regulation becomes more onerous.

Several times the Court has relied on the concept of "distinct [or, in later cases, 'reasonable'] investment-backed expectations" first introduced in *Penn Central*. In *Ruckelshaus v. Monsanto Co.*,[663] the Court used the concept to determine whether a taking had resulted from the government's disclosure of trade secret information submitted with applications for pesticide registrations. Disclosure of data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus "formed the basis of a distinct investment-backed expectation," would have destroyed the property value of the trade secret and constituted a taking.[664] Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.[665] Relying less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in *Connolly v. Pension Benefit Guaranty Corp.*[666] upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and "substantially disproportionate" retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel*[667] struck down the Coal Miner Retiree Health

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[662] Texaco v. Short, 454 U.S. 516 (1982) (state statute deeming mineral claims lapsed upon failure of putative owners to take prescribed steps is not a taking); United States v. Locke, 471 U.S. 84 (1984) (reasonable regulation of recordation of mining claim is not a taking).

[663] 467 U.S. 986 (1984).

[664] 467 U.S. at 1011.

[665] 467 U.S. at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against "unauthorized" disclosure. Id. at 1008–10.

[666] 475 U.S. 211 (1986). *Accord*, Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645–46 (1993). In addition, *see* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (involving frustration of "expectancies" developed through improvements to private land and governmental approval of permits), and PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (characterizing and distinguishing *Kaiser Aetna* as involving interference with "reasonable investment backed expectations").

[667] 524 U.S. 498 (1998). The split doctrinal basis of *Eastern Enterprises* undercuts its precedent value, and that of *Connolly* and *Concrete Pipe*, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework

Benefit Act's requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

On the other hand, a federal ban on the sale of artifacts made from eagle feathers was sustained as applied to the existing inventory of a commercial dealer in such artifacts, the Court not directly addressing the ban's obvious interference with investment-backed expectations.[668] The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and that he still had the value of possession.[669]

The Court has made plain that in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts are to compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff's property—the "parcel as a whole"—that sets the scope of analysis. The Supreme Court holds that takings law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[670] But while this apparently means that one may not exclude acreage from the relevant parcel solely to isolate the regulated portion, there are numerous arguments for excluding acreage (purchased by plaintiff at a different time, in different zoning status, etc.) that the Court has not addressed. And roiling the waters are persistent expressions of concern by the conservative justices, often in dicta, about the possible unfairness of an absolute par-

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where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.

[668] Andrus v. Allard, 444 U.S. 51 (1979).

[669] Similarly, the Court in *Goldblatt* had pointed out that the record contained no indication that the mining prohibition would reduce the value of the property in question. 369 U.S. at 594. *Contrast* Hodel v. Irving, 481 U.S. 704 (1987), where the Court found insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property. Note as well the differing views expressed in Irving as to whether that case limits *Andrus v. Allard* to its facts. Id. at 718 (Justice Brennan concurring, 719 (Justice Scalia concurring). *And see* the suggestion in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992), that *Allard* may rest on a distinction between permissible regulation of personal property, on the one hand, and real property, on the other.

[670] *Penn Central*, 438 U.S. at 130. The identical principle was reaffirmed in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993); and *Tahoe-Sierra*, 122 S. Ct. at 1481.

cel-as-a-whole rule.[671] Most recently, however, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[672] a six-justice majority including Justices Kennedy and O'Connor offered a ringing endorsement of relevant-parcel doctrine. *Tahoe-Sierra* affirmed the established spatial (court must consider the entire relevant tract) and functional (court must consider plaintiff's full bundle of rights) dimensions of the doctrine,[673] and added a temporal one (court must consider the entire time span of plaintiff's property interest). Invoking this temporal dimension, the Court held that temporary land-use development moratoria do not effect a total elimination of use, since use and value return in the period following the moratorium's expiration. Thus, such moratoria are to be tested under the ad hoc, multifactor *Penn Central* test, rather than the per se approach to "total takings" discussed further on.

In the course of its opinion in *Penn Central* the Court rejected the principle that no compensation is required when regulation bans a noxious or harmful effect of land use.[674] The principle, it had been contended, followed from several earlier cases, including *Goldblatt v. Town of Hempstead*.[675] In that case, after the town had expanded around an excavation used by a company for mining sand and gravel, the town enacted an ordinance that in effect terminated further mining at the site. Declaring that no compensation was owed, the Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes,

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[671] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) ("answer ... may lie in how the owner's reasonable expectations have been shaped by the State's law of property"). Justice Kennedy provided extended dicta in his majority opinion in *Palazzolo v. Rhode Island*, referring to this "difficult, persisting question" and noting that "we have at times expressed discomfort with the logic of this rule." 533 U.S. 606, 631 (2001).

[672] 122 S. Ct. 1465 (2002).

[673] The spatial dimension is illustrated by the takings analysis in *Penn Central*, declining to segment Grand Central Terminal from the air rights over it. Functional parcel as a whole—refusing to segment one "stick" in the "bundle" of rights—was applied in Andrus v. Allard, 444 U.S. 51, 65-66 (1979), holding that denial of the right to sell Indian artifacts was not a taking in light of rights in the artifacts that were retained.

[674] The dissent was based upon this test. 438 U.S. at 144–46.

[675] 369 U.S. 590 (1962). Hadacheck v. Sebastian, 239 U.S. 394 (1915), and, perhaps, Miller v. Schoene, 276 U.S. 272 (1928), also fall under this heading, although Schoene may also be assigned to the public peril line of cases.

is prejudicial to the public interests."[676] In *Penn Central*, however, the Court denied that there was any such test and that prior cases had turned on the concept. "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property."[677] More recently, in *Lucas v. South Carolina Coastal Council*,[678] the Court explained "noxious use" analysis as merely an early characterization of police power measures that do not require compensation. "[N]oxious use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."[679]

*Penn Central* is not the only guide to when an inverse condemnation has occurred; other criteria have emerged from other cases before and after *Penn Central*. The Court has long recognized a *per se* takings rule for certain physical invasions: when government permanently[680] occupies (or authorizes someone else to permanently occupy property), the action constitutes a taking and compensation must be paid regardless of the public interests served by the occupation or the extent of damage to the parcel as a whole.[681] The modern case dealt with a law that required landlords to permit a cable television company to install its cable facilities upon their buildings; although the equipment occupied only about 1 ½ cubic feet of space on the exterior of each building and had only

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[676] 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. 369 U.S. at 595. The test was derived from Lawton v. Steele, 152 U.S. 133, 137 (1894) (holding that state officers properly destroyed fish nets that were banned by state law in order to preserve certain fisheries from extinction).

[677] 438 U.S. at 133–34 n.30.

[678] 505 U.S. 1003 (1992).

[679] 505 U.S. at 1026. The *Penn Central* majority also rejected the dissent's contention, 438 U.S. at 147–50, that regulation of property use constitutes a taking unless it spreads its distribution of benefits and burdens broadly so that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. The Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others: "Legislation designed to promote the general welfare commonly burdens some more than others." Id. at 133–34.

[680] By contrast, the *per se* rule is inapplicable to *temporary* physical occupations of land. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428, 434 (1982); PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

[681] The rule emerged from cases involving flooding of lands and erection of poles for telegraph lines, *e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872); City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904).

de minimis economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking.[682] Recently, the Court sharpened further the distinction between regulatory takings and permanent physical occupations by declaring it "inappropriate" to use case law from either realm as controlling precedent in the other.[683] Physical invasions falling short of permanent physical occupations remain subject to *Penn Central*.

A second *per se* taking rule is of more recent vintage. Land use controls constitute takings, the Court stated in *Agins v. City of Tiburon*, if they do not "substantially advance legitimate governmental interests,"[684] or if they deny a property owner "economically viable use of his land."[685] This second *Agins* criterion creates a categorical rule: when, with respect to the parcel as a whole, the landowner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[686] The only exceptions, the Court explained in *Lucas*, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations. Regulations "so severe" as to prohibit all economically beneficial use of land "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its com-

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[682] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Loretto was distinguished in FCC v. Florida Power Corp., 480 U.S. 245 (1987); regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking in the absence of any requirement that utilities allow attachment and acquiesce in physical occupation of their property. *See also* Yee v. City of Escondido, 503 U.S. 519 (1992) (no physical occupation was occasioned by regulations in effect preventing mobile home park owners from setting rents or determining who their tenants would be; owners could still determine whether their land would be used for a trailer park and could evict tenants in order to change the use of their land).

[683] Tahoe-Sierra, 122 S. Ct. at 1479.

[684] This test was derived from Nectow v. City of Cambridge, 277 U.S. 183 (1928), a due process case.

[685] 447 U.S. 255, 260 (1980).

[686] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). The *Agins*/ *Lucas* total deprivation rule does not create an all-or-nothing situation, since "the landowner whose deprivation is one step short of complete" may still be able to recover through application of the *Penn Central* economic impact and "distinct [or reasonable] investment-backed expectations" criteria. Id. at 1019 n.8 (1992). *See also* Palazzolo, 533 U.S. at 632.

plementary power to abate [public] nuisances . . . , or otherwise."[687] Thus, while there is no broad "noxious use" exception separating police power regulations from takings, there is a narrower "background principles" exception based on the law of nuisance and unspecified "property law" principles.

Together with the investment-backed expectations factor of *Penn Central*, background principles were viewed by many lower courts as supporting a "notice rule" under which a taking claim was absolutely barred if based on a restriction imposed under a regulatory regime predating plaintiff's acquisition of the property. In *Palazzolo v. Rhode Island*,[688] the Court forcefully rejected the absolute version of the notice rule, regardless of rationale. Under such a rule, it said, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause."[689] Whether any role is left for preacquisition regulation in the takings analysis, however, the Court's majority opinion did not say, leaving the issue to dueling concurrences from Justice O'Connor (prior regulation remains a factor) and Justice Scalia (prior regulation is irrelevant). Less than a year later, Justice O'Connor's concurrence carried the day in extended dicta in *Tahoe-Sierra*,[690] though the decision failed to elucidate the factors affecting the weighting to be accorded the pre-existing regime.

The "or otherwise" reference, the Court explained in *Lucas*,[691] was principally directed to cases holding that in times of great public peril, such as war, spreading municipal fires, and the like, property may be taken and destroyed without necessitating compensation. Thus, in *United States v. Caltex*,[692] the owners of property destroyed by retreating United States armies in Manila during World War II were held not entitled to compensation, and in *United States v. Central Eureka Mining Co.*,[693] the Court held that a federal order suspending the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompanied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compensa-

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[687] 505 U.S. at 1029.

[688] 533 U.S. 606 (2001).

[689] 533 U.S. at 627.

[690] 122 S. Ct. at 1486.

[691] 505 U.S. at 1029 n.16.

[692] 344 U.S. 149 (1952). In dissent, Justices Black and Douglas advocated the applicability of a test formulated by Justice Brandeis in Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935), a regulation case, to the effect that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

[693] 357 U.S. 155 (1958).

tion for loss of profits. Finally, the Court held that when federal troops occupied several buildings during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners' benefit as for the general public benefit and the owners must bear the costs of the damage inflicted on the buildings subsequent to the occupation.[694]

The first prong of the *Agins* test,[695] asking whether land use controls "substantially advance legitimate governmental interests," has been applied by the Court only in *Nollan v. California Coastal Commission*.[696] There the Court held that extraction of a public access easement across a strip of beach as a condition for a permit to enlarge a beachfront home did not "substantially advance" the state's legitimate interest in preserving public view of the beach from the street in front of the lot. The easement instead was designed to allow the public to walk back and forth along the beach between two public beaches. "[U]nless the permit condition serves the same governmental purpose as the development ban," the Court concluded, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[697] "If [the government] wants an easement across the Nollans' property, it must pay for it."[698] Because the *Nollan* Court found no essential nexus between the permit condition and the asserted government interest, it did not address whether there is any additional requirement when such a nexus does exist.[699] Seven years later, however, the Court announced in *Dolan v. City of Tigard*[700] that conditions attached to development permits must be related to the impact of the proposed development not only in nature but also in degree. Gov-

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[694] National Bd. of YMCA v. United States, 395 U.S. 85 (1969). "An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." United States v. Sponenbarger, 308 U.S. 256, 265 (1939).

[695] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[696] 483 U.S. 825 (1987).

[697] 483 U.S. at 837.

[698] 483 U.S. at 842.

[699] Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (e.g., congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[700] 512 U.S. 374 (1994).

ernment must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community—at least in the context of adjudicated (rather than legislated) conditions.

*Nollan* and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[701] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. For certain, then, is that *City of Monterey* bars application of rough proportionality to outright denials of development. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the dedication conditions involved in *Nollan* and *Dolan*.[702]

Following the *Penn Central* decision, the Court grappled with the issue of the appropriate remedy property owners should pursue in objecting to land use regulations.[703] The remedy question arises because there are two possible constitutional objections to be made to regulations that go "too far" in reducing the value of property or which do not substantially advance a legitimate governmental interest. The regulation may be invalidated as a denial of due process, or may be deemed a taking requiring compensation, at least for the period in which the regulation was in effect. The Court finally resolved the issue in *First English Evangelical Lutheran Church v. County of Los Angeles*, holding that when land use regulation is held to be a taking, compensation is due for the period of implementation prior to the holding.[704] The Court recognized that,

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[701] 526 U.S. 687 (1999).

[702] *City of Monterey* also appears to give a lax interpretation to the "substantially advances a legitimate government interest" test of *Agins*, by endorsing jury instructions interpreting "substantially advance" to require only a "reasonable relationship." 526 U.S. at 704. Such a reading of *City of Monterey*, however, puts it squarely at odds with *Nollan*, 483 U.S. at 834 n.3, where the Court earlier stressed that "substantially advance" imposes a stricter standard than the due process one of rational basis.

[703] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (issue not reached because property owners challenging development density restrictions had not submitted a development plan); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293–97 (1981), and Hodel v. Indiana, 452 U.S. 314, 333–36 (1981) (rejecting facial taking challenges to federal strip mining law).

[704] 482 U.S. 304 (1987). The decision was 6–3, Chief Justice Rehnquist's opinion of the Court being joined by Justices Brennan, White, Marshall, Powell, and Scalia,

even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." [705] Outside the land-use context, however, the Court has now recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy. [706]

The process of describing general criteria to guide resolution of regulatory taking claims, begun in *Penn Central*, has reduced to some extent the ad hoc character of takings law. It is nonetheless true that not all cases fit neatly into the categories delimited to date, and that still other cases that might be so categorized are explained in different terms by the Court. The overriding objective, the Court frequently reminds us, is to vitalize the Takings Clause's protection against government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [707] Thus a taking may be found if the effect of regulation is enrichment of the government itself rather than adjustment of the benefits and burdens of economic life in promotion of the public good. [708] Similarly, the Court looks askance at governmental efforts to secure public benefits at a landowner's expense— "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions." [709]

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and Justice Stevens' dissent being joined in part by Justices Blackmun and O'Connor. The position the Court adopted had been advocated by Justice Brennan in a dissenting opinion in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (dissenting from Court's holding that state court decision was not "final judgment" under 28 U.S.C. § 1257).

[705] 482 U.S. at 321.

[706] Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (statute imposing generalized monetary liability); Babbitt v. Youpee, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); Hodel v. Irving, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

[707] Armstrong v. United States, 364 U.S. 40, 49 (1960). For other incantations of this fairness principle, *see* Penn Central, 438 U.S. at 123–24; and Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465, 1478, 1484-89 (2002).

[708] Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) (government retained the interest derived from funds it required to be deposited with the clerk of the county court as a precondition to certain suits; the interest earned was not reasonably related to the costs of using the courts, since a separate statute required payment for the clerk's services). By contrast, a charge for governmental services "not so clearly excessive as to belie [its] purported character as [a] user fee" does not qualify as a taking. United States v. Sperry Corp., 493 U.S. 52, 62 (1989).

[709] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128 (1978). In addition to the cases cited there, *see also* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (viewed as governmental effort to turn private pond into "public aquatic

On the other side of the coin, the nature as well as the extent of property interests affected by governmental regulation sometimes takes on importance. Some strands are more important than others. The right to exclude others from one's land is so basic to ownership that extinguishment of this right ordinarily constitutes a taking.[710] Similarly valued is the right to pass on property to one's heirs.[711] Nor must property have realizable net value to fall under the Takings Clause.[712]

Even though takings were found or assumed in several decisions since 1987,[713] considerable obstacles remain for future litigants challenging regulatory restrictions on land use. As suggested above, regulatory takings will most likely remain difficult to establish in spite of *Nollan*. The *Lucas* fact situation, in which government regulation renders land entirely without economic use, will doubtless prove rare, as the Court itself envisioned on more than one occasion.[714] Buttressing this point is *Tahoe-Sierra*'s strong implication that the *Lucas per se* rule is triggered only by complete elimination of use *and value*, something that occurs exceedingly infrequently in the real world in light of the lingering value even undevelopable land may have as open space or for speculation. More broadly, *Tahoe-Sierra* is suffused with a general distaste for the use of *per se* rules in takings analysis, leading observers to argue that in the ordinary regulatory situation, the ad hoc *Penn Central* standard will often be "the only game in town.".

Failure to incur administrative (and judicial) delays can result in dismissal of an as-applied taking claim based on ripeness doc-

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park"); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) ("extortion" of beachfront easement for public as permit condition unrelated to purpose of permit).

[710] Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (physical occupation occurs with public easement that eliminates right to exclude others); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of navigation servitude requiring public access to a privately-owned pond was a taking under the circumstances; owner's commercially valuable right to exclude others was taken, and requirement amounted to "an actual physical invasion"). *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (requiring shopping center to permit individuals to exercise free expression rights on property onto which public had been invited was not destructive of right to exclude others or "so essential to the use or economic value of [the] property" as to constitute a taking).

[711] Hodel v. Irving, 481 U.S. 704 (1987) (complete abrogation of the right to pass on to heirs fractionated interests in lands constitutes a taking), Babbitt v. Youpee, 519 U.S. 234 (1997) (same result based on "severe" restriction of the right).

[712] Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) (interest on client funds in state Interest on Lawyers Trust Account program is property of client within meaning of Takings Clause, though funds could not generate net interest in absence of program).

[713] *First English*, *Nollan*, *Lucas*, *Dolan*, and *City of Monterey*.

[714] *Lucas* spoke of the total taking situation to which its rule applied as "extraordinary" and "relatively rare." 505 U.S. at 1017-18. Quite recently, *Tahoe-Sierra* reiterated the "extraordinary" reference. 122 S. Ct. at 1483.

trine, an area of takings law that the Court has developed extensively since *Penn Central*. In the leading decision of *Williamson County Regional Planning Commission v. Hamilton Bank*,[715] the Court announced the canonical two-part ripeness test for takings actions brought in federal court. First, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land. Second, when suing a state or municipality, the owner must exhaust any possibilities for obtaining compensation from the state or its courts before coming to federal court. Thus, the claim in *Williamson County* was found unripe because the plaintiff had failed to seek a variance (first prong of test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong). Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*,[716] a final decision was found lacking where the landowner had been denied approval for one subdivision plan calling for intense development, but that denial had not foreclosed the possibility that a scaled-down (though still economic) version would be approved. In a somewhat different context, a taking challenge to a municipal rent control ordinance was considered "premature" in the absence of evidence that a tenant hardship provision had ever been applied to reduce what would otherwise be considered a reasonable rent increase.[717] Beginning with *Lucas* in 1992, however, the Court's ripeness determinations have displayed an impatience with formalistic reliance on the "final decision" rule, while nonetheless explicitly reaffirming it. In *Palazzolo v. Rhode Island*,[718] for example, the Court saw no point in requiring the landowner to apply for approval of a scaled-down development of his wetland, since the regulations at issue made plain that no development at all would be permitted there. "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[719]

Facial challenges dispense with the *Williamson County* final decision prerequisite, though at great risk to the plaintiff in that without pursuing administrative remedies, a claimant often lacks

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[715] 473 U.S. 172 (1985).
[716] 477 U.S. 340 (1986).
[717] Pennell v. City of San Jose, 485 U.S. 1 (1988).
[718] 533 U.S. 606 (2001).
[719] 533 U.S. at 620. *See also* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (taking claim ripe despite plaintiff's not having applied for sale of her transferrable development rights, since no discretion remains to agency and value of such rights is simple issue of fact).

evidence that a statute has the requisite economic impact on his or her property.[720]

[720] *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295–97 (1981) (facial challenge to surface mining law rejected); United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987) (facial challenge to anti-subsidence mining law rejected).

# SIXTH AMENDMENT

## RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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# RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

## SIXTH AMENDMENT

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 defense.

### CRIMINAL PROSECUTIONS

#### Coverage

Criminal prosecutions in the District of Columbia [1] and in incorporated territories [2] must conform to this Amendment, but those in the unincorporated territories need not do so. [3] In upholding a trial before a United States consul of a United States citizen for a crime committed within the jurisdiction of a foreign nation, the Court specifically held that this Amendment reached only citizens and others within the United States or who were brought to the United States for trial for alleged offenses committed elsewhere, and not to citizens residing or temporarily sojourning abroad. [4] It is clear that this holding no longer is supportable after *Reid v. Covert*, [5] but it is not clear what the constitutional rule is. All of the

[1] Callan v. Wilson, 127 U.S. 540 (1888).

[2] Reynolds v. United States, 98 U.S. 145 (1879). *See also* Lovato v. New Mexico, 242 U.S. 199 (1916).

[3] Balzac v. Puerto Rico, 258 U.S. 298, 304–05 (1922); Dorr v. United States, 195 U.S. 138 (1904). These holdings are, of course, merely one element of the doctrine of the Insular Cases, De Lima v. Bidwell, 182 U.S. 1 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901), concerned with the "Constitution and the Advance of the Flag," supra. *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

[4] In re Ross, 140 U.S. 453 (1891).

[5] 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in time of peace for capital offenses committed abroad). Four Justices, Black, Douglas, Brennan, and Chief Justice Warren, disapproved *Ross* as "resting . . . on a fundamental misconception" that the Constitution did not limit the actions of the United States Government wherever it acted, id. at 5–6, 10–12, and evinced some doubt with regard to the *Insular Cases* as well. Id. at 12–14. Justices Frankfurter and Harlan, concur-

rights guaranteed in this Amendment are so fundamental that they have been made applicable against state abridgment by the due process clause of the Fourteenth Amendment. [6]

***Offenses Against the United States***.—There are no common-law offenses against the United States. Only those acts which Congress has forbidden, with penalties for disobedience of its command, are crimes. [7] Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions, [8] as is true also of deportation proceedings, [9] but contempt proceedings which were at one time not considered to be criminal prosecutions are no longer within that category. [10] To what degree Congress may make conduct engaged in outside the territorial limits of the United States a violation of federal criminal law is a matter not yet directly addressed by the Court. [11]

## RIGHT TO A SPEEDY AND PUBLIC TRIAL

### Speedy Trial

***Source and Rationale***.—The right to a speedy trial may be derived from a provision of Magna Carta, and it was a right so interpreted by Coke. [12] Much the same language was incorporated

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ring, would not accept these strictures, but were content to limit Ross to its particular factual situation and to distinguish the Insular Cases. Id. at 41, 65. *Cf.* Middendorf v. Henry, 425 U.S. 25, 33–42 (1976) (declining to decide whether there is a right to counsel in a court-martial, but ruling that the summary court-martial involved in the case was not a "criminal prosecution" within the meaning of the Amendment).

[6] Citation is made in the sections dealing with each provision.

[7] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Britton, 108 U.S. 199, 206 (1883); United States v. Eaton, 144 U.S. 677, 687 (1892).

[8] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909); United States v. Regan, 232 U.S. 37 (1914).

[9] United States ex rel. Turner v. Williams, 194 U.S. 279, 289 (1904); Zakonaite v. Wolf, 226 U.S. 272 (1912).

[10] *Compare* In re Debs, 158 U.S. 564 (1895), *with* Bloom v. Illinois, 391 U.S. 194 (1968).

[11] *See* United States v. Bowman, 260 U.S. 94 (1922) (treating question as a matter of statutory interpretation); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 69–76 (1970). Congress has recently asserted the authority by criminalizing various terrorist acts committed abroad against U.S. nationals. *See, e.g.*, prohibitions against hostage taking and air piracy contained in Pub. L. No. 98–473, ch. XX; 18 U.S.C.§ 1203 and 49 U.S.C. app. §§ 1471, 72; and prohibitions against killing or doing physical violence to a U.S. national abroad contained in Pub. L. No. 99–399, § 1202(a), 100 Stat. 896 (1986); 18 U.S.C. § 2331. Extraterritorial jurisdiction under the hostage taking and air piracy laws was upheld by an appeals court in United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

[12] "We will sell to no man, we will not deny or defer to any man either justice or right." Ch. 40 of the 1215 Magna Carta, a portion of ch. 29 of the 1225 reissue. Klopfer v. North Carolina, 386 U.S. 213, 223–24 (1967).

into the Virginia Declaration of Rights of 1776[13] and from there into the Sixth Amendment. Unlike other provisions of the Amendment, this guarantee can be attributable to reasons which have to do with the rights of and infliction of harms to both defendants and society. The provision is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself."[14] The passage of time alone may lead to the loss of witnesses through death or other reasons and the blurring of memories of available witnesses. But on the other hand, "there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused." Persons in jail must be supported at considerable public expense and often families must be assisted as well. Persons free in the community may commit other crimes, may be tempted over a lengthening period of time to "jump" bail, and may be able to use the backlog of cases to engage in plea bargaining for charges or sentences which do not give society justice. And delay often retards the deterrent and rehabilitative effects of the criminal law.[15]

***Application and Scope***.—Because the guarantee of a speedy trial "is one of the most basic rights preserved by our Constitution," it is one of those "fundamental" liberties embodied in the Bill of Rights which the due process clause of the Fourteenth Amendment makes applicable to the States.[16] The protection afforded by this guarantee "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if those restraints precede the formal preferring of charges.[17] Possible prejudice that may

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[13] 7 F. Thorpe, *The Federal and State Constitutions* H. DOC. NO. 357, 59TH CONGRESS, 2D SESS. 8, 3813 (1909).

[14] United States v. Ewell, 383 U.S. 116, 120 (1966). *See also* Klopfer v. North Carolina, 386 U.S. 213, 221–22 (1967); Smith v. Hooey, 393 U.S. 374, 377–379 (1969); Dickey v. Florida, 389 U.S. 30, 37–38 (1970).

[15] Barker v. Wingo, 407 U.S. 514, 519 (1972); Dickey v. Florida, 398 U.S. 30, 42 (1970) (Justice Brennan concurring). Congress by the Speedy Trial Act of 1974, Pub. L. No. 93–619, 88 Stat. 2076, 18 U.S.C. §§ 3161–74, has codified the law with respect to the right, intending "to give effect to the sixth amendment right to a speedy trial." S. Rep. No. 1021, 93d Congress, 2d Sess. 1 (1974).

[16] Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

[17] United States v. Marion, 404 U.S. 307, 313, 320, 322 (1971). Justices Douglas, Brennan, and Marshall disagreed, arguing that the "right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post-indictment delays," but concurring because they did not think the guarantee violated under the facts of the case. Id. at 328. In United States v. MacDonald, 456 U.S. 1 (1982), the Court held the clause was not

result from delays between the time government discovers sufficient evidence to proceed against a suspect and the time of instituting those proceedings is guarded against by statutes of limitation, which represent a legislative judgment with regard to permissible periods of delay.[18] In two cases, the Court held that the speedy trial guarantee had been violated by States which preferred criminal charges against persons who were already incarcerated in prisons of other jurisdictions following convictions on other charges when those States ignored the defendants' requests to be given prompt trials and made no effort through requests to prison authorities to obtain custody of the prisoners for purposes of trial.[19] A state practice permitting the prosecutor to take *nolle prosequi* with leave, which discharged the accused from custody but left him subject at any time thereafter to prosecution at the discretion of the prosecutor, the statute of limitations being tolled, was condemned as violative of the guarantee.[20]

***When the Right is Denied***.—"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."[21] No length of time is per se too long

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implicated by the action of the United States when, in May of 1970, it proceeded with a charge of murder against defendant under military law but dismissed the charge in October of that year, and he was discharged in December. In June of 1972, the investigation was reopened and an investigation was begun, but a grand jury was not convened until August of 1974, and MacDonald was not indicted until January of 1975. The period between dismissal of the first charge and the later indictment had none of the characteristics which called for application of the speedy trial clause. The period between arrest and indictment must be considered in evaluating a speedy trial claim. *Marion* and *MacDonald* were applied in United States v. Loud Hawk, 474 U.S. 302 (1986), holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained.

[18] United States v. Marion, 404 U.S. 307, 322–23 (1971). *Cf.* United States v. Toussie, 397 U.S. 112, 114–15 (1970). In some circumstances, pre-accusation delay could constitute a due process violation but not a speedy trial problem. If prejudice results to a defendant because of the government's delay, a court should balance the degree of prejudice against the reasons for delay given by the prosecution. *Marion*, 404 U.S. at 324; United States v. Lovasco, 431 U.S. 783 (1977); United States v. MacDonald, 456 U.S. 1, 8 (1982).

[19] Smith v. Hooey, 393 U.S. 374 (1969); Dickey v. Florida, 398 U.S. 30 (1970).

[20] Klopfer v. North Carolina, 386 U.S. 213 (1967). In Pollard v. United States, 352 U.S. 354 (1957), the majority assumed and the dissent asserted that sentence is part of the trial and that too lengthy or unjustified a delay in imposing sentence could run afoul of this guarantee.

[21] Beavers v. Haubert, 198 U.S. 77, 87 (1905) (holding that the guarantee could not be invoked by a defendant first indicted in one district to prevent removal to another district where he had also been indicted).

to pass scrutiny under this guarantee,[22] but on the other hand neither does the defendant have to show actual prejudice by delay.[23] The Court rather has adopted an ad hoc balancing approach. "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[24] The fact of delay triggers an inquiry and is dependent on the circumstances of the case. Reasons for delay will vary. A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these other factors.[25] It is the duty of the prosecution to bring a defendant to trial, and the failure of the defendant to demand the right is not to be construed as a waiver of the right;[26] yet, the defendant's acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, and the defendant's responsibility for the delay would be conclusive. Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.[27]

A determination that a defendant has been denied his right to a speedy trial results in a decision to dismiss the indictment or to reverse a conviction in order that the indictment be dismissed.[28]

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[22] *Cf.* Pollard v. United States, 352 U.S. 354 (1957); United States v. Ewell, 383 U.S. 116 (1966). *See* United States v. Provoo, 350 U.S. 857 (1955), aff'g 17 F.R.D. 183 (D. Md. 1955).

[23] United States v. Marion, 404 U.S. 307, 320 (1971); Barker v. Wingo, 407 U.S. 514, 536 (1972) (Justice White concurring).

[24] Barker v. Wingo, 407 U.S. 514, 530 (1972). For the federal courts, Congress under the Speedy Trial Act of 1974 imposed strict time deadlines, replacing the *Barker* factors.

[25] Barker v. Wingo, 407 U.S. 514, 531 (1972). Delays caused by the prosecution's interlocutory appeal will be judged by the *Barker* factors, of which the second—the reason for the appeal—is the most important. United States v. Loud Hawk, 474 U.S. 302 (1986) (no denial of speedy trial, since prosecution's position on appeal was strong, and there was no showing of bad faith or dilatory purpose). If the interlocutory appeal is taken by the defendant, he must "bear the heavy burden of showing an unreasonable delay caused by the prosecution [or] wholly unjustifiable delay by the appellate court" in order to win dismissal on speedy trial grounds. Id. at 316.

[26] Barker v. Wingo, 407 U.S. at 528. *See generally* id. at 523–29. Waiver is "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and it is not to be presumed but must appear from the record to have been intelligently and understandingly made. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[27] Barker v. Wingo, 407 U.S. 514, 532 (1972).

[28] Strunk v. United States, 412 U.S. 434 (1973). A trial court denial of a motion to dismiss on speedy trial grounds is not an appealable order under the "collateral

**Public Trial**

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment . . . most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public."

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the letter de cachet. All of these institutions obviously symbolized a menace to liberty. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."[29] The purposes of the requirement of open trials are multiple: it helps to assure the criminal defendant a fair and accurate adjudication of guilt or innocence, it provides a public demonstration of fairness, it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality. The Court has also expatiated upon the therapeutic value to the community of open trials to enable the public to see justice done and the fulfillment of the urge for retribution that people feel upon the commission of some kinds of crimes.[30] Because of the near universality of the guarantee in this country, the Supreme Court has had little occasion to deal with the right. It is a right so fundamental that it is protected

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order" exception to the finality rule. One must raise the issue on appeal from a conviction. United States v. MacDonald, 435 U.S. 850 (1977).

[29] In re Oliver, 333 U.S. 257, 266–70 (1948) (citations omitted). Other panegyrics to the value of openness, accompanied with much historical detail, are Gannett Co. v. DePasquale, 443 U.S. 368, 406, 411–33 (1979) (Justice Blackmun concurring in part and dissenting in part); Richmond Newspapers v. Virginia, 448 U.S. 555, 564–73 (1980) (plurality opinion of Chief Justice Burger); id. at 589–97 (Justice Brennan concurring); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603–07 (1982).

[30] Estes v. Texas, 381 U.S. 532, 538–39 (1965); Richmond Newspapers v. Virginia, 448 U.S. 555, 569–73 (1980) (plurality opinion of Chief Justice Burger); id. at 593–97 (Justice Brennan concurring).

against state deprivation by the due process clause,[31] but it is not so absolute that reasonable regulation designed to forestall prejudice from publicity and disorderly trials is foreclosed.[32] The banning of television cameras from the courtroom and the precluding of live telecasting of a trial is not a denial of the right,[33] although the Court does not inhibit televised trials under the proper circumstances.[34]

The Court has borrowed from First Amendment cases in protecting the right to a public trial. Closure of trials or pretrial proceedings over the objection of the accused may be justified only if the state can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[35] In *Waller v. Georgia*,[36] the Court held that an accused's Sixth Amendment rights had been violated by closure of all 7 days of a suppression hearing in order to protect persons whose phone conversations had been taped, when less than 2 and 1/2 hours of the hearing had been devoted to playing the tapes. The need for openness at suppression hearings "may be particularly strong," the Court indicated, due to the fact that the conduct of police and prosecutor is often at issue.[37] However, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings ... demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[38]

The Sixth Amendment guarantee is apparently a personal right of the defendant, which he may in some circumstances waive

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[31] In re Oliver, 333 U.S. 257 (1948); Levine v. United States, 362 U.S. 610 (1960). Both cases were contempt proceedings which were not then "criminal prosecutions" to which the Sixth Amendment applied (for the modern rule *see* Bloom v. Illinois, 391 U.S. 194 (1968)), so that the cases were wholly due process holdings. *Cf.* Richmond Newspapers v. Virginia, 448 U.S. 555, 591 n.16 (1980) (Justice Brennan concurring).

[32] *Cf.* Sheppard v. Maxwell, 384 U.S. 333 (1966); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[33] Estes v. Texas, 381 U.S. 532 (1965). *Cf.* Nixon v. Warner Communications, 435 U.S. 589, 610 (1978).

[34] Chandler v. Florida, 449 U.S. 560 (1981).

[35] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I).

[36] 467 U.S. 39 (1984).

[37] Waller v. Georgia, 467 U.S. 39, 47 (1984) (indicating that the Press-Enterprise I standard governs such 6th Amendment cases).

[38] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986) (Press-Enterprise II).

in conjunction with the prosecution and the court.[39] The First Amendment, however, has been held to protect public and press access to trials in all but the most extraordinary circumstances,[40] hence a defendant's request for closure of his trial must be balanced against the public and press right of access. Before such a request for closure will be honored, there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[41]

## RIGHT TO TRIAL BY IMPARTIAL JURY

### Jury Trial

By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to Magna Carta.[42] The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King's rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of witnesses, called for their knowledge of the case; not until the reign of Henry VI did it become the trier of evidence. It was during the Seventeenth Century that the jury emerged as a safeguard for the criminally accused.[43] Thus, in the Eighteenth Century, Blackstone could commemorate the institution as part of a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown" because "the truth of every accusation . . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."[44] The

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[39] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[40] Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). *See also* Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (Justice Powell concurring).

[41] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). *See also* First Amendment discussion, "Government and the Conduct of Trials."

[42] Historians no longer accept this attribution. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 265 (1892), and the Court has noted this. Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968).

[43] W. FORSYTH, HISTORY OF TRIAL BY JURY (1852).

[44] W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–350 (T. Cooley, 4th ed. 1896). The other of the "two-fold barrier" was, of course, indictment by grand jury.

right was guaranteed in the constitutions of the original 13 States, was guaranteed in the body of the Constitution[45] and in the Sixth Amendment, and the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.[46] "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"[47]

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[48]

Because "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants," the Sixth Amendment provision is binding on the States through the due process clause of the Fourteenth Amendment.[49] But inasmuch as it cannot be said that every criminal trial or any par-

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[45] In Art III, § 2.

[46] Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

[47] Thompson v. Utah, 170 U.S. 343, 349–50 (1898), quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1773 (1833).

[48] Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968). At other times the function of accurate factfinding has been emphasized. *E.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). While federal judges may comment upon the evidence, the right to a jury trial means that the judge must make clear to the jurors that such remarks are advisory only and that the jury is the final determiner of all factual questions. Quercia v. United States, 289 U.S. 466 (1933).

[49] Duncan v. Louisiana, 391 U.S. 145, 158–59 (1968).

ticular trial which is held without a jury is unfair,[50] it is possible for a defendant to waive the right and go to trial before a judge alone.[51]

***The Attributes and Function of the Jury***.—It was previously the position of the Court that the right to a jury trial meant "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted."[52] It had therefore been held that this included trial by a jury of 12 persons[53] who must reach a unanimous verdict[54] and that the jury trial must be held during the first court proceeding and not *de novo* at the first appellate stage.[55] However, as it extended the guarantee to the States, the Court indicated that at least some of these standards were open to re-examination,[56] and in subsequent cases it has done so. In *Williams v. Florida*,[57] the Court held that

[50] 391 U.S. at 159. Thus, state trials conducted before *Duncan* was decided were held to be valid still. DeStefano v. Woods, 392 U.S. 631 (1968).

[51] Patton v. United States, 281 U.S. 276 (1930). As with other waivers, this one must be by the express and intelligent consent of the defendant. A waiver of jury trial must also be with the consent of the prosecution and the sanction of the court. A refusal by either the prosecution or the court to defendant's request for consent to waive denies him no right since he then gets what the Constitution guarantees, a jury trial. Singer v. United States, 380 U.S. 24 (1965). It may be a violation of defendant's rights to structure the trial process so as effectively to encourage him "needlessly" to waive or to penalize the decision to go to the jury, but the standards here are unclear. *Compare* United States v. Jackson, 390 U.S. 570 (1968), *with* Brady v. United States, 397 U.S. 742 (1970), *and* McMann v. Richardson, 397 U.S. 759 (1970), and *see also* State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1971), cert. denied, 408 U.S. 942 (1972).

[52] Patton v. United States, 281 U.S. 276, 288 (1930).

[53] Thompson v. Utah, 170 U.S. 343 (1898). Dicta in other cases was to the same effect. Maxwell v. Dow, 176 U.S. 581, 586 (1900); Rassmussen v. United States, 197 U.S. 516, 519 (1905); Patton v. United States, 281 U.S. 276, 288 (1930).

[54] Andres v. United States, 333 U.S. 740 (1948). *See* dicta in Maxwell v. Dow, 176 U.S. 581, 586 (1900); Patton v. United States, 281 U.S. 276, 288 (1930).

[55] Callan v. Wilson, 127 U.S. 540 (1888). Preserving *Callan*, as being based on Article II, § 2, as well as on the Sixth Amendment and being based on a more burdensome procedure, the Court in Ludwig v. Massachusetts, 427 U.S. 618 (1976), approved a state two-tier system under which persons accused of certain crimes must be tried in the first instance in the lower tier without a jury and if convicted may appeal to the second tier for a trial de novo by jury. Applying a due process standard, the Court, in an opinion by Justice Blackmun, found that neither the imposition of additional financial costs upon a defendant, nor the imposition of increased psychological and physical hardships of two trials, nor the potential of a harsher sentence on the second trial impermissibly burdened the right to a jury trial. Justices Stevens, Brennan, Stewart, and Marshall dissented. Id. at 632. *See also* North v. Russell, 427 U.S. 328 (1976).

[56] Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968); DeStefano v. Woods, 392 U.S. 631, 632–33 (1968).

[57] 399 U.S. 78 (1970). Justice Marshall would have required juries of 12 in both federal and state courts, id. at 116, while Justice Harlan contended that the Sixth Amendment required juries of 12, although his view of the due process standard was that the requirement was not imposed on the States. Id. at 117.

the fixing of jury size at 12 was "a historical accident" which, while firmly established when the Sixth Amendment was proposed and ratified, was not required as an attribute of the jury system, either as a matter of common-law background [58] or by any ascertainment of the intent of the framers. [59] Being bound neither by history nor framers' intent, the Court thought the "relevant inquiry ... must be the function that the particular feature performs and its relation to the purposes of the jury trial." The size of the jury, the Court continued, bore no discernable relationship to the purposes of jury trial—the prevention of oppression and the reliability of fact-finding. Furthermore, there was little reason to believe that any great advantage accrued to the defendant by having a jury composed of 12 rather than six, which was the number at issue in the case, or that the larger number appreciably increased the variety of viewpoints on the jury. A jury should be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility that a cross-section of the community will be represented on it, but the Court did not speculate whether there was a minimum permissible size and it recognized the propriety of conditioning jury size on the seriousness of the offense. [60]

When the unanimity rule was reconsidered, the division of the Justices was such that different results were reached for state and federal courts. [61] Applying the same type of analysis as that used in *Williams*, four Justices acknowledged that unanimity was a common-law rule but observed for the reasons reviewed in *Williams*

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[58] The development of 12 as the jury size is traced in Williams, 399 U.S. at 86-92.

[59] 399 U.S. at 92-99. While the historical materials were scanty, the Court thought it more likely than not that the framers of the Bill of Rights did not intend to incorporate into the word "jury" all its common-law attributes. This conclusion was drawn from the extended dispute between House and Senate over inclusion of a "vicinage" requirement in the clause, which was a common law attribute, and the elimination of language attaching to jury trials their "accustomed requisites." *But see* id. at 123 n.9 (Justice Harlan).

[60] 399 U.S. at 99-103. In Ballew v. Georgia, 435 U.S. 223 (1978), the Court unanimously, but with varying expressions of opinion, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprived an accused of his right to trial by jury. While readily admitting that the line between six and five members is not easy to justify, the Justices believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.

[61] Apodaca v. Oregon, 406 U.S. 404 (1972), involved a trial held after decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and thus concerned whether the Sixth Amendment itself required jury unanimity, while Johnson v. Louisiana, 406 U.S. 356 (1972), involved a pre- *Duncan* trial and thus raised the question whether due process required jury unanimity. Johnson held, five-to-four, that the due process requirement of proof of guilt beyond a reasonable doubt was not violated by a conviction on a nine-to-three jury vote in a case in which punishment was necessarily at hard labor.

that it seemed more likely than not that the framers of the Sixth Amendment had not intended to preserve the requirement within the term "jury." Therefore, the Justices undertook a functional analysis of the jury and could not discern that the requirement of unanimity materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen. The Justices also determined that the unanimity requirement is not implicated in the constitutional requirement of proof beyond a reasonable doubt, and is not necessary to preserve the feature of the requisite cross-section representation on the jury.[62] Four dissenting Justices thought that omitting the unanimity requirement would undermine the reasonable doubt standard, would permit a majority of jurors simply to ignore those interpreting the facts differently, and would permit oppression of dissenting minorities.[63] Justice Powell, on the other hand, thought that unanimity was mandated in federal trials by history and precedent and that it should not be departed from; however, because it was the due process clause of the Fourteenth Amendment which imposed the basic jury-trial requirement on the States, he did not believe that it was necessary to impose all the attributes of a federal jury on the States. He therefore concurred in permitting less-than-unanimous verdicts in state courts.[64]

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,[65] has been held to be a standard mandated by the Sixth Amendment.[66] The Court further held that the Fifth Amendment Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.[67] Thus,

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[62] Apodaca v. Oregon, 406 U.S. 404 (1972) (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Blackmun indicated a doubt that any closer division than nine-to-three in jury decisions would be permissible. Id. at 365.

[63] 406 U.S. at 414, and Johnson v. Louisiana, 406 U.S. 356, 380, 395, 397, 399 (1972) (Justices Douglas, Brennan, Stewart, and Marshall).

[64] 406 U.S. at 366. Burch v. Louisiana, 441 U.S. 130 (1979), however, held that conviction by a non-unanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation of requiring unanimity in six-member juries required nullification of the state policy. *See also* Brown v. Louisiana, 447 U.S. 323 (1980) (*Burch* held retroactive).

[65] *See* In re Winship, 397 U.S. 358, 364 (1970).

[66] Sullivan v. Louisiana, 508 U.S. 275 (1993).

[67] United States v. Gaudin, 515 U.S. 506 (1995).

a district court presiding over a case of providing false statements to a federal agency in violation of 18 U.S.C. §1001 erred when it took the issue of the "materiality" of the false statement away from the jury.[68] Later, however, the Court backed off from this latter ruling, holding that failure to submit the issue of materiality to the jury in a tax fraud case can constitute harmless error.[69]

***Criminal Proceedings to Which the Guarantee Applies.***— Although the Sixth Amendment provision does not differentiate among types of criminal proceedings in which the right to a jury trial is or is not present, the Court has always excluded petty offenses from the guarantee in federal courts, defining the line between petty and serious offenses either by the maximum punishment available[70] or by the nature of the offense.[71] This line has been adhered to in the application of the Sixth Amendment to the States[72] and the Court has now held "that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."[73] A defendant who is prosecuted in a single proceeding for multiple petty offenses, however, does not have a constitutional right to a jury trial, even if the aggregate of sentences authorized for the offense exceeds six months.[74]

The Court has also made some changes in the meaning attached to the term "criminal proceeding." Previously, it had been applied only to situations in which a person has been accused of an offense by information or presentment.[75] Thus, a civil action to

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[68] Gaudin, 515 U.S. at 523.

[69] Neder v. United States, 527 U.S. 1 (1999).

[70] District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904); Callan v. Wilson, 127 U.S. 540 (1888).

[71] District of Columbia v. Colts, 282 U.S. 63 (1930).

[72] Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[73] Baldwin v. New York, 399 U.S. 66, 69 (1970). Justices Black and Douglas would have required a jury trial in all criminal proceedings in which the sanction imposed bears the indicia of criminal punishment. Id. at 74 (concurring); Cheff v. Schnackenberg, 384 U.S. 373, 384, 386 (1966) (dissenting). Chief Justice Burger and Justices Harlan and Stewart objected to setting this limitation at six months for the States, preferring to give them greater leeway. *Baldwin*, 399 U.S. at 76; Williams v. Florida, 399 U.S. 78, 117, 143 (1970) (dissenting). No jury trial was required when the trial judge suspended sentence and placed defendant on probation for three years. Frank v. United States, 395 U.S. 147 (1969). There is a presumption that offenses carrying a maximum imprisonment of six months or less are "petty," although it is possible that such an offense could be pushed into the "serious" category if the legislature tacks on onerous penalties not involving incarceration. No jury trial is required, however, when the maximum sentence is six months in jail, a fine not to exceed $1,000, a 90-day driver's license suspension, and attendance at an alcohol abuse education course. Blanton v. City of North Las Vegas, 489 U.S. 538, 542–44 (1989) .

[74] Lewis v. United States, 518 U.S. 322 (1996).

[75] United States v. Zucker, 161 U.S. 475, 481 (1896).

collect statutory penalties and punitive damages, because not technically criminal, has been held to implicate no right to jury trial.[76] But more recently the Court has held denationalization to be punishment which Congress may not impose without adhering to the guarantees of the Fifth and Sixth Amendments,[77] and the same type of analysis could be used with regard to other sanctions. There is, however, no constitutional right to a jury trial in juvenile proceedings, at least in state systems and probably in the federal system as well.[78]

In a long line of cases, the Court had held that no constitutional right to jury trial existed in trials of criminal contempt.[79] But in *Bloom v. Illinois*,[80] the Court announced that "[o]ur deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution . . . and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial."

Within the context of a criminal trial, what factual issues are submitted to the jury may be influenced by whether the fact to be established is an element of a crime or a sentencing factor. While the right to a jury extends to all facts establishing the elements of a crime, sentencing factors may be evaluated by a judge.[81] The

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[76] Id. *See also* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909).

[77] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[78] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[79] *E.g.*, Green v. United States, 356 U.S. 165, 183–87 (1958), and cases cited; United States v. Burnett, 376 U.S. 681, 692–700 (1964), and cases cited. A Court plurality in Cheff v. Schnackenberg, 384 U.S. 373 (1966), held, asserting the Court's supervisory power over the lower federal courts, that criminal contempt sentences in excess of six months imprisonment could not be imposed without a jury trial or adequate waiver.

[80] 391 U.S. 194, 198 (1968). Justices Harlan and Stewart dissented. Id. at 215. As in other cases, the Court drew the line between serious and petty offenses at six months, but because, unlike other offenses, no maximum punishments are usually provided for contempts it indicated the actual penalty imposed should be looked to. Id. at 211. *And see* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). The distinction between criminal and civil contempt may be somewhat more elusive. International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (fines levied on the union were criminal in nature where the conduct did not occur in the court's presence, the court's injunction required compliance with an entire code of conduct, and the fines assessed were not compensatory).

[81] For instance, the Court has held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these cases may also implicate the Fourteenth Amendment, as a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, while sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence" standard. *See, e.g.,* id. at 86-93. *See* discussion in "Proof, Burden of Proof, and Presumptions" *infra*.

Court has generally taken a formalistic approach to this issue, allowing states to essentially designate which facts fall under which of these two categories. In an exception to this deference, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[82]

Despite suggestions that *Apprendi* was a decision of limited import, the Court's reasoning ultimately led to the overruling of significant prior case law which had upheld a judge's authority to decide whether or not to impose capital punishment by evaluating aggravating and mitigating sentencing factors.[83] On the other hand, the requirement that a sentencing factor cannot increase a maximum penalty has been subject to at least one exception.[84] Further, the impact of these decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

**Impartial Jury**

Impartiality as a principle of the right to trial by jury is served not only by the Sixth Amendment, which is as applicable to the States as to the Federal Government,[85] but as well by the due

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[82] 530 U.S.466, 490 (2000) (interpreting New Jersey's "hate crime" law). It should be noted that prior to its decision in *Apprendi* the Court had held that factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, McMillan was subsequently reaffirmed in Harris v. United States, 122 S. Ct. 2406 (2002).

[83] Walton v. Arizona, 497 U.S. 639 (1990) *overruled by* Ring v. Arizona, 122 S. Ct. 2428 (2002). The Court's decision in *Ring* would also appear to overrule a number of previous decisions on the same issue such as Spaziano v. Florida, 468 U.S. 447, 459 (1984) and Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (per curiam), and undercut the reasoning of another. *See* Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate court may reweigh aggravating and mitigating factors and uphold imposition of death penalty even though jury relied on an invalid aggravating factor).

[84] This limiting principle does not apply to sentencing enhancements based on recidivism. *Apprendi*, 530 U.S. at 488. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[85] Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968); Gonzales v. Beto, 405 U.S. 1052 (1972).

process and equal protection clauses of the Fourteenth,[86] and perhaps the due process clause of the Fifth Amendment, and the Court's supervisory power has been directed to the issue in the federal system.[87] Prior to the Court's extension of a right to jury trials in state courts, it was firmly established that if a State chose to provide juries they must be impartial ones.[88]

Impartiality is a two-fold requirement. First, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment."[89] This requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[90] "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in

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[86] Thus, it violates the Equal Protection Clause to exclude African Americans from grand and petit juries, Strauder v. West Virginia, 100 U.S. 303 (1880); Alexander v. Louisiana, 405 U.S. 625 (1972), whether defendant is or is not an African American, Peters v. Kiff, 407 U.S. 493 (1972), and exclusion of potential jurors because of their national ancestry is unconstitutional, at least where defendant is of that ancestry as well, Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482 (1977).

[87] In the exercise of its supervisory power over the federal courts, the Court has permitted any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. Glasser v. United States, 315 U.S. 60, 83–87 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Ballard v. United States, 329 U.S. 187 (1946). In Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979), male defendants were permitted to challenge the exclusion of women as a Sixth Amendment violation.

[88] Turner v. Louisiana, 379 U.S. 466 (1965).

[89] Taylor v. Louisiana, 419 U.S. 522, 528 (1975). *See also* Williams v. Florida, 399 U.S. 78, 100 (1970); Brown v. Allen, 344 U.S. 443, 474 (1953). In Fay v. New York, 332 U.S. 261 (1947), and Moore v. New York, 333 U.S. 565 (1948), the Court in 5-to-4 decisions upheld state use of "blue ribbon" juries from which particular groups, such as laborers and women, had been excluded. With the extension of the jury trial provision and its fair cross section requirement to the States, the opinions in these cases must be considered tenuous, but the Court has reiterated that defendants are not entitled to a jury of any particular composition. Taylor, 419 U.S. at 538. Congress has implemented the constitutional requirement by statute in federal courts by the Federal Jury Selection and Service Act of 1968, Pub. L. No. 90–274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq.

[90] Lockhart v. McCree, 476 U.S. 162 (1986). "We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U.S. at 173. The explanation is that the fair cross-section requirement "is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." Holland v. Illinois , 493 U.S. 474, 480 (1990) (emphasis original).

the jury-selection process."[91] Thus, in one case the Court voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service, and, in another it invalidated a state selection system granting women who so requested an automatic exemption from jury service.[92] While disproportion alone is insufficient to establish a prima facie showing of unlawful exclusion, a statistical showing of disparity combined with a demonstration of the easy manipulability of the selection process can make out a prima facie case.[93]

Second, there must be assurance that the jurors chosen are unbiased, i.e., willing to decide the case on the basis of the evidence presented. The Court has held that in the absence of an actual showing of bias, a defendant in the District of Columbia is not denied an impartial jury when he is tried before a jury composed primarily of government employees.[94] A violation of a defendant's right to an impartial jury does occur, however, when the jury or any of its members is subjected to pressure or influence which could impair freedom of action; the trial judge should conduct a hearing in which the defense participates to determine whether impartiality has been undermined.[95] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and must be inquired into.[96] Private communications,

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[91] Duren v. Missouri, 439 U.S. 357, 364 (1979).

[92] Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

[93] Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-American defendant successfully made out prima facie case of intentional exclusion of persons of his ethnic background by showing a substantial underrepresentation of Mexican-Americans based on a comparison of the group's proportion in the total population of eligible jurors to the proportion called, and this in the face of the fact that Mexican-Americans controlled the selection process).

[94] Frazier v. United States, 335 U.S. 497 (1948); Dennis v. United States, 339 U.S. 162 (1950). On common-law grounds, the Court in Crawford v. United States, 212 U.S. 183 (1909), disqualified such employees, but a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia was sustained in United States v. Wood, 299 U.S. 123 (1936).

[95] Remmer v. United States, 350 U.S. 377 (1956) (attempted bribe of a juror reported by him to authorities); Smith v. Phillips, 455 U.S. 209 (1982) (during trial one of the jurors had been actively seeking employment in the District Attorney's office).

[96] *E.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966). Exposure of the jurors to knowledge about the defendant's prior criminal record and activities is not alone sufficient to establish a presumption of reversible prejudice, but on *voir dire* jurors should be questioned about their ability to judge impartially. Murphy v. Florida, 421 U.S. 794 (1975). The Court indicated that under the same circumstances in a federal trial it would have overturned the conviction pursuant to its supervisory power. Id. at 797–98, citing Marshall v. United States, 360 U.S. 310 (1959). Essentially, the defendant must make a showing of prejudice which the court then may inquire into. Chandler v. Florida, 449 U.S. 560, 575, 581

contact, or tampering with a jury, or the creation of circumstances raising the dangers thereof, is not to be condoned.[97] When the locality of the trial has been saturated with publicity about a defendant, so that it is unlikely that he can obtain a disinterested jury, he is constitutionally entitled to a change of venue.[98] It is undeniably a violation of due process to subject a defendant to trial in an atmosphere of mob or threatened mob domination.[99]

Because it is too much to expect that jurors can remain uninfluenced by evidence they receive even though they are instructed to use it for only a limited purpose and to disregard it for other purposes, the Court will not permit a confession to be submitted to the jury without a prior determination by the trial judge that it is admissible. A defendant is denied due process, therefore, if he is convicted by a jury that has been instructed to first determine the voluntariness of a confession and then to disregard the confession if it is found to be inadmissible.[100] Similarly invalid is a jury instruction in a joint trial to consider a confession only with regard to the defendant against whom it is admissible, and to disregard that confession as against a co-defendant which it implicates.[101]

In *Witherspoon v. Illinois*,[102] the Court held that the exclusion in capital cases of jurors conscientiously scrupled about capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant's constitutional right to an impartial jury. Inasmuch as the jury is given broad discretion whether or not to fix the penalty at death, the Court ruled, the jurors must reflect "the conscience of the community" on the issue, and the automatic exclusion of all scrupled jurors "stacked the deck" and made of the jury a tribunal

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(1981); Smith v. Phillips, 455 U.S. 209, 215–18 (1982); Patton v. Yount, 467 U.S. 1025 (1984).

[97] Remmer v. United States, 347 U.S. 227 (1954). *See* Turner v. Louisiana, 379 U.S. 466 (1965) (placing jury in charge of two deputy sheriffs who were principal prosecution witnesses at defendant's jury trial denied him his right to an impartial jury); Parker v. Gladden, 385 U.S. 363 (1966) (influence on jury by prejudiced bailiff). *Cf.* Gonzales v. Beto, 405 U.S. 1052 (1972).

[98] Irvin v. Dowd, 366 U.S. 717 (1961) (felony); Groppi v. Wisconsin, 400 U.S. 505 (1971) (misdemeanor).

[99] Frank v. Mangum, 237 U.S. 309 (1915); Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966).

[100] Jackson v. Denno, 378 U.S. 368 (1964) (overruling Stein v. New York, 346 U.S. 156 (1953)).

[101] Bruton v. United States, 391 U.S. 123 (1968) (overruling Delli Paoli v. United States, 352 U.S. 232 (1957)). The rule applies to the States. Roberts v. Russell, 392 U.S. 293 (1968). *But see* Nelson v. O'Neil, 402 U.S. 622 (1971) (co-defendant's out-of-court statement is admissible against defendant if co-defendant takes the stand and denies having made the statement).

[102] 391 U.S. 510 (1968).

"organized to return a verdict of death." [103] A court may not refuse a defendant's request to examine potential jurors to determinew whether they would vote automatically to impose the death penalty; general questions about fairness and willingness to follow the law are inadequate. [104]

The proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [105] Thus the juror need not indicate that he would "automatically" vote against the death penalty, and his "bias [need not] be proved with 'unmistakable clarity.'" [106] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial. [107] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints." [108] Moreover, the state has "an entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate evidence for the two distinct but interrelated functions. [109] For the same reasons, there is no violation of the right to an impartial jury if a defendant for whom capital charges have been dropped is tried, along with a codefendant still facing capital charges, before a "death qualified" jury. [110]

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[103] 391 U.S. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968). The *Witherspoon* case was given added significance when in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. *See also* Adams v. Texas, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

[104] Morgan v. Illinois, 504 U.S. 719 (1992).

[105] Wainwright v. Witt, 469 U.S. 412, 424 (1985), (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[106] Wainwright v. Witt, 469 U.S. at 424. *Accord*, Darden v. Wainwright, 477 U.S. 168 (appropriateness of exclusion should be determined by context, including excluded juror's understanding based on previous questioning of other jurors).

[107] Lockhart v. McCree, 476 U.S. 162 (1986).

[108] 476 U.S. at 183.

[109] 476 U.S. at 180.

[110] Buchanan v. Kentucky, 483 U.S. 402 (1987).

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion may not be subjected to harmless error analysis.[111] However, a court's error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an impartial jury if he is able to exclude the juror through exercise of a peremptory challenge.[112] The relevant inquiry is "on the jurors who ultimately sat," the Court declared, rejecting as overly broad the assertion in *Gray* that the focus instead should be on "'whether the composition of the jury panel as a whole could have been affected by the trial court's error.'"[113]

It is the function of the *voir dire* to give the defense and the prosecution the opportunity to inquire into, or have the trial judge inquire into, possible grounds of bias or prejudice that potential jurors may have, and to acquaint the parties with the potential jurors.[114] It is good ground for challenge for cause that a juror has formed an opinion on the issue to be tried, but not every opinion which a juror may entertain necessarily disqualifies him. The judge must determine whether the nature and strength of the opinion raise a presumption against impartiality.[115] It suffices for the judge to question potential jurors about their ability to put aside what they had heard or read about the case, listen to the evidence with an open mind, and render an impartial verdict; the judge's refusal to go further and question jurors about the contents of news reports to which they had been exposed did not violate the Sixth Amendment.[116] Under some circumstances, it may be constitutionally required that questions specifically directed to the existence of racial bias must be asked. Thus, in a situation in which defendant, a black man, alleged that he was being prosecuted on false charges because of his civil rights activities in an atmosphere perhaps open to racial appeals, prospective jurors must be asked about their racial prejudice, if any.[117] A similar rule applies in some capital trials, where the risk of racial prejudice "is especially serious in light of the complete finality of the death sentence." A defendant accused of an interracial capital offense is entitled to have prospective jurors informed of the victim's race and questioned as to racial

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[111] Gray v. Mississippi, 481 U.S. 648 (1987).

[112] Ross v. Oklahoma, 487 U.S. 81 (1987). The same rule applies in the federal setting. United States v. Martinez-Salazar, 528 U.S. 304 (2000).

[113] 487 U.S. at 86, 87.

[114] Lewis v. United States, 146 U.S. 370 (1892); Pointer v. United States, 151 U.S. 396 (1894).

[115] Reynolds v. United States, 98 U.S. 145 (1879). *See* Witherspoon v. Illinois, 391 U.S. 510, 513–15, 522 n.21 (1968).

[116] Mu'Min v. Virginia, 500 U.S. 415 (1991).

[117] Ham v. South Carolina, 409 U.S. 524 (1973).

bias.[118] But in circumstances not suggesting a significant likelihood of racial prejudice infecting a trial, as when the facts are merely that the defendant is black and the victim white, the Constitution is satisfied by a more generalized but thorough inquiry into the impartiality of the veniremen.[119]

Although government is not constitutionally obligated to allow peremptory challenges, typically a system of peremptory challenges has existed in criminal trials, in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.[120] While, in *Swain v. Alabama*,[121] the Court held that a prosecutor's purposeful exclusion of members of a specific racial group from the jury would violate the Equal Protection Clause, it posited so difficult a standard of proof that defendants could seldom succeed. The *Swain* standard of proof was relaxed in *Batson v. Kentucky*,[122] with the result that a defendant may now establish an equal protection violation resulting from a prosecutor's use of peremptory challenges to systematically exclude blacks from the jury.[123] A violation can occur whether or not the defendant and the excluded jurors are of the same race.[124] Racially discriminatory use of peremptory challenges does not, however, constitute a violation of the Sixth Amendment, the Court ruled in *Holland v. Illinois*.[125] The Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them

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[118] Turner v. Murray, 476 U.S. 28 (1986). The quote is from a section of Justice White's opinion not adopted as opinion of the Court. Id. at 35.

[119] Ristaino v. Ross, 424 U.S. 589 (1976). The Court noted that under its supervisory power it would require a federal court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. Id. at 597 n.9. *See* Aldridge v. United States, 283 U.S. 308 (1931). *But see* Rosales-Lopez v. United States, 451 U.S. 182 (1981), in which the trial judge refused a defense request to inquire about possible bias against Mexicans. A plurality apparently adopted a rule that, all else being equal, the judge should necessarily inquire about racial or ethnic prejudice only in cases of violent crimes in which the defendant and victim are members of different racial or ethnic groups, id. at 192, a rule rejected by two concurring Justices. Id. at 194. Three dissenting Justices thought the judge must always ask when defendant so requested. Id. at 195.

[120] *Cf.* Stilson v. United States, 250 U.S. 583, 586 (1919), an older case holding that it is no violation of the guarantee to limit the number of peremptory challenges to each defendant in a multi-party trial.

[121] 380 U.S. 202 (1965).

[122] 476 U.S. 79 (1986).

[123] *See* Fourteenth Amendment discussion of "Equal Protection and Race," infra.

[124] Powers v. Ohio, 499 U.S. 400 (1991) (defendant has standing to raise equal protection rights of excluded juror of different race).

[125] 493 U.S. 474 (1990). *But see* Trevino v. Texas, 503 U.S. 562 (1992) (claim of Sixth Amendment violation resulting from racially discriminatory use of peremptory challenges treated as sufficient to raise equal protection claim under Swain and Batson).

on the basis of innumerable other generalized characteristics." [126] To rule otherwise, the Court reasoned, "would cripple the device of peremptory challenge" and thereby undermine the Amendment's goal of "impartiality with respect to both contestants." [127]

The restraint on racially discriminatory use of peremptory challenges is now a two-way street. The Court ruled in 1992 that a criminal defendant's use of peremptory challenges to exclude jurors on the basis of race constitutes "state action" in violation of the Equal Protection Clause. [128] Disputing the contention that this limitation would undermine "the contribution of the peremptory challenge to the administration of justice," the Court nonetheless asserted that such a result would in any event be "too high" a price to pay. "It is an affront to justice to argue that a fair trail includes the right to discriminate against a group of citizens based upon their race." [129] It followed, therefore, that the limitation on peremptory challenges does not violate a defendant's right to an impartial jury. While a defendant has "the right to an impartial jury that can view him without racial animus," this means that "there should be a mechanism for removing those [jurors] who would be incapable of confronting and suppressing their racism," not that the defendant may remove jurors on the basis of race or racial stereotypes. [130]

### PLACE OF TRIAL—JURY OF THE VICINAGE

Article III, § 2 requires that federal criminal cases be tried by jury in the State and district in which the offense was committed, [131] but much criticism arose over the absence of any guarantee that the jury be drawn from the "vicinage" or neighborhood of the crime. [132] Madison's efforts to write into the Bill of Rights an

[126] 493 U.S. at 487.

[127] 493 U.S. at 484. As a consequence, a defendant who uses a peremptory challenge to correct the court's error in denying a for-cause challenge may have no Sixth Amendment cause of action. Peremptory challenges "are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Ross v. Oklahoma, 487 U.S. 81, 88 (1987). Similarly, there is no due process violation, at least where state statutory law requires use of peremptory challenges to cure erroneous refusals by the court to excuse jurors for cause. "It is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Id.

[128] Georgia v. McCollum, 505 U.S. 42 (1992).

[129] 505 U.S. at 57.

[130] 505 U.S. at 58.

[131] "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 Crime 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."

[132] "Vicinage" means neighborhood, and "vicinage of the jury" means jury of the neighborhood or, in medieval England, jury of the County. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350–351 (T. Cooley, 4th ed. 1899). *See* 3 J.

express vicinage provision were rebuffed by the Senate, and the present language was adopted as a compromise.[133] The provisions limit the Federal Government only.[134]

An accused cannot be tried in one district under an indictment showing that the offense was committed in another;[135] the place where the offense is charged to have been committed determines the place of trial.[136] Thus, a defendant cannot be tried in Missouri for money-laundering if the charged offenses occurred in Florida and there was no evidence that the defendant had been involved with the receipt or transportation of the proceeds from Missouri.[137] In a prosecution for conspiracy, the accused may be tried in any State and district where an overt act was performed.[138] Where a United States Senator was indicted for agreeing to receive compensation for services to be rendered in a proceeding before a government department, and it appeared that a tentative arrangement for such services was made in Illinois and confirmed in St. Louis, the defendant was properly tried in St. Louis, although he was not physically present in Missouri when notice of ratification was dispatched.[139] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates,[140] or the sending of excluded matter through the mails,[141] may be made triable in any district through which the forbidden transportation is conducted. By virtue of a presumption that a letter is delivered in the district to which it is addressed, the offense of scheming to defraud a corporation by mail was held to have been committed in that district although the letter was posted elsewhere.[142] The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdiction of the charge.[143] The assignment of a district judge from one district to another, conformably to statute, does not create a new

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STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1775–85 (1833).

[133] The controversy is conveniently summarized in Williams v. Florida, 399 U.S. 78, 92–96 (1970).

[134] Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96, 101 (1888).

[135] Salinger v. Loisel, 265 U.S. 224 (1924).

[136] Beavers v. Henkel, 194 U.S. 73, 83 (1904). For some more recent controversies about the place of the commission of the offense, *see* United States v. Cores, 356 U.S. 405 (1958), and Johnston v. United States, 351 U.S. 215 (1956).

[137] United States v. Cabrales, 524 U.S. 1 (1998).

[138] Brown v. Elliott, 225 U.S. 392 (1912); Hyde v. United States, 225 U.S. 347 (1912); Haas v. Henkel, 216 U.S. 462 (1910).

[139] Burton v. United States, 202 U.S. 344 (1906).

[140] Armour Packing Co. v. United States, 209 U.S. 56 (1908).

[141] United States v. Johnson, 323 U.S. 273, 274 (1944).

[142] Hagner v. United States, 285 U.S. 427, 429 (1932).

[143] United States ex rel. Hughes v. Gault, 271 U.S. 142 (1926). *Cf.* Tinsley v. Treat, 205 U.S. 20 (1907); Beavers v. Henkel, 194 U.S. 73, 84 (1904).

judicial district whose boundaries are undefined nor subject the accused to trial in a district not established when the offense with which he is charged was committed.[144] For offenses against federal laws not committed within any State, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.[145] The place of trial may be designated by statute after the offense has been committed.[146]

## NOTICE OF ACCUSATION

The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge.[147] No indictment is sufficient if it does not allege all of the ingredients that constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology,[148] but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. The facts necessary to bring the case within the statutory definition must also be alleged.[149] If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment which does not contain such allegation is defective.[150] Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is described so as reasonably to inform the accused of the nature of the charge sought to be established against him.[151] The Constitution does not require the Government to furnish a copy of the indictment to an accused.[152] The right to

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[144] Lamar v. United States, 241 U.S. 103 (1916).

[145] Jones v. United States, 137 U.S. 202, 211 (1890); United States v. Dawson, 56 U.S. (15 How.) 467, 488 (1853).

[146] Cook v. United States, 138 U.S. 157, 182 (1891). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 250–54 (1940); United States v. Johnson, 323 U.S. 273 (1944).

[147] United States v. Cruikshank, 92 U.S. 542, 544, 558 (1876); United States v. Simmons, 96 U.S. 360 (1878); Bartell v. United States, 227 U.S. 427 (1913); Burton v. United States, 202 U.S. 344 (1906).

[148] Potter v. United States, 155 U.S. 438, 444 (1894).

[149] United States v. Carll, 105 U.S. 611 (1882).

[150] United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872).

[151] Rosen v. United States, 161 U.S. 29, 40 (1896).

[152] United States v. Van Duzee, 140 U.S. 169, 173 (1891).

notice of accusation is so fundamental a part of procedural due process that the States are required to observe it.[153]

## CONFRONTATION

"The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"[154] The right of confrontation is "[o]ne of the fundamental guarantees of life and liberty ... long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union."[155] Before 1965, when the Court held the right to be protected against state abridgment,[156] it had little need to clarify the relationship between the right of confrontation and the hearsay rule,[157] inasmuch as its supervisory powers over the inferior federal courts permitted it to control the admission of hearsay on this basis.[158] Thus, on the basis of the Confrontation Clause, it had concluded that evidence given at a preliminary hearing could not be used at the trial if the absence of the witness was attributable to the negligence of the prosecution,[159] but that if a witness' absence had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial.[160] It had also rec-

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[153] In re Oliver, 333 U.S. 257, 273 (1948); Cole v. Arkansas, 333 U.S. 196, 201 (1948); Rabe v. Washington, 405 U.S. 313 (1972).

[154] Mattox v. United States, 156 U.S. 237, 242–43 (1895).

[155] Kirby v. United States, 174 U.S. 47, 55, 56 (1899). *Cf.* Pointer v. Texas, 380 U.S. 400, 404–05 (1965). The right may be waived but it must be a knowing, intelligent waiver uncoerced from defendant. Brookhart v. Janis, 384 U.S. 1 (1966).

[156] Pointer v. Texas, 380 U.S. 400 (1965) (overruling West v. Louisiana, 194 U.S. 258 (1904)); *see also* Stein v. New York, 346 U.S. 156, 195–96 (1953).

[157] Hearsay is the prior out-of-court statements of a person, offered affirmatively for the truth of the matters asserted, presented at trial either orally by another person or in written form. Hickory v. United States, 151 U.S. 303, 309 (1894); Southern Ry. v. Gray, 241 U.S. 333, 337 (1916); Bridges v. Wixon, 326 U.S. 135 (1945).

[158] Thus, while it had concluded that the co-conspirator exception to the hearsay rule was consistent with the Confrontation Clause, Delaney v. United States, 263 U.S. 586, 590 (1924), the Court's formulation of the exception and its limitations was pursuant to its supervisory powers. Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949).

[159] Motes v. United States, 178 U.S. 458 (1900).

[160] Reynolds v. United States, 98 U.S. 145 (1879).

ognized the admissibility of dying declarations [161] and of testimony given at a former trial by a witness since deceased. [162] The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of defendant now on trial was stolen. [163] A prosecutor, however, can comment on a defendant's presence at trial, and call attention to the defendant's opportunity to tailor his or her testimony to comport with that of previous witnesses. [164]

In a series of decisions beginning in 1965, the Court seemed to equate the Confrontation Clause with the hearsay rule, positing that a major purpose of the clause was "to give the defendant charged with crime an opportunity to cross-examine the witnesses against him," unless one of the hearsay exceptions applies. [165] Thus, in *Pointer v. Texas*, [166] the complaining witness had testified at a preliminary hearing at which he was not cross-examined and the defendant was not represented by counsel; by the time of trial, the witness had moved to another State and the prosecutor made no effort to obtain his return. Offering the preliminary hearing testimony violated defendant's right of confrontation. In *Douglas v. Alabama*, [167] the prosecution called as a witness the defendant's al-

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[161] Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[162] Mattox v. United States, 156 U.S. 237, 240 (1895).

[163] Kirby v. United States, 174 U.S. 47 (1899), and Dowdell v. United States, 221 U.S. 325 (1911), recognized the inapplicability of the clause to the admission of documentary evidence to establish collateral facts, admissible under the common law, to permit certification as an additional record to the appellate court of the events of the trial.

[164] Portuondo v. Agard, 529 U.S. 61 (2000).

[165] Pointer v. Texas, 380 U.S. 400, 406–07 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." Barber v. Page, 390 U.S. 719, 725 (1968). Unjustified limitation of defendant's right to cross-examine witnesses presented against him at trial may constitute a confrontation clause violation. Smith v. Illinois, 390 U.S. 129 (1968), or a denial of due process, Alford v. United States, 282 U.S. 687 (1931); and In re Oliver, 333 U.S. 257 (1948).

[166] 380 U.S. 400 (1965). Justices Harlan and Stewart concurred on due process grounds, rejecting the "incorporation" holding. Id. at 408, 409. *See also* Barber v. Page, 390 U.S. 719 (1968), in which the Court refused to permit the State to use the preliminary hearing testimony of a witness in a federal prison in another State at the time of trial. The Court acknowledged the hearsay exception permitting the use of such evidence when a witness was unavailable but refused to find him "unavailable" when the State had made no effort to procure him; Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court permitted the State to assume the unavailability of a witness because he now resided in Sweden and to use the transcript of the witness' testimony at a former trial.

[167] 380 U.S. 415 (1965). *See also* Smith v. Illinois, 390 U.S. 129 (1968) (informer as prosecution witness permitted to identify himself by alias and to conceal his true name and address; Confrontation Clause violated because defense could not effec-

leged accomplice, and when the accomplice refused to testify, pleading his privilege against self-incrimination, the prosecutor read to him to "refresh" his memory a confession in which he implicated defendant. Because defendant could not cross-examine the accomplice with regard to the truth of the confession, the Court held the Confrontation Clause had been violated. In *Bruton v. United States*,[168] the use at a joint trial of a confession made by one of the defendants was held to violate the confrontation rights of the other defendant who was implicated by it because he could not cross-examine the codefendant not taking the stand.[169] The Court continues to view as "presumptively unreliable accomplices' confessions that incriminate defendants."[170]

More recently, however, the Court has moved away from these cases. "While . . . hearsay rules and the Confrontation Clause are

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tively cross-examine); Davis v. Alaska, 415 U.S. 308 (1974) (state law prohibiting disclosure of identity of juvenile offenders could not be applied to preclude cross-examination of witness about his juvenile record when object was to allege possible bias on part of witness). *Cf.* Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Nobles, 422 U.S. 233, 240–41 (1975).

[168] 391 U.S. 123 (1968). The Court in this case equated confrontation with the hearsay rule, first emphasizing "that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence", id. at 128 n.3, and then observing that "[t]he reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter." Id. at 136 n.12 (emphasis by Court). *Bruton* was applied retroactively in a state case in Roberts v. Russell, 392 U.S. 293 (1968). Where, however, the codefendant takes the stand in his own defense, denies making the alleged out-of-court statement implicating defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has not been denied his right of confrontation under Bruton, Nelson v. O'Neil, 402 U.S. 622 (1971). In two cases, violations of the rule in Bruton have been held to be "harmless error" in the light of the overwhelming amount of legally admitted evidence supporting conviction. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972). *Bruton* was held inapplicable, however, when the nontestifying codefendant's confession was redacted to omit any reference to the defendant, and was circumstantially incriminating only as the result of other evidence properly introduced. Richardson v. Marsh, 481 U.S. 200 (1987). *Bruton* was held applicable, however, where a blank space or the word "deleted" is substituted for the defendant's name in a co-defendant's confession, making such confession incriminating of the defendant on its face. Gray v. Maryland, 523 U.S. 185 (1998).

[169] In Parker v. Randolph, 442 U.S. 62 (1979), the Court was evenly divided on the question whether interlocking confessions may be admitted without violating the clause. Four Justices held that admission of such confessions is proper, even though neither defendant testifies, if the judge gives the jury a limiting instruction. Four Justices held that a harmless error analysis should be applied, although they then divided over its meaning in this case. The former approach was rejected in favor of the latter in Cruz v. New York, 481 U.S. 186 (1987). The appropriate focus is on reliability, the Court indicated, and "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him (assuming the 'unavailability of the codefendant' despite the lack of opportunity for cross-examination." 481 U.S. at 193–94.

[170] Lee v. Illinois, 476 U.S. 530, 541 (1986). Lilly v. Virginia, 527 U.S. 116 (1999).

generally designed to protect similar values it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception .... The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." [171]

Further, the Court in *California v. Green* [172] upheld the use at trial as substantive evidence of two prior statements made by a witness who at the trial claimed that he had been under the influence of LSD at the time of the occurrence of the events in question and that he could therefore neither deny nor affirm the truth of his prior statements. One of the earlier statements was sworn testimony given at a preliminary hearing at which the defendant was represented by counsel with the opportunity to cross-examine the witness; that statement was admissible because it had been subjected to cross-examination earlier, the Court held, and that was all that was required. The other statement had been made to policemen during custodial interrogation, had not been under oath, and, of course, had not been subject to cross-examination, but the Court deemed it admissible because the witness had been present at the trial and could have been cross-examined then. "[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both

[171] California v. Green, 399 U.S. 149, 155–56 (1970); Dutton v. Evans, 400 U.S. 74, 80–86 (1970). *Compare* id. at 93, 94, 95 (Justice Harlan concurring), *with* id. at 100, 105 n.7 (Justice Marshall dissenting). *See also* United States v. Inadi, 475 U.S. 387 (1986).

[172] 399 U.S. 149 (1970).

stories."[173] But in *Dutton v. Evans*,[174] the Court upheld the use as substantive evidence at trial of a statement made by a witness whom the prosecution could have produced but did not. Presentation of a statement by a witness who is under oath, in the presence of the jury, and subject to cross-examination by the defendant is only one way of complying with the Confrontation Clause, four Justices concluded. Thus, at least in the absence of prosecutorial misconduct or negligence and where the evidence is not "crucial" or "devastating," the Confrontation Clause is satisfied if the circumstances of presentation of out-of-court statements are such that "the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement," and this is to be ascertained in each case by focusing on the reliability of the proffered hearsay statement, that is, by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory.[175]

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[173] 399 U.S. at 164. Justice Brennan dissented. Id. at 189. *See also* Nelson v. O'Neil, 402 U.S. 622 (1971). "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination." Delaware v. Fensterer, 474 U.S. 15, 21–22 (1985) (per curiam) (expert witness testified as to conclusion, but could not remember basis for conclusion). *See also* United States v. Owens, 484 U.S. 554 (1988) (testimony as to previous, out-of-court identification statement is not barred by witness' inability, due to memory loss, to explain the basis for his identification).

[174] 400 U.S. 74 (1970). The statement was made by an alleged co-conspirator of the defendant on trial and was admissible under the co-conspirator exception to the hearsay rule permitting the use of a declaration by one conspirator against all his fellow conspirators. The state rule permitted the use of a statement made during the concealment stage of the conspiracy while the federal rule permitted use of a statement made only in the course of and in furtherance of the conspiracy. Id. at 78, 81–82.

[175] 400 U.S. at 86-89. The quoted phrase is at 89, (quoting California v. Green, 399 U.S. 149, 161 (1970)). Justice Harlan concurred to carry the case, on the view that (1) the Confrontation Clause requires only that any testimony actually given at trial must be subject to cross-examination, but (2) in the absence of countervailing circumstances introduction of prior recorded testimony— "trial by affidavit"—would violate the clause. Id. at 93, 95, 97. Justices Marshall, Black, Douglas, and Brennan dissented, id. at 100, arguing for adoption of a rule that: "The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule." Id. at 110–11. The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant's own testimony. Tennessee v. Street, 471 U.S. 409 (1985) (use of accomplice's confession not to establish facts as to defendant's participation in the crime, but instead to support officer's rebuttal of defendant's testimony as to circumstances of defendant's confession; presence of officer assured right of cross-examination).

In *Ohio v. Roberts*,[176] the Court explained that it had construed the clause "in two separate ways to restrict the range of admissible hearsay." First, there is a rule of "necessity," under which in the usual case "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, "once a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"[177] That is, if the hearsay declarant is not present for cross-examination at trial, the "statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[178]

*Roberts* was narrowed in *United States v. Inadi*,[179] holding that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. The latter—at least those "made while the conspiracy is in progress"—have "independent evidentiary significance of [their] own"; hence in-court testimony is not a necessary or valid substitute.[180] Similarly, "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment" is not barred from trial by the Confrontation Clause.[181] Particularized guarantees of trustworthiness inherent in the circumstances under which a statement is made must be shown for admission of other hearsay evidence not covered by a "firmly rooted exception;" evidence tending to corroborate the truthfulness of a statement may not be relied upon as a bootstrap.[182]

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[176] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The State's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74–77.

[177] 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

[178] 448 U.S. at 66. Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986).

[179] 475 U.S. 387 (1986).

[180] 475 U.S. at 394-95.

[181] White v. Illinois, 502 U.S. 346, 357 (1992).

[182] Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

Contrasting approaches to the Confrontation Clause were taken by the Court in two cases involving state efforts to protect a child from trauma while testifying. In *Coy v. Iowa*,[183] the Court held that the right of confrontation is violated by a procedure, authorized by statute, placing a one-way screen between complaining child witnesses and the defendant, thereby sparing the witnesses from viewing the defendant. This conclusion was reached even though the witnesses could be viewed by the defendant's counsel and by the judge and jury, even though the right of cross-examination was in no way limited, and even though the state asserted a strong interest in protecting child sex-abuse victims from further trauma.[184] The Court's opinion by Justice Scalia declared that a defendant's right during his trial to *face-to-face* confrontation with his accusers derives from "the irreducible literal meaning of the clause," and traces "to the beginnings of Western legal culture."[185] Squarely rejecting the Wigmore view "that the only essential interest preserved by the right was cross-examination,"[186] the Court emphasized the importance of face-to-face confrontation in eliciting truthful testimony.

*Coy*'s interpretation of the Clause, though not its result, was rejected in *Maryland v. Craig*.[187] In *Craig* the Court upheld Maryland's use of one-way, closed circuit television to protect a child witness in a sex crime from viewing the defendant. As in *Coy*, procedural protections other than confrontation were afforded: the child witness must testify under oath, is subject to cross examination, and is viewed by the judge, jury, and defendant. The critical factual difference between the two cases was that Maryland required a case-specific finding that the child witness would be traumatized by presence of the defendant, while the Iowa procedures struck down in *Coy* rested on a statutory presumption of trauma. But the difference in approach is explained by the fact that Justice O'Connor's views, expressed in a concurring opinion in *Coy*, became the opinion of the Court in *Craig*.[188] Beginning with the propo-

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[183] 487 U.S. 1012 (1988).

[184] On this latter point, the Court indicated that only "individualized findings," rather than statutory presumption, could suffice to create an exception to the rule. 487 U.S. at 1021.

[185] 487 U.S. at 1015, 1021.

[186] 487 U.S. at 1018 n.2.

[187] 497 U.S. 836 (1990).

[188] Coy was decided by a 6–2 vote. Justice Scalia's opinion of the Court was joined by Justices Brennan, White, Marshall, Stevens, and O'Connor; Justice O'Connor's separate concurring opinion was joined by Justice White; Justice Blackmun's dissenting opinion was joined by Chief Justice Rehnquist; and Justice Kennedy did not participate. In Craig, a 5–4 decision, Justice O'Connor's opinion of the Court was joined by the two Coy dissenters and by Justices White and Kennedy. Justice Scalia's dissent was joined by Justices Brennan, Marshall, and Stevens.

sition that the Confrontation Clause does not, as evidenced by hearsay exceptions, grant an absolute right to face-to-face confrontation, the Court in *Craig* described the Clause as "reflect[ing] a *preference* for face-to-face confrontation." [189] This preference can be overcome "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." [190] Relying on the traditional and "transcendent" state interest in protecting the welfare of children, on the significant number of state laws designed to protect child witnesses, and on "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims," [191] the Court found a state interest sufficiently important to outweigh a defendant's right to face-to-face confrontation. Reliability of the testimony was assured by the "rigorous adversarial testing [that] preserves the essence of effective confrontation." [192] All of this, of course, would have led to a different result in *Coy* as well, but *Coy* was distinguished with the caveat that "[t]he requisite finding of necessity must of course be a case-specific one;" Maryland's required finding that a child witness would suffer "serious emotional distress" if not protected was clearly adequate for this purpose. [193]

In another case involving child sex crime victims, the Court held that there is no right of face-to-face confrontation at an in-chambers hearing to determine the competency of a child victim to testify, since the defendant's attorney participated in the hearing, and since the procedures allowed "full and effective" opportunity to cross-examine the witness at trial and request reconsideration of the competency ruling. [194] And there is no absolute right to confront witnesses with relevant evidence impeaching those witnesses; failure to comply with a rape shield law's notice requirement can validly preclude introduction of evidence relating to a witness's prior sexual history. [195]

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[189] 497 U.S. at 849 (emphasis original).

[190] 497 U.S. at 850. Dissenting Justice Scalia objected that face-to-face confrontation "is not a preference 'reflected' by the Confrontation Clause [but rather] a constitutional right unqualifiedly guaranteed," and that the Court "has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it." Id. at 863, 870.

[191] 497 U.S. at 855.

[192] 497 U.S. at 857.

[193] 497 U.S. at 855.

[194] Kentucky v. Stincer, 482 U.S. 730, 744 (1987).

[195] Michigan v. Lucas, 500 U.S. 145 (1991).

## COMPULSORY PROCESS

The provision requires, of course, that the defendant be afforded legal process to compel witnesses to appear,[196] but another apparent purpose of the provision was to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense.[197] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law," applicable to states by way of the Fourteenth Amendment, and the right is violated by a state law providing that coparticipants in the same crime could not testify for one another.[198]

The right to present witnesses is not absolute, however; a court may refuse to allow a defense witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pretrial discovery request and thereby attempted to gain a tactical advantage.[199]

In *Pennsylvania v. Ritchie*, the Court indicated that requests to compel the government to reveal the identity of witnesses or produce exculpatory evidence should be evaluated under due process rather than compulsory process analysis, adding that "compulsory process provides no *greater* protections in this area than due process."[200]

## ASSISTANCE OF COUNSEL

### Development of an Absolute Right to Counsel at Trial

Neither in the Congress which proposed what became the Sixth Amendment guarantee that the accused is to have the assistance of counsel nor in the state ratifying conventions is there any indication of the understanding associated with the language em-

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[196] United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800) (Justice Chase on circuit).

[197] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1786 (1833). *See* Rosen v. United States, 245 U.S. 467 (1918).

[198] Washington v. Texas, 388 U.S. 14, 19–23 (1967). Texas did permit coparticipants to testify for the prosecution.

[199] Taylor v. Illinois, 484 U.S. 400 (1988).

[200] 480 U.S. 39, 56 (1987) (ordering trial court review of files of child services agency to determine whether they contain evidence material to defense in child abuse prosecution).

ployed. The development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel, while the right was afforded in misdemeanor cases, a rule ameliorated in practice, however, by the judicial practice of allowing counsel to argue points of law and then generously interpreting the limits of "legal questions." The colonial and early state practice in this country was varied, ranging from the existent English practice to appointment of counsel in a few States where needed counsel could not be retained.[201] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the guarantee was limited to assuring that a person wishing and able to afford counsel would not be denied that right.[202] It was not until the 1930s that the Supreme Court began expanding the clause to its present scope.

***Powell v. Alabama***.—The expansion began in *Powell v. Alabama*,[203] in which the Court set aside the convictions of eight black youths sentenced to death in a hastily carried-out trial without benefit of counsel. Due process, Justice Sutherland said for the Court, always requires the observance of certain fundamental personal rights associated with a hearing, and "the right to the aid of counsel is of this fundamental character." This observation was about the right to retain counsel of one's choice and at one's expense, and included an eloquent statement of the necessity of counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and

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[201] W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–26 (1955).

[202] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that in federal courts parties could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. The Act of April 30, 1790, ch. 9, 1 Stat. 118, provided: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours." It was apparently the practice almost invariably to appoint counsel for indigent defendants charged with noncapital crimes, although it may be assumed that the practice fell short often of what is now constitutionally required. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 29–30 (1955).

[203] 287 U.S. 45 (1932).

knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." [204]

The failure to afford the defendants an opportunity to retain counsel violated due process, but the Court acknowledged that as indigents the youths could not have retained counsel. Therefore, the Court concluded, under the circumstances— "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives"— "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." The holding was narrow. "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . ." [205]

***Johnson v. Zerbst***.—Next step in the expansion came in *Johnson v. Zerbst*, [206] in which the Court announced an absolute rule requiring appointment of counsel for federal criminal defendants who could not afford to retain a lawyer. The right to assistance of counsel, Justice Black wrote for the Court, "is necessary to insure fundamental human rights of life and liberty." Without stopping to distinguish between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Justice quoted Justice Sutherland's invocation of the necessity of legal counsel for even the intelligent and educated layman and said: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." [207] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from

[204] 287 U.S. at 68-69.

[205] 287 U.S. at 71.

[206] 304 U.S. 458 (1938).

[207] 304 U.S. at 462, 463.

a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[208]

***Betts v. Brady and Progeny***.—An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts v. Brady*.[209] Justice Roberts for the Court observed that the Sixth Amendment would compel the result only in federal courts but that in state courts the Due Process Clause of the Fourteenth Amendment "formulates a concept less rigid and more fluid" than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of the first eight Amendments might "in certain circumstances" be a violation of due process. The question was rather "whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."[210] Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the Court concluded that it was the "considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to a fair trial." Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice, but this was not the general rule.[211] Justice Black in dissent argued that the Fourteenth Amendment made the Sixth applicable to the States and required the appointment of counsel, but that even on the Court's terms counsel was a fundamental right and appointment was required by due process.[212]

Over time the Court abandoned the "special circumstances" language of *Powell v. Alabama*[213] when capital cases were involved and finally in *Hamilton v. Alabama*,[214] held that in a capital case

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[208] 304 U.S. at 464-65. The standards for a valid waiver were tightened in Walker v. Johnston, 312 U.S. 275 (1941), setting aside a guilty plea made without assistance of counsel, by a ruling requiring that a defendant appearing in court be advised of his right to counsel and asked whether or not he wished to waive the right. *See also* Von Moltke v. Gillies, 332 U.S. 708 (1948); Carnley v. Cochran, 369 U.S. 506 (1962).

[209] 316 U.S. 455 (1942).

[210] 316 U.S. at 461-62, 465.

[211] 316 U.S. at 471, 473.

[212] 316 U.S. at 474 (joined by Justices Douglas and Murphy).

[213] 287 U.S. 45, 71 (1932).

[214] 368 U.S. 52 (1961). Earlier cases employing the "special circumstances" language were Williams v. Kaiser, 323 U.S. 471 (1945); Tompkins v. Missouri, 323 U.S. 485 (1945); Hawk v. Olson, 326 U.S. 271 (1945); De Meerleer v. Michigan, 329 U.S. 663 (1947); Marino v. Ragen, 332 U.S. 561 (1947); Haley v. Ohio, 332 U.S. 596 (1948). Dicta appeared in several cases thereafter suggesting an absolute right to

a defendant need make no showing of particularized need or of prejudice resulting from absence of counsel; henceforth, assistance of counsel was a constitutional requisite in capital cases. In noncapital cases, developments were such that Justice Harlan could assert that "the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded."[215] The rule was designed to afford some certainty in the determination of when failure to appoint counsel would result in a trial lacking in "fundamental fairness." Generally, the Court developed three categories of prejudicial factors, often overlapping in individual cases, which required the furnishing of assistance of counsel. There were (1) the personal characteristics of the defendant which made it unlikely he could obtain an adequate defense of his own,[216] (2) the technical complexity of the charges or of possible defenses to the charges,[217] and (3) events occurring at trial that raised problems of prejudice.[218] The last characteristic especially had been utilized by the Court to set aside convictions occurring in

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counsel in capital cases. Bute v. Illinois, 333 U.S. 640, 674 (1948); Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). A state court decision finding a waiver of the right in a capital case was upheld in Carter v. Illinois, 329 U.S. 173 (1946).

[215] Gideon v. Wainwright, 372 U.S. 335, 350 (1963).

[216] Youth and immaturity (Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948); Marino v. Ragen, 332 U.S. 561 (1947); De Meerleer v. Michigan, 329 U.S. 663 (1947)), inexperience (Moore v. Michigan, supra (limited education), Uveges v. Pennsylvania, supra), and insanity or mental abnormality (Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951)), were commonly-cited characteristics of the defendant demonstrating the necessity for assistance of counsel.

[217] Technicality of the crime charged (Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Williams v. Kaiser, 323 U.S. 471 (1945)), or the technicality of a possible defense (Rice v. Olson, 324 U.S. 786 (1945); McNeal v. Culver, 365 U.S. 109 (1961)), were commonly cited.

[218] The deliberate or careless overreaching by the court or the prosecutor (Gibbs v. Burke, 337 U.S. 772 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Palmer v. Ashe, 342 U.S. 134 (1951); White v. Ragen, 324 U.S. 760 (1945)), prejudicial developments during the trial (Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, supra), and questionable proceedings at sentencing (Townsend v. Burke, supra), were commonly cited.

the absence of counsel,[219] and the last case rejecting a claim of denial of assistance of counsel had been decided in 1950.[220]

***Gideon v. Wainwright***.—Against this background, a unanimous Court in *Gideon v. Wainwright*[221] overruled *Betts v. Brady* and held "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[222] Justice Black, a dissenter in the 1942 decision, asserted for the Court that *Betts* was an "abrupt break" with earlier precedents, citing *Powell* and *Johnson v. Zerbst*. Rejecting the *Betts* reasoning, the Court decided that the right to assistance of counsel is "fundamental" and the Fourteenth Amendment does make the right constitutionally required in state courts.[223] The Court's opinion in *Gideon* left unanswered the question whether the right to assistance of counsel was claimable by defendants charged with misdemeanors or serious misdemeanors as well as with felonies, and it was not until recently that the Court held that the right applies to any misdemeanor case in which imprisonment is imposed—that no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right.[224] The Court subsequently extended the right to cases where a suspended sentence or proba-

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[219] Hudson v. North Carolina, 363 U.S. 697 (1960), held that an unrepresented defendant had been prejudiced when his co-defendant's counsel plead his client guilty in the presence of the jury, the applicable state rules to avoid prejudice in such situation were unclear, and the defendant in any event had taken no steps to protect himself. The case seemed to require reversal of any conviction when the record contained a prejudicial occurrence that under state law might have been prevented or ameliorated. Carnley v. Cochran, 369 U.S. 506 (1962), reversed a conviction because the unrepresented defendant failed to follow some advantageous procedure that a lawyer might have utilized. Chewning v. Cunningham, 368 U.S. 443 (1962), found that a lawyer might have developed several defenses and adopted several tactics to defeat a charge under a state recidivist statute, and that therefore the unrepresented defendant had been prejudiced.

[220] Quicksal v. Michigan, 339 U.S. 660 (1950). *See also* Canizio v. New York, 327 U.S. 82 (1946); Foster v. Illinois, 332 U.S. 134 (1947); Gayes v. New York, 332 U.S. 145 (1947); Bute v. Illinois, 333 U.S. 640 (1948); Gryger v. Burke, 334 U.S. 728 (1948). *Cf.* White v. Ragen, 324 U.S. 760 (1945).

[221] 372 U.S. 335 (1963).

[222] 372 U.S. at 344.

[223] 372 U.S. at 342-43, 344. Justice Black, of course, believed the Fourteenth Amendment made applicable to the States all the provisions of the Bill of Rights, Adamson v. California, 332 U.S. 46, 71 (1947), but for purposes of delivering the opinion of the Court followed the due process absorption doctrine. Justice Douglas, concurring, maintained the incorporation position. Gideon, 372 U.S. at 345. Justice Harlan concurred, objecting both to the Court's manner of overruling Betts v. Brady and to the incorporation implications of the opinion. Id. at 349.

[224] Scott v. Illinois, 440 U.S. 367 (1979), adopted a rule of actual punishment and thus modified Argersinger v. Hamlin, 407 U.S. 25 (1972), which had held counsel required if imprisonment were possible. The Court has also extended the right of assistance of counsel to juvenile proceedings. In re Gault, 387 U.S. 1 (1967). *See also* Specht v. Patterson, 386 U.S. 605 (1967).

tionary period is imposed, on the theory that any future incarceration which occurred would be based on the original uncounseled conviction.[225]

Because the absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court, *Gideon* has been held fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,[226] but also may not be subsequently used either to support guilt in a new trial or to enhance punishment upon a valid conviction.[227]

***Protection of the Right to Retained Counsel***.—The Sixth Amendment has also been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Thus, in *Chandler v. Fretag*,[228] when a defendant appearing to plead guilty on a house-breaking charge was orally advised for the first time that, because of three prior convictions for felonies, he would be tried also as an habitual criminal and if convicted would be sentenced to life imprisonment, the court's denial of his request for a continuance in order to consult an attorney was a violation of his Fourteenth Amendment due process rights. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. . . . A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."[229] But the right to retain counsel of choice does not bar operation of forfeiture

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[225] Alabama v. Shelton, 122 S. Ct. 1764 (2002).

[226] Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Doughty v. Maxwell, 376 U.S. 202 (1964); Kitchens v. Smith, 401 U.S. 847 (1971). *See* Linkletter v. Walker, 381 U.S. 618, 639 (1965).

[227] Burgett v. Texas, 389 U.S. 109 (1967) (admission of record of prior counselless conviction at trial with instruction to jury to regard it only for purposes of determining sentence if it found defendant guilty but not to use it in considering guilt inherently prejudicial); United States v. Tucker, 404 U.S. 443 (1972) (error for sentencing judge in 1953 to have relied on two previous convictions at which defendant was without counsel); Loper v. Beto, 405 U.S. 473 (1972) (error to have permitted counseled defendant in 1947 trial to have his credibility impeached by introduction of prior uncounseled convictions in the 1930's; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); *But see* Nichols v. United States, 511 U.S. 738 (1994) (as Scott v. Illinois, 440 U.S. 367 (1979) provides that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).

[228] 348 U.S. 3 (1954).

[229] 348 U.S. at 9, 10. *See also* House v. Mayo, 324 U.S. 42 (1945); Hawk v. Olson, 326 U.S. 271 (1945); Reynolds v. Cochran, 365 U.S. 525 (1961).

provisions, even if the result is to deny to a defendant the wherewithal to employ counsel. In *Caplin & Drysdale v. United States*,[230] the Court upheld a federal statute requiring forfeiture to the government of property and proceeds derived from drug-related crimes constituting a "continuing criminal enterprise,"[231] even though a portion of the forfeited assets had been used to retain defense counsel. While a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice."[232] Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act,[233] the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.[234]

Whenever defense counsel is representing two or more defendants and asserts in timely fashion to the trial judge that because of possible conflicts of interest between or among his clients he is unable to render effective assistance, the judge must examine the claim carefully, and unless he finds the risk too remote he must permit or appoint separate counsel.[235] Subsequently, the Court elaborated upon this principle and extended it.[236] First, the Sixth Amendment right to counsel applies to defendants who retain private counsel as well as to defendants served by appointed counsel. Second, judges are not automatically required to initiate an inquiry into the propriety of multiple representation, being able to assume in the absence of undefined "special circumstances" that no conflict exists. Third, to establish a violation, a defendant must show an "actual conflict of interest which adversely affected his lawyer's performance." Once it is established that a conflict affected the lawyer's action, however, prejudice need not be proved.[237]

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[230] 491 U.S. 617 (1989).

[231] 21 U.S.C. § 853.

[232] 491 U.S. at 626.

[233] The statute was interpreted in United States v. Monsanto, 491 U.S. 600 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.

[234] Dissenting Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, described the Court's ruling as allowing the Sixth Amendment right to counsel of choice to be "outweighed by a legal fiction." 491 U.S. at 644 (dissenting from both *Caplin & Drysdale* and *Monsanto*).

[235] Holloway v. Arkansas, 435 U.S. 475 (1978). Counsel had been appointed by the court.

[236] Cuyler v. Sullivan, 446 U.S. 335 (1980).

[237] 446 U.S. at 348-50. For earlier cases presenting more direct violations of defendant's rights, *see* Glasser v. United States, 315 U.S. 60 (1942); United States v. Hayman, 342 U.S. 205 (1952); and Ellis v. United States, 365 U.S. 674 (1958).

"[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." [238] So saying, the Court invalidated a statute empowering every judge in a nonjury criminal trial to deny the parties the right to make a final summation before rendition of judgment which had been applied in the specific case to prevent defendant's counsel from making a summation. The opportunity to participate fully and fairly in the adversary factfinding process includes counsel's right to make a closing argument. And, in *Geders v. United States*, [239] the Court held that a trial judge's order preventing defendant from consulting his counsel during a 17-hour overnight recess between his direct and cross-examination, in order to prevent tailoring of testimony or "coaching," deprived defendant of his right to assistance of counsel and was invalid. [240] Other direct and indirect restraints upon counsel and his discretion have been found to be in violation of the Amendment. [241] Actions of governmental investigative agents may interfere as well with the relationship of defense and counsel. [242]

***Effective Assistance of Counsel***.—"[T]he right to counsel is the right to the effective assistance of counsel." [243] From the beginning of the cases holding that counsel must be appointed for defendants unable to afford to retain a lawyer, the Court has indicated that appointment must be made in a manner that affords "effective aid in the preparation and trial of the case." [244] Of course, the government must not interfere with representation, either

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[238] Herring v. New York, 422 U.S. 853, 857 (1975).

[239] 425 U.S. 80 (1976).

[240] *Geders* was distinguished in Perry v. Leeke, 488 U.S. 272 (1989), in which the Court upheld a trial court's order that the defendant and his counsel not consult during a 15-minute recess between the defendant's direct testimony and his cross-examination.

[241] *E.g.*, Ferguson v. Georgia, 365 U.S. 570 (1961) (where defendant was prevented by statute from giving sworn testimony in his defense, the refusal of a state court to permit defense counsel to question him to elicit his unsworn statement denied due process because it denied him assistance of counsel); Brooks v. Tennessee, 406 U.S. 605 (1972) (alternative holding) (statute requiring defendant to testify prior to any other witness for defense or to forfeit the right to testify denied him due process by depriving him of decision of counsel on questions whether to testify and when).

[242] United States v. Morrison, 449 U.S. 361 (1981) (Court assumed that investigators who met with defendant, on another matter, without knowledge or permission of counsel and who disparaged counsel and suggested she could do better without him interfered with counsel, but held that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

[243] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[244] Powell v. Alabama, 287 U.S. 45, 71–72 (1932); Glasser v. United States, 315 U.S. 60, 70 (1942).

through the manner of appointment or through the imposition of restrictions upon appointed or retained counsel that would impede his ability fairly to provide a defense,[245] but the Sixth Amendment goes further than that. "The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."[246] That is, a criminal trial initiated and conducted by government is state action that may be so fundamentally unfair that no conviction obtained thereby may be allowed to stand, irrespective of the possible fact that government did nothing itself to bring about the unfairness. Thus, ineffective assistance provided by retained counsel provides a basis for finding a Sixth Amendment denial in a trial.[247]

The trial judge must not only refrain from creating a situation of ineffective assistance, but may well be obligated under certain circumstances to inquire whether defendant's counsel, because of a possible conflict of interest or otherwise, is rendering or may render ineffective assistance.[248] A much more difficult issue is presented when a defendant on appeal or in a collateral proceeding alleges that his counsel was incompetent or was not competent enough to provide effective assistance. While the Court touched on the question in 1970,[249] it was not until 1984, in *Strickland v.*

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[245] *E.g.*, Glasser v. United States, 315 U.S. 60 (1942) (trial court required defendant and codefendant to be represented by same appointed counsel despite divergent interests); Geders v. United States, 425 U.S. 80 (1976) (trial judge barred consultation between defendant and attorney overnight); Herring v. New York, 422 U.S. 853 (1975) (application of statute to bar defense counsel from making final summation).

[246] Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

[247] 446 U.S. at 342-45. *But see* Wainwright v. Torna, 455 U.S. 586 (1982) (summarily holding that defendant may not raise ineffective assistance claim in context of proceeding in which he had no constitutional right to counsel).

[248] Holloway v. Arkansas, 435 U.S. 475 (1978) (public defender representing three defendants alerted trial judge to possibility of conflicts of interest; judge should have appointed different counsel or made inquiry into possibility of conflicts); Cuyler v. Sullivan, 446 U.S. 335 (1980) (trial judge had no obligation to inquire into adequacy of multiple representation, with possible conflict of interest, in absence of raising of issue by defendant or counsel); Wood v. Georgia, 450 U.S. 261 (1981) (where counsel retained by defendants' employer had conflict between their interests and employer's, and all the facts were known to trial judge, he should have inquired further); Wheat v. United States, 486 U.S. 153 (1988) (district court correctly denied defendant's waiver of right to conflict-free representation; separate representation order is justified by likelihood of attorney's conflict of interest); Mickens v. Taylor, 122 S. Ct. 1237 (2002) (failure of judge who knew or should have known of an attorney's conflicting interest to inquire as to whether such conflict was prejudicial not grounds for automatic reversal).

[249] In McMann v. Richardson, 397 U.S. 759, 768–71 (1970), the Court observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on whether a court would retrospectively consider his advice right or wrong "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *See also* Tollett v. Henderson, 411 U.S. 258, 266–69 (1973); United States v. Agurs, 427 U.S. 97, 102 n.5 (1976).

*Washington*,[250] that the Court articulated a general test for ineffective assistance of counsel in criminal trials and in capital sentencing proceedings.[251]

There are two components to the test: deficient attorney performance and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question. Although the gauge of effective attorney performance is an objective standard of reasonableness, the Court concluded that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable," as are "reasonable" decisions making investigation unnecessary.[252] In order to establish prejudice resulting from attorney error, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[253]

In *Strickland*, neither part of the test was satisfied. The attorney's decision to forego character and psychological evidence in the capital sentencing proceeding in order to avoid evidence of the defendant's criminal history was deemed "the result of reasonable professional judgment," and prejudice could not be shown because "the overwhelming aggravating factors" outweighed whatever evidence of good character could have been presented.[254] In *Lockhart v. Fretwell,*[255] the Court refined the *Strickland* test to require that not only would a different trial result be probable because of attor-

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[250] 466 U.S. 668 (1984).

[251] *Strickland* involved capital sentencing, and the Court left open the issue of what standards might apply in ordinary sentencing, where there is generally far more discretion than in capital sentencing, or in the guilt/innocence phase of a capital trial. 466 U.S. at 686.

[252] 466 U.S. at 689-91. The obligation is to stay within the wide range of legitimate, lawful, professional conduct; there is no obligation to assist the defendant in presenting perjured testimony. Nix v. Whiteside, 475 U.S. 157 (1986). *See also* Georgia v. McCollum, 505 U.S. 42 (1992) (no right to carry out through counsel the racially discriminatory exclusion of jurors during voir dire). Also, "effective" assistance of counsel does not guarantee the accused a "meaningful relationship" of "rapport" with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. Morris v. Slappy, 461 U.S. 1 (1983). *See also* Jones v. Barnes, 463 U.S. 745 (1983) (no obligation to present on appeal all nonfrivolous issues requested by defendant; appointed counsel may exercise his professional judgement in determining which issues are best raised on appeal).

[253] 466 U.S. at 694.

[254] 466 U.S. at 699. *Accord*, Darden v. Wainwright, 477 U.S. 168 (1986) (decision not to introduce mitigating evidence). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court applied the Strickland test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.

[255] 506 U.S. 364 (1993).

ney performance, but that the trial result which did occur was fundamentally unfair or unreliable.[256]

However, the Court has since held that *Lockhart* was merely intended to prevent a defendant from benefitting from undeserved "windfalls" in the trial process,[257] and was not an invitation to courts to weigh and discount the prejudicial effect of a changed trial result.[258] Further, there are times when a court is required to presume prejudice, *i.e.* there can be "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[259] These situations include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution's case to meaningful adversarial testing.[260] However, "[a]part from circumstances of that magnitude ... there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice]."[261]

***Self-Representation***.—The Court has held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself.[262] It is a right the defendant must adopt knowingly and intelligently; under some circumstances the trial judge may deny the authority to exercise it, as when the defendant simply

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[256] 506 U.S. at 368-70 (failure of counsel to raise a constitutional claim that was valid at time of trial did not constitute "prejudice" because basis of claim had since been overruled).

[257] Williams v. Taylor, 529 U.S. 362, 391-93 (2000). *See, e.g.* Nix. v. Whiteside, 475 U.S. 157, 175-76 (1986)(a defendant cannot benefit from the fact that counsel's interference with his perjured testimony would have affected a trial's outcome.)

[258] *See, e.g.,* Glover v. United States, 531 U.S. 198 (2001) (6 to 21 month increase in prison term is sufficient "prejudice" under *Strickland* to raise issue of ineffective counsel).

[259] United States v. Cronic, 466 U.S. 648, 658 (1984).

[260] *But see* Bell v. Cone, 122 S. Ct. 1843 (2002) (failure to introduce mitigating evidence and waiver of closing argument in penalty phase of death penalty case was not failure to test prosecution's case, where mitigating evidence had been presented during guilt phase and where waiver of argument deprived skilled prosecutor an opportunity for rebuttal); Mickens v. Taylor, 122 S. Ct. 1237 (2002) (failure of judge who knew or should have known of an attorney's conflicting interest to inquire as to whether such conflict was prejudicial not grounds for automatic reversal).

[261] Also not constituting *per se* ineffective assistance is a defense counsel's failure to file a notice of appeal, or even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam).

[262] Faretta v. California, 422 U.S. 806 (1975). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. Id. at 834–35 n.46. Related to the right of self-representation is the right to testify in one's own defense. Rock v. Arkansas, 483 U.S. 44 (1987) (per se rule excluding all hypnotically refreshed testimony violates right).

lacks the competence to make a knowing or intelligent waiver of counsel or when his self-representation is so disruptive of orderly procedures that the judge may curtail it. The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction.[263]

The essential elements of self-representation were spelled out in *McKaskle v. Wiggins*,[264] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself."[265] But participation of standby counsel even in the jury's presence and over the defendant's objection does not violate the defendant's Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.[266]

**Right to Assistance of Counsel in Nontrial Situations**

***Judicial Proceedings Before Trial***.—Dicta in *Powell v. Alabama*[267] indicated that "during perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants ... [are] as much entitled to such aid [of counsel] during that period as at the trial itself." This language has gradually been expanded upon and the Court has developed a concept of "a critical stage in a criminal proceeding" as indicating when the defendant must be represented by counsel. Thus, in *Hamilton v. Alabama*,[268] the Court noted that arraignment under state law was a "critical stage" because the defense of insanity had to be pleaded then or lost, pleas in abatement had to be made then, and motions to quash on the ground of racial exclusion of grand jurors or that the grand jury was improperly drawn had to be made then. *White v. Maryland*[269] set aside a conviction obtained at a trial at which defendant's plea of guilty, entered at a preliminary hearing

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[263] Martinez v. Court of App. of Cal., Fourth App. Dist., 528 U.S. 152 (2000). The Sixth Amendment itself "does not include any right to appeal." 528 U.S. at 160.

[264] 465 U.S. 168 (1984).

[265] 465 U.S. at 178.

[266] 465 U.S. at 184.

[267] 287 U.S. 45, 57 (1932).

[268] 368 U.S. 52 (1961).

[269] 373 U.S. 59 (1963).

where he was without counsel, was introduced as evidence against him at trial. Finally in *Coleman v. Alabama*,[270] the Court denominated a preliminary hearing as a "critical stage" necessitating counsel even though the only functions of the hearing were to determine probable cause to warrant presenting the case to a grand jury and to fix bail; no defense was required to be presented at that point and nothing occurring at the hearing could be used against the defendant at trial. The Court hypothesized that a lawyer might by skilled examination and cross-examination expose weaknesses in the prosecution's case and thereby save the defendant from being bound over, and could in any event preserve for use in cross-examination at trial and impeachment purposes testimony he could elicit at the hearing; he could discover as much as possible of the prosecution's case against defendant for better trial preparation; and he could influence the court in such matters as bail and psychiatric examination. The result seems to be that reached in pre-*Gideon* cases in which a defendant was entitled to counsel if a lawyer might have made a difference.[271]

***Custodial Interrogation***.—At first, the Court followed the rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel that his subsequent trial was tainted.[272] It was held in *Spano v. New York*[273] that under the totality of circumstances a confession obtained in a post-indictment interrogation was involuntary, and four Justices wished to place the holding solely on the basis that post-indictment interrogation in the absence of defendant's lawyer was a denial of his right to assistance of counsel. That holding was made in *Massiah v. United States*,[274] in which federal officers caused an informer to elicit from the already-indicted defendant, who was represented by a lawyer, incriminating admis-

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[270] 399 U.S. 1 (1970). Justice Harlan concurred solely because he thought the precedents compelled him to do so, id. at 19, while Chief Justice Burger and Justice Stewart dissented. Id. at 21, 25. Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the factfinding process as the role of counsel at trial, *Coleman* was denied retroactive effect in Adams v. Illinois, 405 U.S. 278 (1972). Justice Blackmun joined Chief Justice Burger in pronouncing *Coleman* wrongly decided. Id. at 285, 286. *Hamilton* and *White*, however, were held to be retroactive in Arsenault v. Massachusetts, 393 U.S. 5 (1968).

[271] *Compare* Hudson v. North Carolina, 363 U.S. 697 (1960), *with* Chewning v. Cunningham, 368 U.S. 443 (1962), *and* Carnley v. Cochran, 369 U.S. 506 (1962).

[272] Crooker v. California, 357 U.S. 433 (1958) (five-to-four decision); Cicenia v. Lagay, 357 U.S. 504 (1958) (five-to-three).

[273] 360 U.S. 315 (1959).

[274] 377 U.S. 201 (1964). *See also* McLeod v. Ohio, 381 U.S. 356 (1965) (applying *Massiah* to the States, in a case not involving trickery but in which defendant was endeavoring to cooperate with the police). *But see* Hoffa v. United States, 385 U.S. 293 (1966). *Cf.* Milton v. Wainwright, 407 U.S. 371 (1972).

sions which were secretly overheard over a broadcasting unit. Then, in *Escobedo v. Illinois*,[275] the Court held that preindictment interrogation was a violation of the Sixth Amendment. But *Miranda v. Arizona*[276] switched from reliance on the Sixth Amendment to the Fifth Amendment's self-incrimination clause, although that case still placed great emphasis upon police warnings with regard to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.

*Massiah* was reaffirmed and in some respects expanded by the Court. Thus, in *Brewer v. Williams*,[277] the right to counsel was found violated when police elicited from defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on the defendant's known weakness. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to the attorney that defendant would not be questioned in his absence. *United States v. Henry*[278] held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that result would follow.

The Court has extended the *Edwards v. Arizona*[279] rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. Thus, the Court held in *Michigan v. Jackson*, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[280] The Court concluded that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been

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[275] 378 U.S. 478 (1964).

[276] 384 U.S. 436 (1966).

[277] 430 U.S. 387 (1977). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. Id. at 415, 429, 438. *Compare* Rhode Island v. Innis, 446 U.S. 291 (1980), decided on self-incrimination grounds under similar facts.

[278] 447 U.S. 264 (1980) Justices Blackmun, White, and Rehnquist dissented. Id. at 277, 289. *But cf.* Weatherford v. Bursey, 429 U.S. 545 (1977).

[279] 451 U.S. 477 (1981).

[280] 475 U.S. 625, 636 (1986).

formally charged with an offense than before."[281] The protection, however, is not as broad under the Sixth Amendment as it is under the Fifth. While *Edwards* has been extended to bar custodial questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested,[282] this extension does not apply for purposes of the Sixth Amendment right to counsel. The Sixth Amendment right is "offense-specific," and so also is "its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews."[283] Therefore, while a defendant who has invoked his Sixth Amendment right to counsel with respect to the offense for which he is being prosecuted may not waive that right, he may waive his *Miranda*-based right not to be interrogated about unrelated and uncharged offenses.[284]

The remedy for violation of the Sixth Amendment rule is exclusion from evidence of statements so obtained.[285] And, while the basis for the Sixth Amendment exclusionary rule—to protect the right to a fair trial—differs from that of the Fourth Amendment rule—to deter illegal police conduct—exceptions to the Fourth Amendment's exclusionary rule can apply as well to the Sixth. In *Nix v. Williams*,[286] the Court held the "inevitable discovery" exception applicable to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[287] Also, an exception to the Sixth Amendment ex-

[281] 475 U.S. at 631. If a prisoner does not ask for the assistance of counsel, however, and voluntarily waives his rights following a Miranda warning, these reasons disappear. Moreover, although the right to counsel is more difficult to waive at trial than before trial, "whatever standards suffice for *Miranda's* purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment questioning." Patterson v. Illinois, 487 U.S. 285, 298 (1988).

[282] Arizona v. Roberson, 486 U.S. 675 (1988).

[283] McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The reason why the right is "offense-specific" is that "it does not attach until a prosecution is commenced." Id.

[284] Rejecting an exception to the offense-specific limitation for crimes that are closely related factually to a charged offense, the Court instead borrowed the *Blockburger* test from double-jeopardy law: if the same transaction constitutes a violation of two separate statutory provisions, the test is "whether each provision requires proof of a fact which the other does not." Texas v. Cobb, 532 U.S. 162, 173 (2001) . This meant that the defendant, who had been charged with burglary, had a right to counsel on that charge, but not with respect to murders committed during the burglary.

[285] *See* Michigan v. Jackson, 475 U.S. 625 (1986).

[286] 467 U.S. 431 (1984).

[287] 467 U.S. at 446.

clusionary rule has been recognized for the purpose of impeaching the defendant's trial testimony.[288]

***Lineups and Other Identification Situations***.—The concept of the "critical stage" was again expanded and its rationale formulated in *United States v. Wade*,[289] which, with *Gilbert v. California*,[290] held that lineups are a critical stage and that in-court identification of defendants based on out-of-court lineups or showups without the presence of defendant's counsel is inadmissible. The Sixth Amendment guarantee, said Justice Brennan, was intended to do away with the common-law limitation of assistance of counsel to matters of law, excluding matters of fact. The abolition of the fact-law distinction took on new importance due to the changes in investigation and prosecution since adoption of the Sixth Amendment. "When the Bill of Rights was adopted there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'"[291]

"It is central to [the principle of *Powell v. Alabama*] that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[292] Counsel's presence at a lineup is constitutionally necessary because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which cannot adequately be discovered and remedied at trial.[293] However, because there was less certainty and

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[288] Michigan v. Harvey, 494 U.S. 344 (1990) (postarraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant's inconsistent trial testimony).

[289] 388 U.S. 218 (1967).

[290] 388 U.S. 263 (1967).

[291] United States v. Wade, 388 U.S. 218, 224–25 (1967) (citations omitted).

[292] 388 U.S. at 226 (citations omitted).

[293] 388 U.S. at 227-39. Previously, the manner of an extra-judicial identification affected only the weight, not the admissibility, of identification testimony at trial. Justices White, Harlan, and Stewart dissented, denying any objective need for the Court's per se rule and doubting its efficacy in any event. Id. at 250.

frequency of possible injustice at this stage, the Court held that the two cases were to be given prospective effect only; more egregious instances, where identification had been based upon lineups conducted in a manner that was unnecessarily suggestive and conducive to irreparable mistaken identification, could be invalidated under the due process clause.[294] The *Wade- Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.[295]

In *United States v. Ash*,[296] the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."[297] Therefore, unless the pretrial stage involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Since the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, and therefore there was no trial-like confrontation, and since the possibilities of

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[294] Stovall v. Denno, 388 U.S. 293 (1967).

[295] Gilbert v. California, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).

[296] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id. at 326.

[297] 413 U.S. at 309-10, 312-13. Justice Stewart, concurring on other grounds, rejected this analysis, id. at 321, as did the three dissenters. Id. at 326, 338–344. "The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of the trial itself.'" Id. at 339 (Justice Brennan dissenting). Examination of defendant by a court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. Estelle v. Smith, 451 U.S. 454, 469–71 (1981). Constructive notice is insufficient to alert counsel to a psychiatric examination to assess future dangerousness of an indicted client. Satterwhite v. Texas, 486 U.S. 249 (1987) (also subjecting *Estelle v. Smith* violations to harmless error analysis in capital cases).

abuse in a photographic display are discoverable and reconstructable at trial by examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.[298]

Both Wade and Gilbert had already been indicted and counsel had been appointed to represent them when their lineups were conducted, a fact noted in the opinions and in subsequent ones,[299] but the cases in which the rulings were denied retroactive application involved preindictment lineups.[300] Nevertheless, in *Kirby v. Illinois*[301] the Court held that no right to counsel existed with respect to lineups that precede some formal act of charging a suspect. The Sixth Amendment does not become operative, explained Justice Stewart's plurality opinion, until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearings, indictment, information, or arraignment. . . . The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[302] The Court's distinguishing of the underlying basis for *Miranda v. Arizona*[303] left that case basically unaffected by *Kirby*, but it appears

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[298] 413 U.S. at 317-21. The due process standards are discussed under the Fourteenth Amendment, "Criminal Identification Process," infra.

[299] United States v. Wade, 388 U.S. 218, 219, 237 (1967); Gilbert v. California, 388 U.S. 263, 269, 272 (1967); Simmons v. United States, 390 U.S. 377, 382–83 (1968).

[300] Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

[301] 406 U.S. 682, 689 (1972).

[302] 406 U.S. at 689-90. Justices Brennan, Douglas, and Marshall, dissenting, argued that it had never previously been doubted that *Wade* and *Gilbert* applied in preindictment lineup situations and that in any event the rationale of the rule was no different whatever the formal status of the case. Id. at 691. Justice White, a dissenter in *Wade* and *Gilbert*, dissented simply on the basis that those two cases controlled this one. Id. at 705. Indictment, as the quotation from *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (suspect had been seized pursuant to an arrest warrant, arraigned, and committed by court). United States v. Gouveia, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment—there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes).

[303] "[T]he *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory

that *Escobedo v. Illinois*,[304] and perhaps other cases, are greatly restricted thereby.

***Post-Conviction Proceedings***.—Counsel is required at the sentencing stage,[305] and the Court has held that where sentencing was deferred after conviction and the defendant was placed on probation, he must be afforded counsel at a hearing on revocation of probation and imposition of the deferred sentence.[306] Beyond this stage, however, it would appear that the issue of counsel at hearings on the granting of parole or probation, the revocation of parole which has been imposed following sentencing, and prison disciplinary hearings will be determined according to due process and equal protection standards rather than by further expansion of the Sixth Amendment.[307]

***Noncriminal and Investigatory Proceedings***.—Commitment proceedings which lead to the imposition of essentially criminal punishment are subject to the due process clause and require the assistance of counsel.[308] A state administrative investigation by a fire marshal inquiring into the causes of a fire was held not to be a criminal proceeding and hence, despite the fact that the petitioners had been committed to jail for noncooperation, not the type of hearing at which counsel was requisite.[309] Another decision refused to extend the right to counsel to investigative proceedings antedating a criminal prosecution, and sustained the contempt conviction of private detectives who refused to testify before a judge authorized to conduct a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding, and who based their refusal on the ground that their counsel were required to remain outside the hearing room.[310]

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that custodial *interrogation* is inherently coercive." 406 U.S. at 688 (emphasis by Court).

[304] "But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination. . . .' *Johnson v. New Jersey*, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, Johnson v. New Jersey, supra, at 733–34, and those facts are not remotely akin to the facts of the case before us." 406 U.S. at 689. *But see* id. at 693 n.3 (Justice Brennan dissenting).

[305] Townsend v. Burke, 334 U.S. 736 (1948).

[306] Mempa v. Rhay, 389 U.S. 128 (1967) (applied retroactively in McConnell v. Rhay, 393 U.S. 2 (1968)).

[307] Counsel is not a guaranteed right in prison disciplinary proceedings. Wolff v. McDonnell, 418 U.S. 539, 560–70 (1974); Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976). *See generally* "Rights of Prisoners" under the Fourteenth Amendment.

[308] Specht v. Patterson, 386 U.S. 605 (1967).

[309] In re Groban, 352 U.S. 330 (1957). Four Justices dissented.

[310] Anonymous v. Baker, 360 U.S. 287 (1959). Four Justices dissented.

# SEVENTH AMENDMENT

## CIVIL TRIALS

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# CIVIL TRIALS

## SEVENTH AMENDMENT

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.

### TRIAL BY JURY IN CIVIL CASES

#### The Right and the Characteristics of the Civil Jury

***History***.—On September 12, 1787, as the Convention was in its final stages, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." The comment elicited some support and the further observation that because of the diversity of practice in civil trials in the States it would be impossible to draft a suitable provision.[1] When on September 15 it was moved that a clause be inserted in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases," this objection seems to have been the only one urged in opposition and the motion was defeated.[2] The omission, however, was cited by many opponents of ratification and "was pressed with an urgency and zeal . . . well-nigh preventing its ratification."[3] A guarantee of right to jury in civil cases was one of the amendments urged on Congress by the ratifying conventions[4] and it was included from the first among Madison's proposals to the House.[5] It does not appear that the text

[1] 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (rev. ed. 1937).

[2] Id. at 628.

[3] J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1757 (1833). "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." Id. at 1762.

[4] J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836) (New Hampshire); 2 id. at 399–414 (New York); 3 id. at 658 (Virginia).

[5] 1 ANNALS OF CONGRESS 436 (1789). "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."

of the proposed amendment or its meaning was debated during its passage.[6]

***Composition and Functions of Civil Jury***.—Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[7] The right was to "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[8] Decision of the jury must be by unanimous verdict.[9] In *Colgrove v. Battin*,[10] however, the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[11]

The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate

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[6] It is simply noted in 1 ANNALS OF CONGRESS 760 (1789), that on August 18 the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved." On September 7, the SENATE JOURNAL states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150 (1971).

[7] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1913); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830).

[8] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

[9] Maxwell v. Dow, 176 U.S. 581 (1900); American Publishing Co. v. Fisher, 166 U.S. 464 (1897); Springville v. Thomas, 166 U.S. 707 (1897).

[10] 413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id. at 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id. at 165, 188.

[11] Id. at 155–56. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals . . ." Id. at 160 n.16. Application of similar reasoning has led the Court to uphold elimination of the unanimity as well as the 12-person requirement for criminal trials. *See* Williams v. Florida, 399 U.S. 78 (1970) (jury size); Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimity); and Sixth Amendment discussion supra "The Attributes of the Jury."

instructions by the court."[12] But it "does not exact the retention of old forms of procedure" nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence.[13] Those matters which were tried by a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried by the judge in England in 1791 are to be so tried today,[14] and when new rights and remedies are created "the right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.[15]

***Courts in Which the Guarantee Applies***.—The Amendment governs only courts which sit under the authority of the United States,[16] including courts in the territories[17] and the District of Columbia,[18] and does not apply generally to state courts.[19] But when a state court is enforcing a federally created right, of which the right to trial by jury is a substantial part, the States may not eliminate trial by jury as to one or more elements.[20] Ordinarily, a federal court enforcing a state-created right will follow its own rules with regard to the allocation of functions between judge and jury, a rule the Court based on the "interests" of the federal court system, eschewing reliance on the Seventh Amendment but noting its influence.[21] Where the "interests" of the state and federal sys-

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[12] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931); Dimick v. Schiedt, 293 U.S. 474, 476, 485–86 (1935).

[13] Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); Ex parte Peterson, 253 U.S. 300, 309 (1920).

[14] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377–78 (1913); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). *But see* Ross v. Bernhard, 396 U.S. 531 (1970), which may foreshadow a new analysis.

[15] Luria v. United States, 231 U.S. 9, 27–28 (1913).

[16] Pearson v. Yewdall, 95 U.S. 294, 296 (1877); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874); The Justices v. Murray, 76 U.S. (9 Wall.) 274, 277 (1870); Walker v. Sauvinet, 92 U.S. 90 (1876); St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419 (1916).

[17] Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851); Kennon v. Gilmer, 131 U.S. 22, 28 (1889).

[18] Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

[19] Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916). *See also* Melancon v. McKeithen, 345 F. Supp. 105 (E.D.La.) (three-judge court), *aff'd. per curiam*, 409 U.S. 943 (1972); Alexander v. Virginia, 413 U.S. 836 (1973).

[20] Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952). Four dissenters contended that the ruling was contrary to the unanimous decision in *Bombolis*.

[21] Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (citing Herron v. Southern Pacific Co., 283 U.S. 91 (1931)).

tems can be reconciled, however, a court should endeavor to implement the rules of the state courts.[22]

***Waiver of the Right***.—Parties may enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for waiver.[23] Prior to adoption of the Federal Rules, Congress had, "by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing."[24] Under the Federal Rules of Civil Procedure, any party may make a timely demand for a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, and failure so to serve a demand constitutes a waiver of the right.[25] However, a waiver is not to be implied from a request for a directed verdict.[26]

**Application of the Amendment**

***Cases "at Common Law"***.—The coverage of the Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[27] The term "common law" was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing of the Amendment and equitable remedies were administered.[28] Illus-

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[22] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). In *Gasperini*, the Court examined whether New York state law, which required that state trial courts and courts of appeals review jury awards to determine if they "deviate materially from reasonable compensation," should be applied by federal courts exercising diversity jurisdiction. The Court, in what has been characterized as a "state-friendly" decision, *Leading Cases*, 110 HARV. L. REV. 266 (1996), found that absent inconsistent federal interests, the state standard of review should be applied by the federal courts. The Court held that a district court could apply such a standard consistent with Seventh Amendment precepts, but that the court of appeals could only review an award under an "abuse of discretion" standard. 518 U.S. at 434–35.

[23] Henderson's Distilled Spirits, 81 U.S. (14 Wall.) 44, 53 (1872); Rogers v. United States, 141 U.S. 548, 554 (1891); Parsons v. Armor, 28 U.S. (3 Pet.) 413 (1830); Campbell v. Boyreau, 62 U.S. (21 How.) 223 (1859).

[24] Baylis v. Travellers' Ins. Co., 113 U.S. 316, 321 (1885). The provision did not preclude other kinds of waivers, Duignan v. United States, 274 U.S. 195, 198 (1927), though every reasonable presumption was indulged against a waiver. Hodges v. Easton, 106 U.S. 408, 412 (1883).

[25] FED. R. CIV. P. 38.

[26] Aetna Life Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Fed. R. Civ. P. 50(a).

[27] Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

[28] Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 447 (1930); Barton v. Barbour, 104 U.S. 126, 133 (1881). Formerly, it did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325 (1886); Pease

trative of the Court's course of decision on this subject are two unanimous decisions holding that civil juries were required, one in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent, the other in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents "require[ed] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty."[29] The statutory cause of action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had argued that the Amendment was inapplicable to new causes of action created by congressional action, but the Court disagreed. "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[30]

Omission of provision for a jury has been upheld in a number of other cases on the ground that the suit in question was not a suit at common law within the meaning of the Amendment, or that the issues raised were not peculiarly legal in their nature.[31] Where

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v. Rathbun-Jones Eng. Co., 243 U.S. 273, 279 (1917). *But see* Dairy Queen v. Wood, 369 U.S. 469 (1962) (legal claims must be tried before equitable ones).

[29] Pernell v. Southall Realty, 416 U.S. 363 (1974).

[30] Curtis v. Loether, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id. at 195. *See also* Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. International Bhd. of Electrical Workers Local 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim). Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analogue at common law, even though the relief sought is not actual damages but statutory damages based on what is "just)."

[31] Among such actions or issues were, *e.g.*, (1) enforcement of claims against the United States, McElrath v. United States, 102 U.S. 426, 440 (1880); *see also* Galloway v. United States, 319 U.S. 372, 388 (1943); (2) suit under a territorial statute authorizing a special nonjury tribunal to hear claims against a municipality having no legal obligation but based on moral obligation only, Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528, 534 (1899); *see also* United States v. Realty Co., 163 U.S. 427, 439 (1896); New Orleans v. Clark, 95 U.S. 644, 653 (1877); (3) cancellation of a naturalization certificate for fraud, Luria v. United States, 231 U.S. 9, 27 (1913); (4) reversal of an order to deport an alien, Gee Wah Lee v. United States, 25 F.2d 107 (5th Cir. 1928), cert. denied, 277 U.S. 608 (1928); (5) damages for patent infringement, Filer & Stowell Co. v. Diamond Iron Works, 270 F. 489 (2d Cir. 1921), cert. denied, 256 U.S 691 (1921); (6) reversal of an award under the Longshoremen's and Harbor Workers' Compensation Act, Crowell v. Benson, 285 U.S. 22, 45 (1932); (7)

there is no direct historical antecedent dating to the adoption of the amendment, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries.[32]

The amendment does not apply to cases in admiralty and maritime jurisdiction, in which the trial is by a court without a jury,[33] nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an order of an administrative body.[34] Thus, when Congress committed to administrative determination the finding of a violation of the Occupational Safety and Health Act with a discretion to fix a fine for a violation, the charged party being able to obtain judicial review of the administrative proceeding in a federal court of appeal and the fine being collectible in a suit in federal court, the argument that the absence of a jury trial in the process for a charged party violated the Seventh Amendment was unanimously rejected. "At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[35]

On the other hand, if Congress assigns such cases to Article III courts, a jury may be required. In *Tull v. United States*,[36] the Court ruled that the Amendment requires trial by jury in civil actions to determine liability for civil penalties under the Clean Water Act, but not to assess the amount of penalty. The penal nature of the Clean Water Act's civil penalty remedy distinguishes it from restitution-based remedies available in equity courts, and

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reversal of a decision of customs appraisers on the value of imports, Auffmordt v. Hedden, 137 U.S. 310, 329 (1890); (8) a summary disposition by referee in bankruptcy of issues regarding voidable preferences as asserted and proved by the trustee, Katchen v. Landy, 382 U.S. 323 (1966); and (9) a determination by a judge in calculating just compensation in a federal eminent domain proceeding of the issue as to whether the condemned lands were originally within the scope of the government's project or were adjacent lands later added to the plan, United States v. Reynolds, 397 U.S. 14 (1970).

[32] Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (interpretation and construction of terms underlying patent claims may be reserved entirely for the court).

[33] Parsons v. Bedford, 28 U.S. (3 Pet.) 443 (1830); Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). *But see* Fitzgerald v. United States Lines, 374 U.S. 16 (1963).

[34] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). *See also* ICC v. Brimson, 154 U.S. 447, 488 (1894); Yakus v. United States, 321 U.S. 414, 447 (1944).

[35] Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 450 (1977).

[36] 481 U.S. 412 (1987).

therefore makes it a remedy of the type that could be imposed only by courts of law.[37] On the other hand, a jury need not invariably determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

More recently still, the Court relied on a broadened concept of "public rights" to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. In *Granfinanciera, S.A. v. Nordberg*,[38] the Court declared that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.[39] As a general matter, "public rights" involve "'the relationship between the Government and persons subject to its authority,'" while "private rights" relate to "'the liability of one individual to another.'"[40] While finding room for "some debate," the Court determined that a bankruptcy trustee's right to recover for a fraudulent conveyance "is more accurately characterized as a private rather than a public right," at least

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[37] The statute itself specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.

[38] 492 U.S. 33, 51–52 (1989).

[39] "[I]f a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.' And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." Id. at 53–54 (citation omitted).

[40] Id. at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)). The Court qualified certain statements in *Atlas Roofing* and in the process refined its definition of "public rights." There are some "public rights" cases, the Court explained, in which "the Federal Government is not a party in its sovereign capacity," but which involve "statutory rights that are integral parts of a public regulatory scheme." It is in cases of this nature that Congress may "dispense with juries as factfinders through its choice of an adjudicative forum." This does not mean, however, that Congress may assign "at least the initial factfinding in *all* cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts." 492 U.S. at 55 n.10 (emphasis added).

when the defendant had not submitted a claim against the bankruptcy estate.[41]

***The Continuing Law-Equity Distinction***.—The use of the term "common law" in the Amendment as indicating those cases in which the right to jury trial was to be preserved reflected, of course, the division of the English and United States legal systems into separate law and equity jurisdictions, in which actions cognizable in courts of law generally were triable to a jury while in equity there was no right to a jury. In the federal court system there were unitary courts having jurisdiction in both law and equity, but distinct law and equity procedures, including the use or nonuse of the jury. Adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure. Legal and equitable claims which previously had to be brought as separate causes of action on different "sides" of the court could now be joined in a single action, and in some instances, such as compulsory counterclaims, had to be joined in one action.[42] But the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty.[43]

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[41] Id. at 55. On the other hand, a creditor who does submit a claim against the bankruptcy estate subjects himself to the bankruptcy court's equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. Langenkamp v. Culp, 498 U.S. 42 (1990).

[42] 5 J. MOORE, FEDERAL PRACTICE §§ 38.01–38.05 (2d ed. 1971).

[43] Under the old equity rules it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Hipp v. Babin, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. Scott v. Neely, 140 U.S. 106, 109 (1891); Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850); Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884); Buzard v. Houston, 119 U.S. 347, 351 (1886). Where an action at law evoked an equitable counterclaim the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, *res judicata* and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity where the remedy was complete at law served to guard the right of trial by jury and were liberally construed. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932).

Nor was the distinction between law and equity to be obliterated by state legislation. Thompson v. Railroad Companies, 73 U.S. (6 Wall.) 134 (1868). So, where state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. Ascertainment of plaintiff's demand being properly by action at law, however, the fact that the equity court had power to summon a jury on occasion did not afford an

This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*,[44] the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[45] Then in *Dairy Queen v. Wood*,[46] in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before

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equivalent of the right of trial by jury secured by the Seventh Amendment. Whitehead v. Shattuck, 138 U.S. 146 (1891); Buzard v. Houston, 119 U.S. 347 (1886); Greeley v. Lowe, 155 U.S. 58, 75 (1894). But where state law gave an equitable remedy, such as to quiet title to land, the federal courts enforced it, if it did not obstruct the rights of the parties as to trial by jury. Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839); Holland v. Challen, 110 U.S. 15 (1884); Reynolds v. Crawfordsville Bank, 112 U.S. 405 (1884); Chapman v. Brewer, 114 U.S. 158 (1885); Cummings v. National Bank, 101 U.S. 153, 157 (1879); United States v. Landram, 118 U.S. 81 (1886); More v. Steinbach, 127 U.S. 70 (1888). *Cf.* Ex parte Simons, 247 U.S. 321 (1918).

By the inclusion in the Law and Equity Act of 1915 of § 274(b) of the Judicial Code, 38 Stat. 956, the transfer of cases to the other side of the court was made possible. The new procedure permitted legal questions arising in an equity action to be determined therein without sending the case to the law side. This section also permitted equitable defenses to be interposed in an action at law. The same order was preserved as under the system of separate courts. The equitable issues were disposed of first, and if a legal issue remained, it was triable by a jury. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935). *See also* Liberty Oil Co. v. Condon Bank, 260 U.S. 235 (1922). There was no provision for legal counterclaims in an equitable action, for the reason that Equity Rule 30, requiring the answer to a bill in equity to state any counterclaim arising out of the same transaction, was not intended to change the line between law and equity and was construed as referring to equitable counterclaims only. American Mills Co. v. American Surety Co., 260 U.S. 360, 364 (1922); Stamey v. United States, 37 F.2d 188 (W.D. Wash. 1929). Equitable jurisdiction existing at the time of the filing of the bill was not disturbed by the subsequent availability of legal remedies, and the scheduling was discretionary. American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937).

[44] 359 U.S. 500 (1959).

[45] Id. at 510–11.

[46] 369 U.S. 469 (1962).

a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished.[47]

In *Ross v. Bernhard*,[48] the Court further held that the right to a jury trial depends on the nature of the issue to be tried rather than the procedural framework in which it is raised. The case involved a stockholder derivative action,[49] which has always been considered to be a suit in equity. The Court agreed that the action was equitable but asserted that it involved two separable claims. The first, the stockholder's standing to sue for a corporation, is an equitable issue; the second, the corporation's claim asserted by the stockholder, may be either equitable or legal. Because the 1938 merger of law and equity in the federal courts eliminated any procedural obstacles to transferring jurisdiction to the law side once the equitable issue of standing was decided, the Court continued, if the corporation's claim being asserted by the stockholder was legal in nature, it should be heard on the law side and before a jury.[50] Whether this analysis will be followed in other areas so that the right to a jury trial extends to all legal issues in actions formerly within equity's concurrent jurisdiction is a question now open.[51]

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[47] If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

[48] 396 U.S. 531 (1970).

[49] The stockholders' derivative action is a creation of equity made necessary by the traditional concept of "the corporate entity" or the "concept of separate personality." That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. But if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them and the common law courts would not allow the shareholders to bring an action running to the "separate personality" of the corporation; equity thus permitted a derivative action in which the shareholder is permitted to set in motion the adjudication of a cause of action belonging to the corporation. Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

[50] Justices Stewart and Harlan and Chief Justice Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the Rules simply preserved the right as it had existed, and that it was error to think that the two could somehow "magically interact" to enlarge the right in a way that neither did alone. Ross v. Bernhard, 396 U.S. 531, 543 (1970).

[51] Among the possibilities in which a legal right was enforceable in equity in the absence of an adequate remedy at law are suits to compel specific performance of a contract, suits for cancellation of a contract, and suits to enjoin tortious action. On Ross' implications, *see* J. MOORE, FEDERAL PRACTICE §§ 38.11[8.-8], 38.11[9] (2d ed. 1971).

***Procedures Limiting Jury's Role***.—As was noted above, the primary purpose of the Amendment was to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which did not transgress this line. Elucidating this formula, the Court has achieved the following results: it is constitutional for a federal judge, in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury,[52] to call the jury's attention to parts of the evidence he deems of special importance,[53] being careful to distinguish between matters of law and matters of opinion in relation thereto,[54] to inform the jury when there is not sufficient evidence to justify a verdict, that such is the case,[55] to require a jury to answer specific interrogatories in addition to rendering a general verdict,[56] to direct the jury, after the plaintiff's case is all in, to return a verdict for the defendant on the ground of the insufficiency of the evidence,[57] to set aside a verdict which in his opinion is against the law or the evidence, and order a new trial,[58] to refuse defendant a new trial on the condition, accepted by plaintiff, that the latter remit a portion of the damages awarded him,[59] but not, on the other hand, to deny plaintiff a new trial on the converse condition, although defendant accepted it.[60] Nor can a Court of Appeals reverse the jury's finding on the issue of reasonableness of petitioner's conduct, in an indemnity action for damages respondent had paid petitioner's employee, on the ground that as a matter of law petitioner had not acted reasonably; "[u]nder the Seventh Amendment, that issue should have been left to the jury's determination."[61]

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[52] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886); United States v. Philadelphia & Reading R.R., 123 U.S. 113, 114 (1887).

[53] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545 (1886) (citing Carver v. Jackson, 29 U.S. (4 Pet.) 1, 80 (1830); Magniac v. Thompson, 32 U.S. (7 Pet.) 348, 390 (1833); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 131 (1852); Transportation Line v. Hope, 95 U.S. 297, 302 (1877)).

[54] Games v. Dunn, 39 U.S. (14 Pet.) 322, 327 (1840).

[55] Sparf and Hansen v. United States, 156 U.S. 51, 99–100 (1895); Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 121 (1875); Randall v. Baltimore & Ohio R.R., 109 U.S. 478, 482 (1883); Meehan v. Valentine, 145 U.S. 611, 625 (1892); Coughran v. Bigelow, 164 U.S. 301 (1896).

[56] Walker v. New Mexico So. Pac. R.R., 165 U.S. 593, 598 (1897).

[57] Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U.S. 674 (1895); Randall v. Baltimore & Ohio R.R., 109 U.S. 478, 482 (1883), and cases cited therein.

[58] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1889).

[59] Arkansas Cattle Co. v. Mann, 130 U.S. 69, 74 (1889).

[60] Dimick v. Schiedt, 293 U.S. 474, 476–78 (1935).

[61] International Terminal Operating Co. v. N. V. Nederl. Amerik Stoomv, Maats., 393 U.S. 74, 75 (1968). *But see* Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967), where the Court held that the Seventh Amendment does not bar an appellate court from granting a judgment *n. o. v.* insofar as "there is no greater restriction on the province of the jury when an appellate court enters judg-

***Directed Verdicts***.—In 1913 the Court in *Slocum v. New York Life Ins. Co.*,[62] held that a federal appeals court lacked authority to order the entry of a judgment contrary to the verdict in a case in which the federal trial court should have directed a verdict for one party, but the jury had found for the other party contrary to the evidence; the only course open to either court was to order a new trial. While plainly in accordance with the common law as it stood in 1791, the five-to-four decision was subjected to a heavy fire of professional criticism based on convenience and urging recognition of capacity for growth in the common law.[63] *Slocum* was then impaired, if not completely undermined, by subsequent holdings.[64]

In the first of these cases, the Court held that a trial court had the right to enter a judgment for the plaintiff on the verdict of the jury after having reserved decision on a motion by the defendant for dismissal on the ground of insufficient evidence.[65] The Court distinguished *Slocum* while noting that its ruling qualified some of its assertions in *Slocum*.[66] In the second case[67] the Court sustained a United States district court in rejecting the defendant's motion for dismissal and in peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas procedure in the diversity action, had acted consistently with the Federal Conformity Act.[68] In the third case,[69] which involved

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ment *n. o. v.* than when a trial court does." Id. at 322. A federal appellate court may also review a district court's denial of a motion to set aside an award as excessive under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) (New York State law which requires a review of jury awards to determine if they "deviate materially from reasonable compensation" may be adopted by federal district, but not appellate, court exercising diversity jurisdiction).

[62] 228 U.S. 364 (1913).

[63] F. JAMES, CIVIL PROCEDURE 332–33 & n.8 (1965).

[64] *But see* Hetzel v. Prince William County, 523 U.S. 208 (1998) (when an appeals court affirms liability but orders the level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award or to have a new trial).

[65] Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

[66] Id. at 661. The Court's opinions in both *Redman* and *Slocum* were authored by Justice Van Devanter.

[67] Lyon v. Mutual Benefit Ass'n, 305 U.S. 484 (1939).

[68] Ch. 255, § 5, 17 Stat. 197 (1872), now superseded by the Federal Rules of Civil Procedure.

[69] Galloway v. United States, 319 U.S. 372, 389 (1943), wherein the Court said "the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure," citing Berry v. United States, 312 U.S. 450 (1941). In the latter case the Court remarked that the new rule has given "district judges, under certain circumstances, . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of facts—a jury being the constitutional tribunal provided for trying facts in courts of law." Id. at 452–53.

an action against the Government for benefits under a war risk insurance policy which had been allowed to lapse, the trial court directed a verdict for the Government on the ground of the insufficiency of the evidence, and was sustained in so doing by both the appeals court and the Supreme Court. Three Justices, speaking by Justice Black, dissented in an opinion in which it is asserted that "today's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."[70] That the Court should experience occasional difficulty in harmonizing the idea of preserving the historic common law covering the relations of judge and jury with the notion of a developing common law is not surprising.[71]

***Jury Trial Under the Federal Employers' Liability Act.***— One aspect of the problem of delineating the respective provinces of judge and jury divided the Justices for a lengthy period but now appears quiescent—cases arising under the Federal Employers' Liability Act. The argument was frequently couched by the majority in terms of protecting the function of the jury from usurpation by judges intent on subverting and limiting remedial legislation enacted by Congress,[72] and by the minority in terms of the costs to the Supreme Court in time and effort spent in evaluating the quantum of evidence necessary to create a jury question.[73]

Although the considerations present in the FELA cases were not inherently different from those in any civil case where the direction of a verdict or a decision of an issue by the court may raise *sub silentio* the issue whether the Seventh Amendment right to a

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[70] 319 U.S. 372, 397. The case, being a claim against the United States, need not have been tried by a jury except for the allowance of Congress.

[71] *See, e.g.*, Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967), interpreting Rules 50(b), 50(c)(2) and 50(d) of the Federal Rules of Civil Procedure, as well as the Seventh Amendment.

[72] *E.g.*, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), in which Justice Black's opinion of the Court initiated the line of cases here considered; Bailey v. Central Vermont Ry., 319 U.S. 350 (1943); Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944). *See* Rogers v. Missouri Pacific R.R., 352 U.S. 500, 507–510 (1957). Trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. Bailey v. Central Vermont Ry., 319 U.S. at 354. "The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment." Harris v. Pennsylvania R.R., 361 U.S. 15, 17 (1959) (Justice Douglas concurring). "[T]his Court is vigilant to exercise its power of review . . . to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." Rogers v. Missouri Pacific R.R., 352 U.S. at 509.

[73] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting), contains a lengthy review and critique of the Court's practice.

jury trial has been impaired by court usurpation of the jury function, cases under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery, involved peculiarly difficult decisions as to the adequacy of proof of negligence. "Special and important reasons for the grant of certiorari in these cases are certainly present," the Court wrote in a leading case, "when lower federal and state courts persistently deprive litigants of their right to a jury determination."[74] The operating test was: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on ground of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." Similar issues have arisen under such statutes as the Jones Act[75] and the Safety Appliance Act.[76]

"Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."[77] A persistent dissent in the line of cases expressed the fear that in FELA cases "anything that a jury says goes, with the consequences that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. . . . If so, . . . the time has come when the Court should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases."[78]

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[74] Rogers v. Missouri Pacific R.R., 352 U.S. 500, 510 (1957).

[75] Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960). *See also* Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957); A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962).

[76] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 525 n.2 (1957) (Justice Frankfurter dissenting).

[77] Rogers v. Missouri Pacific R.R., 352 U.S. at 507. The cases are collected id. at 510 n.26. The cases are tabulated and categorized in Wilkerson v. McCarthy, 336 U.S. 53, 68–73 (1949) (Justice Douglas concurring), and Harris v. Pennsylvania R.R., 361 U.S. 15, 16–25 (1959). *See also* Harrison v. Missouri Pac. R.R., 372 U.S. 248 (1963); Basham v. Pennsylvania R.R., 372 U.S. 699 (1963).

[78] Harris v. Pennsylvania R.R., 361 U.S. 15, 27–28 (1959) (Justice Harlan dissenting). *See also* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Dick v. New York Life Ins. Co., 359 U.S. 437, 447 (1959) (Justice Frankfurter dissenting).

**Appeals From State Courts to the Supreme Court**

The clause of the Amendment prohibiting the re-examination of any fact found by a jury is not restricted in its application to suits at common law tried before juries in courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court on appeal.[79] Note, however, that the Court has frequently indicated that in cases involving a claim of a denial of constitutional rights it is free to examine and review the evidence upon which lower court conclusions are based, a position that under some circumstances could conflict with the principle of jury autonomy.[80]

[79] The Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 242–46 (1897).

[80] *See* Time, Inc. v. Pape, 401 U.S. 279, 284–92 (1971), and cases cited therein.

# EIGHTH AMENDMENT

## FURTHER GUARANTEES IN CRIMINAL CASES

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## FURTHER GUARANTEES IN CRIMINAL CASES

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### EIGHTH AMENDMENT

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

#### EXCESSIVE BAIL

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. '. . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." [1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept." [2] These two contrasting views of the "excessive bail" provision, uttered by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment. [3]

The history of the bail controversy in England is crucial to understanding why the ambiguity exists. [4] The Statute of Westminster the First of 1275 [5] set forth a detailed enumeration of those offenses which were bailable and those which were not, and,

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[1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that in Bell v. Wolfish, 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." Id. at 556.

[3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 ANNALS OF CONGRESS 754 (1789).

[4] Still the best and most comprehensive treatment is Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965–89 (1965), *reprinted in* C. FOOTE, STUDIES ON BAIL 181, 187–211 (1966).

[5] 3 Edw. 1, ch. 12.

though supplemented by later statutes, it served for something like five-and-a-half centuries as the basic authority.[6] *Darnel's Case*,[7] in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628.[8] The Petition cited Magna Carta as proscribing the kind of detention that was permitted in *Darnel's Case*. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for *habeas corpus* could not be presented,[9] and Parliament reacted by enacting the Habeas Corpus Act of 1679,[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high it could not be met, and Parliament responded by including in the Bill of Rights of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,[13] and was introduced verbatim by Madison in the House of Representatives.[14]

Thus, in England the right to bail generally was conferred by the basic 1275 statute, as supplemented, the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679, and protection against abridgement through the fixing of an excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected *habeas corpus* in Article 1, § 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought to curtail excessive bail without guaranteeing a right

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[6] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233–43 (1833). The statute is summarized at pp. 234–35.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by Darnel's Case, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on *habeas corpus* to effectuation of the right to bail. Id. at 69.

[9] Jenkes' Case, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, ch. 2. The text is in 2 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 327–340 (Z. Chafee ed., 1951).

[11] I W. & M. 2, ch. 2, clause 10.

[12] 7 F. Thorpe, *The Federal and State Constitutions*, H. R. DOC. NO. 357, 59TH CONG., 2D SESS. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 658 (2d ed. 1836).

[14] 1 ANNALS OF CONGRESS 438 (1789).

to bail, or whether the phrase "excessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States which had its origin in a provision of the Massachusetts Body of Liberties of 1641,[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789,[18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

Long unresolved was the issue of whether "preventive detention"—the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community—is constitutionally permissible. Not until 1984 did Congress authorize preventive detention in federal criminal proceedings.[19]

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[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Reprinted in* I DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 79, 82 (Z. Chafee ed., 1951).

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, *The Federal and State Constitutions*, H. DOC. NO. 357, 59TH Congress, 2d Sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. Id. at 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1787), *reprinted in* 1 Stat. 50 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein...." 1 Stat. 91 § 33 (1789).

[19] Congress first provided for pretrial detention without bail of certain persons and certain classes of persons in the District of Columbia. D.C. Code, §§ 23–1321 et seq., held constitutional in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982). The law applies only to persons charged with violating statutes applicable exclusively in the District of Columbia, United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1978), while in other federal courts, the Bail Reform Act of 1966, as amended, applies. 80 Stat. 214, 18 U.S.C. §§ 3141–56. Amendments contained in the Bail Reform Act of 1984 added general preventive detention authority. *See* 18 U.S.C. § 3142(d) and (e). Those amendments authorized pretrial detention for persons charged with

The Court first tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.[20] Then, in *United States v. Salerno*,[21] the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[22] Instead, "the only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[23] Detention pending trial of "arrestees 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" satisfies this requirement.[24]

Bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[25] If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[26] To challenge bail as excessive, one must move for a reduction, and if that motion is denied appeal to the Court of Appeals, and if unsuccessful then to the Supreme Court Justice sitting for that circuit.[27] The Amendment is apparently inapplicable to postconviction release

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certain serious crimes (e.g., crimes of violence, capital crimes, and crimes punishable by 10 or more years' imprisonment) if the court or magistrate finds that no conditions will reasonably assure both the appearance of the person and the safety of others. Detention can also be ordered in other cases where there is a serious risk that the person will flee or that the person will attempt to obstruct justice. Preventive detention laws have also been adopted in some States. Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106, cert. denied, 444 U.S. 920 (1979).

[20] Schall v. Martin, 467 U.S. 253 (1984).

[21] 481 U.S. 739 (1988).

[22] 481 U.S. at 753.

[23] 481 U.S. at 754.

[24] 481 U.S. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals).

[25] Stack v. Boyle, 342 U.S. 1, 4–6 (1951).

[26] United States v. Salerno, 481 U.S. at 754.

[27] Stack v. Boyle, 342 U.S. at 6-7.

pending appeal, but the practice has apparently been to grant such releases.[28]

## EXCESSIVE FINES

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.[29] Justice Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an "unusual" and "unprecedented" punishment proscribed by the Eighth Amendment.[30] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the equal protection clause,[31] thus obviating any necessity to develop the meaning of "excessive fines" in relation to ability to pay. The Court has held the Clause inapplicable to civil jury awards of punitive damages in cases between private parties, "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[32] The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[33] The Eighth Amendment itself, as were antecedents of the Clause in the Virginia Declaration of Rights and in the English Bill of Rights of 1689, "clearly was adopted with the particular intent of placing limits on the powers of the new government."[34] Therefore, while leaving open the issues of whether the Clause has any applicability to civil penalties or to *qui tam* actions, the Court determined that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[35] The Court has held, however, that the excessive fines clause can be applied in civil forfeiture cases.[36]

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[28] Hudson v. Parker, 156 U.S. 277 (1895).
[29] Ex parte Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).
[30] Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 435 (1921).
[31] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).
[32] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
[33] 492 U.S. at 265.
[34] 492 U.S. at 266.
[35] 492 U.S. at 268.
[36] In Austin v. United States, 509 U.S. 602 (1993), the Court noted that the application of the excessive fines clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be

In 1998, however, the Court injected vitality into the strictures of the clause. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[37] In *United States v. Bajakajian*,[38] the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture[39] in this particular case violated the Excessive Fines Cause because the amount forfeited was "grossly disproportionate to the gravity of defendant's offense."[40] In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[41]

## CRUEL AND UNUSUAL PUNISHMENTS

During congressional consideration of this provision one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this

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seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[37] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[38] 524 U.S. 321 (1998).

[39] The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. 524 U.S. at 328. The Court distinguished this from civil forfeiture, which, as an *in rem* proceeding against property, would generally not function as a punishment of the criminal defendant. 524 U.S. at 330-32.

[40] 524 U.S. at 334.

[41] In *Bajakajian*, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. 524 U.S. at 325-26. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed, *i.e.* a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. 524 U.S. at 338.

kind."[42] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[43] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[44] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

**Style of Interpretation**

At first, the Court was inclined to an historical style of interpretation, determining whether or not a punishment was "cruel and unusual" by looking to see if it or a sufficiently similar variant was considered "cruel and unusual" in 1789.[45] But in *Weems v. United States*[46] it was concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but had intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment." The Amendment therefore was of an "expansive and vital character"[47] and, in the words of a later Court, "must draw its meaning from the evolving standards of decency that mark the

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[42] 1 ANNALS OF CONGRESS 754 (1789).

[43] *E.g.*, 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 111 (2d ed. 1836); 3 id. at 447–52.

[44] *See* Granucci, *'Nor Cruel and Unusual Punishments Inflicted' : The Original Meaning*, 57 CALIF. L. REV. 839 (1969). Disproportionality, in any event, was utilized by the Court in Weems v. United States, 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (*but see* Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Justice Brennan concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

[45] Wilkerson v. Utah, 99 U.S. 130 (1878); In re Kemmler, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). On the present Court, Chief Justice Rehnquist subscribes to this view (*see, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 208 (dissenting)), and the views of Justices Scalia and Thomas appear to be similar. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Justice Thomas dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[46] 217 U.S. 349 (1910).

[47] 217 U.S. at 376–77.

progress of a maturing society."[48] The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases.[49]

**Application and Scope**

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."[50]

In upholding capital punishment inflicted by a firing squad, the Court not only looked to traditional practices but examined the history of executions in the territory concerned, the military practice, and current writings on the death penalty.[51] Relying on the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment, the Court next approved electrocution as a permissible method of administering punishment.[52] Many years later, a divided Court, assuming the applicability of the Eighth Amendment to the States, held that a second electrocution following a mechanical failure at the first which injured but did not kill the condemned man did not violate the proscription.[53]

Divestiture of the citizenship of a natural born citizen was held to be cruel and unusual punishment in *Trop v. Dulles*.[54] The Court viewed divestiture as a penalty more cruel and "more primitive

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[48] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was recently repeated, the Court adding that cruel and unusual punishment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002).

[49] *See* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[50] Wilkerson v. Utah, 99 U.S. 130, 135 (1878).

[51] Hanging was the other method of execution commonly used at the time, and implicitly approved by the Court.

[52] In re Kemmler, 136 U.S. 436 (1890).

[53] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). Justice Frankfurter tested the issue by due process standards. Id. at 470 (concurring). Years earlier the Court, although recognizing that the Eight Amendment was then inapplicable to the states, opined in dictum that a fine and brief imprisonment for illegal sale of alcohol was not cruel and unusual punishment. Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479–80 (1867).

[54] 356 U.S. 86 (1958). Again the Court was divided. Four Justices joined the plurality opinion while Justice Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. Id. at 114. Four Justices dissented, denying that denationalization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. Id. at 121, 124–27.

than torture," inasmuch as it entailed statelessness or "the total destruction of the individual's status in organized society." "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." A punishment must be examined "in light of the basic prohibition against inhuman treatment," and the Amendment was intended to preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards." [55]

**Capital Punishment**

The Court's 1972 decision in *Furman v. Georgia*, [56] finding constitutional deficiencies in the manner in which the death penalty was arrived at but not holding the death penalty unconstitutional *per se*, was a watershed in capital punishment jurisprudence. In the long run the ruling may have had only minor effect in determining who is sentenced to death and who is actually executed, but it had the indisputable effect of constitutionalizing capital sentencing law and of involving federal courts in extensive review of capital sentences. [57] Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional, and there were few grounds for constitutional review. *Furman* and the five 1976 followup cases that reviewed state laws revised in light of *Furman* reaffirmed the constitutionality of capital punishment *per se*, but also opened up several avenues for constitutional review. Since 1976, the Court has issued a welter of decisions attempting to apply and reconcile the sometimes conflicting principles it had announced: that sentencing discretion must be confined through application of specific guidelines that narrow and define the category of death-eligible defendants and thereby prevent arbitrary imposition of the death penalty, but that jury discretion must also be preserved in order to weigh the mitigating circumstances of individual defendants who fall within the death-eligible class.

While the Court continues to tinker with application of these principles, it also has taken steps to attempt to reduce the many procedural and substantive opportunities for delay and defeat of

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[55] 356 U.S. at 99–100. The action of prison guards in handcuffing a prisoner to a hitching post for long periods of time violated basic human dignity and constituted "gratuitous infliction of 'wanton and unnecessary pain'" prohibited by the Clause. Hope v. Pelzer, 122 S. Ct. 2508, 2515 (2002).

[56] 408 U.S. 238 (1972).

[57] See Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

the carrying out of death sentences, and to give the states more leeway in administering capital sentencing. The early post-*Furman* stage involving creation of procedural protections for capital defendants and premised on a "death is different" rationale,[58] gave way to increasing impatience with the delays made possible through procedural protections, especially those associated with federal *habeas corpus* review.[59] Having consistently held that capital punishment is not inherently unconstitutional, the Court seems bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. In the *habeas* context, the interest in finality has trumped a death-is-different approach.[60] The writ has also been restricted statutorily.[61]

Changed membership on the Court has had an effect. Gone from the Court are Justices Brennan and Marshall, whose belief that all capital punishment constitutes cruel and unusual punishment resulted in two automatic votes against any challenged death sentence.[62] Strong differences remain over such issues as the appropriate framework for consideration of aggravating and mitigating circumstances and the appropriate scope of federal review, but as of 2002 a Court majority still seemed committed to reducing

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[58] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357–58 (1977): "From the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

[59] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 888 (1983): "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." *See also* Gomez v. United States District Court, 503 U.S. 653 (1992) (vacating orders staying an execution, and refusing to consider, because of "abusive delay," a claim that "could have been brought more than a decade ago"—that California's method of execution (cyanide gas) constitutes cruel and unusual punishment).

[60] In Herrera v. Collins, 506 U.S. 390, 405 (1993), the Court rejected the position that "the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus," and also declared that, because of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, . . . the threshold showing for such an assumed right would necessarily be extraordinarily high." Id. at 417.

[61] *See, e.g.*, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[62] Gone too is Justice Blackmun, whose early support for capital punishment gave way near the end of his career to a belief that the Court's effort to reconcile the twin goals of fairness to the individual defendant and consistency and rationality of sentencing had failed, and that the death penalty "as currently administered, is unconstitutional." Callins v. Collins, 510 U.S. 1141, 1159 (1994) (dissenting from denial of cert.)

obstacles created by federal review of death sentences imposed under state laws that have been upheld as constitutional.

***General Validity and Guiding Principles***.—In *Trop v. Dulles*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[63] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent.

A series of cases testing the means by which the death penalty was imposed[64] culminated in what appeared to be a decisive rejection of the attack in *McGautha v. California*.[65] Nonetheless, the Court then agreed to hear a series of cases directly raising the question of the validity of capital punishment under the cruel and unusual punishments clause, and, to considerable surprise, the Court held in *Furman v. Georgia*[66] that the death penalty, at least as administered, did violate the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty was "cruel and unusual" *per se* because the imposition of

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[63] 356 U.S. 86, 99 (1958).

[64] In Rudolph v. Alabama, 375 U.S. 889 (1963), Justices Goldberg, Douglas, and Brennan, dissenting from a denial of certiorari, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment. The Court addressed exclusion of death-scrupled jurors in Witherspoon v. Illinois, 391 U.S. 510 (1968). *See also* Davis v. Georgia, 429 U.S. 122 (1976), and Adams v. Texas, 448 U.S. 38 (1980) (explicating Witherspoon). The Eighth Amendment was the basis for grant of review in Boykin v. Alabama, 395 U.S. 238 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970), but membership changes on the Court resulted in decisions on other grounds.

[65] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with *Crampton v. Ohio*. *McGautha* raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the due process clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; while bifurcated proceedings might be desirable, they were not required by due process.

[66] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in *McGautha*.

capital punishment "does not comport with human dignity" [67] or because it is "morally unacceptable" and "excessive." [68] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment. [69] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner [70] and so infrequently that it served no justifying end. [71]

Because only two of the *Furman* Justices thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions. [72] Enactment of death penalty statutes by 35 States following *Furman* led to renewed litigation, but not to the elucidation one might expect from a series of opinions. [73] Instead, while the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life, [74] it chose several different

[67] 408 U.S. at 257 (Justice Brennan).
[68] 408 U.S. at 314 (Justice Marshall).
[69] 408 U.S. at 240 (Justice Douglas).
[70] 408 U.S. at 306 (Justice Stewart).
[71] 408 U.S. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.
[72] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).
[73] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See, e.g.*, Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not ... always been easy to decipher"); Justice White, id. at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and id. at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").
[74] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape); Enmund v.

paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not *per se* cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[75] Divisions among the Justices, however, made it difficult to ascertain the form which permissible statutory schemes may take.[76]

Inasmuch as the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[77] legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing, but approved other statutes specifying factors for jury consideration.[78]

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Florida, 458 U.S. 782 (1982) (felony murder committed by confederate). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking law, 49 U.S.C. § 1472, imposes death only when death occurs during commission of the hijacking. But the treason statute does not require a death to occur and represents a situation in which great and fatal danger might be presented. 18 U.S.C. § 2381.

[75] Justices Brennan and Marshall adhered to the view that the death penalty is per se unconstitutional. *E.g.*, Coker v. Georgia, 433 U.S. 584, 600 (1977); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Enmund v. Florida, 458 U.S. 782, 801 (1982).

[76] A comprehensive evaluation of the multiple approaches followed in Furman-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[77] Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it had been applied in an arbitrary, "wanton," and "freakish" manner , id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

[78] The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other States were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggra-

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. While there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur in the position that reenactment of capital punishment statutes by 35 States precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity which can be overcome only upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Neither is the punishment of death disproportionate to the crime being punished, murder.[79]

Second, a different majority, however, concluded that statutes *mandating* the imposition of death for crimes classified as first-degree murder violate the Eighth Amendment. A review of history, traditional usage, legislative enactments, and jury determinations led the plurality to conclude that mandatory death sentences had been rejected by contemporary standards. Moreover, mandatory sentencing precludes the individualized "consideration of the character and record of the . . . offender and the circumstances of the

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vating factors against statutory mitigating factors), and Jurek v. Texas, 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other States were invalidated, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

[79] Gregg v. Georgia, 428 U.S. 153, 168–87 (1976) (Justices Stewart, Powell, and Stevens); Roberts v. Louisiana, 428 U.S. 325, 350–56 (1976) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice White's *Furman* dissent and those of Chief Justice Burger and Justice Blackmun show a rejection of proportionality analysis. Justices Brennan and Marshall dissented, reiterating their *Furman* views. *Gregg*, 428 U.S. at 227, 231.

particular offense" that "the fundamental respect for humanity underlying the Eighth Amendment" requires in capital cases.[80]

A third principle established by the 1976 cases was that the procedure by which a death sentence is imposed must be so structured as to reduce arbitrariness and capriciousness as much as possible.[81] What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,[82] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[83] (2) that to prevent jury prejudice on the issue of guilt there be a sepa-

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[80] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality, and Justices Brennan and Marshall concurred on the basis of their own views of the death penalty. 428 U.S. at 305, 306, 336.

[81] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. *See* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[82] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). A definitive ruling came in Spaziano v. Florida, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id. at 462–63. Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court's decision is adequately channeled to prevent arbitrary results. Harris v. Alabama, 513 U.S. 504 (1995) (Eighth Amendment not violated where judge is only required to "consider" a capital jury's sentencing recommendation). The Sixth Amendment right to jury trial is violated, however, if the judge makes factual findings (e.g., as to the existence of aggravating circumstances) on which a death sentence is based. Ring v. Arizona, 122 S. Ct. 2258 (2002).

[83] Gregg v. Georgia, 428 U.S. 153, 188–95 (1976). Justice White seemed close to the plurality on the question of standards, id. at 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. Woodson v. North Carolina, 428 U.S. 280, 319–21 (1976) (dissenting). In McGautha v. California, 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the due process clause. On the vitiation of *McGautha*, *see* Gregg, 428 U.S. at 195 n.47, and Lockett v. Ohio, 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding self-incrimination and counsel clauses applicable to psychiatric examination, at least when doctor testifies about his conclusions with respect to future dangerousness).

rate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, will be presented;[84] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was in fact fairly imposed both on the facts of the individual case and by comparison with the penalties imposed in similar cases.[85] The Court later ruled, however, that proportionality review is not constitutionally required.[86] *Gregg*, *Proffitt*, and *Jurek* did not require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences."[87]

The Court added a fourth major guideline in 2002, holding that the Sixth Amendment right to trial by jury comprehends the right to have a jury make factual determinations on which a sentencing increase is based.[88] This means that capital sentencing schemes are unconstitutional if judges are allowed to make factual findings as to the existence of aggravating circumstances that are prerequisites for imposition of a death sentence.

***Implementation of Procedural Requirements***.—Most states responded to the 1976 requirement that the sentencing authority's discretion be narrowed by enacting statutes spelling out "aggravating" circumstances, and providing that at least one such aggravating circumstance must be found to be present before the death penalty may be imposed. The Court has required that the standards be relatively precise and instructive so as to minimize the risk of arbitrary and capricious action by the sentencer, the desired result being a principled way to distinguish cases in which the death penalty should be imposed from other cases in which it should not be. Thus, the Court invalidated a capital sentence based upon a

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[84] Gregg v. Georgia, 428 U.S. 153, 163, 190–92, 195 (1976) (plurality opinion). McGautha v. California, 402 U.S. 183 (1971), had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in Roberts v. Louisiana, 428 U.S. 325, 358 (1976), rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1224–25 (1984).

[85] Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976) (plurality); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality).

[86] Pulley v. Harris, 465 U.S. 37 (1984).

[87] 465 U.S. at 50.

[88] Ring v. Arizona, 122 S. Ct. 2258 (2002).

jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder."[89] Similarly, an "especially heinous, atrocious or cruel" aggravating circumstance was held to be unconstitutionally vague.[90] The "especially heinous, cruel or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death.[91]

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first-degree murder of a police officer,[92] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[93] On the other hand, if actual sentencing authority is conferred on the trial judge, it is not unconstitutional for a statute to require a jury to return a death "sentence" upon convicting for specified crimes.[94] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when that would be justified by the evidence.[95] Because the jury had to

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[89] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

[90] Maynard v. Cartwright, 486 U.S. 356 (1988). *But see* Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[91] Walton v. Arizona, 497 U.S. 639 (1990). *Accord*, Lewis v. Jeffers, 497 U.S. 764 (1990). *See also* Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory circumstance of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 504 U.S. 527 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness).

[92] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant than the first Roberts v. Louisiana case, 428 U.S. 325 (1976).

[93] Sumner v. Shuman, 483 U.S. 66 (1987).

[94] Baldwin v. Alabama, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence). The constitutionality of this approach has been brought into question, however, by the Court's decision in Ring v. Arizona, 122 S. Ct. 2258 (2002) that a judge's finding of facts constituting aggravating circumstances violates the defendant's right to trial by jury.

[95] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." Id. at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses

choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt.[96]

The overarching principle of *Furman* and of the *Gregg* series of cases was that the jury should not be 'without guidance or direction' in deciding whether a convicted defendant should live or die. The jury's attention was statutorily 'directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime.'[97] Discretion was channeled and rationalized. But in *Lockett v. Ohio*,[98] a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any as-

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is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See* Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.

[96] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare* Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with* California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). *See also* Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole); Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment); Jones v. United States, 527 U.S. 373 (1999) (court's refusal to instruct the jury on the consequences of deadlock did not violate Eighth Amendment, even though court's actual instruction was misleading as to range of possible sentences).

[97] Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (plurality).

[98] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens. Justices Blackmun, Marshall, and White concurred in the result on separate and conflicting grounds. Id. at 613, 619, 621. Justice Rehnquist dissented. Id. at 628.

pect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[99] Similarly, the reason that a three-justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid was that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant."[100] *Lockett* and *Woodson* have since been endorsed by a Court majority.[101] Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[102]

The Court has explained this apparent contradiction as constituting recognition that "individual culpability is not always measured by the category of crime committed,"[103] and as the product of an attempt to pursue the "twin objectives" of "measured, consistent

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[99] 438 U.S. at 604 (plurality).

[100] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Justice Stewart, joined by Justices Powell and Stevens). *Accord*, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first-degree murder).

[101] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting Lockett); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting *Woodson*). The majority in *Eddings* was composed of Justices Powell, Brennan, Marshall, Stevens, and O'Connor; Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. The *Shuman* majority was composed of Justices Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor; dissenting were Justices White and Scalia and Chief Justice Rehnquist. *Woodson* and the first *Roberts v. Louisiana* had earlier been followed in the second Roberts v. Louisiana, 431 U.S. 633 (1977), a *per curiam* opinion from which Chief Justice Burger, and Justices Blackmun, White, and Rehnquist dissented.

[102] Justice White, dissenting in *Lockett* from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623. More recently, Justice Scalia voiced similar misgivings. "Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to '*decline* to impose' it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had.... In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661–62 (1990) (concurring in the judgment). For a critique of these criticisms of Lockett, *see* Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

[103] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Chief Justice Burger dissenting)).

application" of the death penalty and "fairness to the accused."[104] The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restriction on mitigating evidence helps promote fairness to the accused through an "individualized" consideration of his circumstances. In the Court's words, statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscribing the class of persons eligible for the death penalty,"[105] while consideration of all mitigating evidence requires focus on "the character and record of the individual offender and the circumstances of the particular offense" consistent with "the fundamental respect for humanity underlying the Eighth Amendment."[106] As long as the defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[107]

So far, the Justices who favor abandonment of the *Lockett* and *Woodson* approach have not prevailed. The Court has, however, given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered.[108] States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court.[109] Also, the Court has constrained the use of federal *habeas corpus* to review state court judgments. As a result of these trends, the Court recognizes a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.

While holding fast to the *Lockett* requirement that sentencers be allowed to consider all mitigating evidence,[110] the Court has

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[104] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982).

[105] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).

[106] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

[107] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[108] *See, e.g.*, Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[109] Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[110] *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (jury must be permitted to give effect to de-

upheld state statutes that control the relative weight that the sentencer may accord to aggravating and mitigating evidence.[111] "The requirement of individualized sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence"; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor.[112] So too, the legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance,[113] or if the jury finds that aggravating circumstances outweigh mitigating circumstances.[114] And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," since in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial."[115] However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as in effect allowing one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence.[116] Due process considerations can also come into play; if the state argues for the death penalty based on the defendant's future dangerousness, due process requires that the jury be informed if the

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fendant's evidence of mental retardation and abused background); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his *Lockett* right to introduce all mitigating evidence). *But cf.* Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[111] "Neither [*Lockett* nor *Eddings*] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Justice Stevens concurring in judgment).

[112] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[113] 494 U.S. at 307.

[114] Boyde v. California, 494 U.S. 370 (1990). A court is not required give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 522 U.S. 269 (1998). By the same token, a court did not offend the Constitution by directing the jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to the jury's question about proper construction of mitigating circumstances. Weeks v. Angelone, 528 U.S. 225 (2000).

[115] California v. Brown, 479 U.S. 538, 543 (1987).

[116] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990).

alternative to a death sentence is a life sentence without possibility of parole.[117]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[118] or on a trial judge's consideration of improper aggravating circumstances.[119] In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in *Zant* evidence relating to the invalid factor was nonetheless admissible on another basis.[120] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evidence.[121] By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand in spite of the presence of other aggravating factors.[122]

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim's family or community was inappropriate because it "creates an impermissible risk that the capital sentencing decision will

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[117] Simmons v. South Carolina, 512 U.S. 154 (1994). *See also* Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of *Simmons*); Kelly v. South Carolina, 122 S. Ct. 726 (2002) (prosecutor need not express intent to rely on future dangerousness; logical inference may be drawn). But see Ramdass v. Angelone, 530 U.S. 156 (2000) (refusing to apply *Simmons* because the defendant was not technically parole ineligible at time of sentencing).

[118] Zant v. Stephens, 462 U.S. 862 (1983).

[119] Barclay v. Florida, 463 U.S. 954 (1983).

[120] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995).

[121] Clemons v. Mississippi, 494 U.S. 738 (1990). *Cf.* Parker v. Dugger, 498 U.S. 308 (1991) (affirmance of death sentence invalid because appellate court did not reweigh non-statutory mitigating evidence).

[122] Johnson v. Mississippi, 486 U.S. 578 (1988).

be made in an arbitrary manner." [123] Changed membership on the Court resulted in overruling of these decisions, however, and a holding that "victim impact statements" are not barred from evidence by the Eighth Amendment. [124] "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." [125] In the view of the Court majority, admissibility of victim impact evidence was necessary in order to restore balance to capital sentencing. Exclusion of such evidence had "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." [126]

***Limitations on Capital Punishment: Proportionality***.—In *Coker v. Georgia*, [127] the Court held that the state may not impose a death sentence upon a rapist who did not take a human life. [128]

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[123] Booth v. Maryland, 482 U.S. 496, 503 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of [the] victim's family, but on circumstances over which [the defendant] has control." Id. at 504 n.7. The decision was 5–4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting. *See also* South Carolina v. Gathers, 490 U.S. 805 (1989), holding that a prosecutor's extensive comments extolling the personal characteristics of a murder victim can invalidate a death sentence when the victim's character is unrelated to the circumstances of the crime.

[124] Payne v. Tennessee, 501 U.S. 808 (1991). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," Chief Justice Rehnquist explained for the Court. Id. at 825. Justices White, O'Connor, Scalia, Kennedy, and Souter joined in that opinion. Justices Marshall, Blackmun, and Stevens dissented.

[125] 501 U.S. at 827. Overruling of *Booth* may have been unnecessary in *Payne*, inasmuch as the principal "victim impact" evidence introduced involved trauma to a surviving victim of attempted murder who had been stabbed at the same time his mother and sister had been murdered and who had apparently witnessed those murders; this evidence could have qualified as "admissible because . . . relate[d] directly to the circumstances of the crime." *Booth*, 482 U.S. at 507 n.10. *Gathers* was directly at issue in *Payne* because of the prosecutor's references to effects on family members not present at the crime.

[126] 501 U.S. at 822 (citation omitted).

[127] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is *per se* invalid, id. at 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id. at 601. Chief Justice Burger and Justice Rehnquist dissented. Id. at 604.

[128] Although the Court stated the issue in the context of the rape of an adult woman, 433 U.S. at 592, the opinion at no point sought to distinguish between adults and children. Justice Powell's concurrence expressed the view that death is

The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime committed. A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." [129] In order that judgment not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions. . . ." [130] While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public." [131]

Applying the *Coker* analysis, the Court ruled in *Enmund v. Florida* [132] that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. While a few more States imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus similarly opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because the death penalty is a likely deterrent only when murder is the result of premeditation and deliberation, and because the justification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and

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ordinarily disproportionate for the rape of an adult woman, but that some rapes might be so brutal or heinous as to justify it. Id. at 601.

[129] 433 U.S. at 592.

[130] 433 U.S. at 592

[131] 433 U.S. at 598.

[132] 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id. at 801. *Accord*, Cabana v. Bullock, 474 U.S. 376 (1986) (also holding that the proper remedy in a *habeas* case is to remand for state court determination as to whether Enmundfindings have been made).

not as a result of his own intention serves neither of the purposes underlying the penalty.[133] In *Tison v. Arizona*, however, the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[134] A few years earlier, *Enmund* had also been weakened by the Court's holding that the factual finding of requisite intent to kill need not be made by the guilt/innocence factfinder, whether judge or jury, but may be made by a state appellate court.[135]

***Limitations on Capital Punishment: Diminished Capacity***.—The Court has recently grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright*[136] that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of execution-time sanity must be determined in a proceeding satisfying the minimum requirements of due process.[137] The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and con-

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[133] Justice O'Connor thought the evidence of contemporary standards did not support a finding that capital punishment was not appropriate in felony murder situations. 458 U.S. at 816–23. She also objected to finding the penalty disproportionate, first because of the degree of participation of the defendant in the underlying crime, id. at 823–26, but also because the Court appeared to be constitutionalizing a standard of intent required under state law.

[134] 481 U.S. 137, 158 (1987). The decision was 5–4. Justice O'Connor's opinion for the Court viewed a "narrow" focus on intent to kill as "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers," id. at 157, and concluded that "reckless disregard for human life" may be held to be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Id.

[135] Cabana v. Bullock, 474 U.S. 376 (1986). Moreover, an appellate court's finding of culpability is entitled to a presumption of correctness in federal *habeas* review, a *habeas* petitioner bearing a "heavy burden of overcoming the presumption." Id. at 387–88. *See also* Pulley v. Harris, 465 U.S. 37 (1984) (Eighth Amendment does not invariably require comparative proportionality review by a state appellate court).

[136] 477 U.S. 399 (1986).

[137] There was an opinion of the Court only on the first issue, that the Eighth Amendment creates a right not to be executed while insane. Justice Marshall's opinion to that effect was joined by Justices Brennan, Blackmun, Stevens, and Powell. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422.

tinued to be so viewed. And, while no states purported to permit the execution of the insane, Florida and a number of others left the determination to the governor. Florida's procedures, the Court held, fell short of due process because the decision was vested in the governor without the defendant having the opportunity to be heard, the governor's decision being based on reports of three state-appointed psychiatrists.[138]

When first confronted with the issue of whether execution of the mentally retarded is constitutional, the Court in 1989 found "insufficient evidence of a national consensus against executing mentally retarded people."[139] In 2002, however, the Court determined in *Atkins v. Virginia*[140] that "much ha[d] changed" since 1989, that the practice had become "truly unusual," and that it was "fair to say" that a "national consensus" had developed against it.[141] In 1989, only two states and the Federal Government prohibited execution of the mentally retarded while allowing executions generally. By 2002, an additional 16 states had prohibited execution of the mentally retarded, and no states had reinstated the power. But the important element of consensus, the Court explained, was "not so much the number" of states that had acted, but instead "the consistency of the direction of change."[142] The Court's "own evaluation of the issue" reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—apply with full force to mentally retarded offenders. Retribution necessarily depends on the culpability of the offender, yet mental retardation reduces culpa-

[138] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[139] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). While unwilling to conclude that execution of a mentally retarded person is "categorically prohibited by the Eighth Amendment," the Court did point out that, due to the requirement of individualized consideration of culpability, a retarded defendant is entitled to an instruction that the jury may consider and give mitigating effect to evidence of retardation or a background of abuse. Id. at 328.

[140] 122 S. Ct. 2242 (2002). *Atkins* was a 6–3 decision. Justice Stevens' opinion of the Court was joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

[141] 122 S. Ct. at 2249.

[142] 122 S. Ct. at 2249.

bility. Deterrence is premised on the ability of offenders to control their behavior, yet "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information."[143]

So far the Court has not imposed a categorical prohibition on execution of juveniles. A closely divided Court has invalidated one statutory scheme which permitted capital punishment to be imposed for crimes committed before age 16, but has upheld other statutes authorizing capital punishment for crimes committed by 16 and 17 year olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[144] While four Justices favored a flat ruling that execution of anyone younger than 16 at the time of his offense is barred by the Eighth Amendment, concurring Justice O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty.[145] The following year Justice O'Connor again provided the decisive vote when the Court in *Stanford v. Kentucky*[146] held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri[147] directly specified a minimum age for the death penalty. To Justice O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16 or 17-year-old murderers, whereas there was such a consensus against execution of 15 year olds.[148] This lack of consensus apparently continued in 2002. In *At-*

[143] 122 S. Ct. at 2251. The Court also noted that reduced capacity both increases the risk of false confessions and reduces a defendant's ability to assist counsel in making a persuasive showing of mitigation.

[144] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[145] The plurality opinion by Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun; as indicated in the text, Justice O'Connor concurred in a separate opinion; and Justice Scalia, joined by Chief Justice Rehnquist and by Justice White, dissented. Justice Kennedy did not participate.

[146] 492 U.S. 361 (1989). The bulk of Justice Scalia's opinion, representing the opinion of the Court, was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Kennedy. Justice O'Connor took exceptions to other portions of Justice Scalia's opinion (dealing with proportionality analysis); and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented.

[147] The case of *Wilkins v. Missouri* was decided along with *Stanford*.

[148] *Compare Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age 15, and no state had "unequivocally endorsed" a lower age limit) *with Stanford*, 492 U.S. at 370 (15 of 37 states permitting capital punishment de-

*kins v. Virginia*, the Court contrasted the national consensus said to have developed against executing the mentally retarded with the situation regarding execution of juvenile offenders over age 15, and noted that only two state legislatures had raised the threshold age. [149]

The *Stanford* Court was split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would focus almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. [150] The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. [151] As indicated above, the *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing the mentally retarded.

***Limitations on Capital Punishment: Equality of Application***.—One of the principal objections to imposition of the death penalty, voiced by Justice Douglas in his concurring opinion in *Furman*, was that it was not being administered fairly—that the capital sentencing laws vesting "practically untrammeled discretion" in juries were being used as vehicles for racial discrimination, and that "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on

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cline to impose it on 16-year-old offenders; 12 decline to impose it on 17-year-old-offenders).

[149] 122 S. Ct. at 2249 n.18. Only two months after the *Atkins* decision, Justice Stevens, author of the Court's opinion in *Atkins*, asserted that the Court should reconsider the issue of execution of juvenile offenders, "[g]iven the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender." *Patterson v. Texas*, 536 U.S. 984 (2002) (dissenting from denial of stay of execution). Justice Ginsburg, joined by Justice Breyer, also dissented from the stay denial, asserting that *Atkins* had made it "tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky*," but the petition for a stay was rejected by 6–3 vote.

[150] "A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." 492 U.S. at 377.

[151] 492 U.S. at 394–96. Justice O'Connor, while recognizing the Court's "constitutional obligation to conduct proportionality analysis," did not believe that such analysis can resolve the underlying issue of the constitutionally required minimum age. 492 U.S. at 382.

'cruel and unusual' punishments." [152] This argument has not carried the day. Although the Court has acknowledged the possibility that the death penalty may be administered in a racially discriminatory manner, it has made proof of such discrimination quite difficult.

A measure of protection against jury bias was provided by the Court's holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." [153]

Proof of prosecution bias is another matter. The Court ruled in *McCleskey v. Kemp* [154] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions." [155] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (e.g., by carefully defining "aggravating"' circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. While the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty, [156] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a prima facie case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency. [157]

***Limitations on Habeas Corpus Review of Capital Sentences***.—The Court's rulings limiting federal *habeas corpus* review

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[152] 408 U.S. at 248, 257.

[153] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[154] 481 U.S. 279 (1987). The decision was 5–4. Justice Powell's opinion of the Court was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia. Justices Brennan, Blackmun, Stevens, and Marshall dissented.

[155] 481 U.S. at 308.

[156] 481 U.S. at 339–40 (Brennan), 345 (Blackmun), 366 (Stevens).

[157] 481 U.S. at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See* discussion of "Capital Punishment" under the Fourteenth Amendment, infra. *See also* United States v. Bass, 122 S. Ct. 2389 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the Government provide information on its decisions to seek the death penalty.

of state convictions, reinforced by the Antiterrorism and Effective Death Penalty Act of 1996,[158] may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. In the *habeas* context, the Court has flatly rejected the "death is different" approach by applying to capital cases the same rules that limit federal petitions in non-capital cases.[159]

The Court held in *Penry v. Lynaugh*[160] that its *Teague v. Lane*[161] rule of nonretroactivity applies to capital sentencing challenges. Under *Teague*, "new rules" of constitutional interpretation announced after a defendant's conviction has become final will not be applied in *habeas* cases unless one of two exceptions applies. The exceptions will rarely apply. One exception is for decisions placing certain conduct or defendants beyond the reach of the criminal law, and the other is for decisions recognizing a fundamental procedural right "without which the likelihood of an accurate conviction is seriously diminished."[162] Further restricting the availability of federal *habeas* review is the Court's definition of "new rule." Interpretations that are a logical outgrowth or application of an earlier rule are nonetheless "new rules" unless the result was "dictated" by that precedent.[163] While in *Penry* itself the Court determined that the requested rule (requiring an instruction that the jury consider mitigating evidence of the defendant's mental retardation and abused childhood) was *not* a "new rule" because it was dictated by *Eddings* and *Lockett*, in subsequent *habeas* capital

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[158] Pub. L. No. 104–132, 110 Stat. 1214.

[159] Herrera v. Collins, 506 U.S. 390, 405 (1993) ("we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus'") (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989)).

[160] 492 U.S. 302 (1989).

[161] 489 U.S. 288 (1989). The "new rule" limitation was suggested in a plurality opinion in *Teague*. A Court majority in *Penry* and later cases has adopted it.

[162] 489 U.S. at 313. The second exception was at issue in Sawyer v. Smith, 497 U.S. 227 (1990); there the Court held the exception inapplicable to the *Caldwell v. Mississippi* rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the *Sawyer* Court explained, "that a new rule is aimed at improving the accuracy of a trial. . . . A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Id. at 242.

[163] *Penry*, 492 U.S. at 314. Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" or if it would not have been "an illogical or even a grudging application" of the prior decision to hold it inapplicable. Butler v. McKellar, 494 U.S. 407, 415 (1990).

sentencing cases the Court has found substantive review barred by the "new rule" limitation.[164]

A second restriction on federal *habeas* review also has ramifications for capital sentencing review. Claims that state convictions are unsupported by the evidence are weighed by a "rational factfinder" inquiry: "viewing the evidence in the light most favorable to the prosecution, [could] any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt."[165] This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal *habeas* court to weigh a claim that a generally valid aggravating factor is unconstitutional *as applied* to the defendant.[166] In addition, the Court has held that, absent an independent constitutional violation, *habeas corpus* relief for prisoners who assert innocence based on newly discovered evidence should generally be denied.[167] While a majority of the Justices accepted the general principle that execution of the innocent is unconstitutional,[168] the different five-Justice majority that determined the outcome in the case indicated that the "traditional remedy" has been executive clemency.[169]

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[164] *See, e.g.*, Butler v. McKellar, 494 U.S. 407 (1990) (1988 ruling in *Arizona v. Roberson*, that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a *separate* investigation, announced a "new rule" not dictated by the 1981 decision in *Edwards v. Arizona* that police must refrain from all further questioning of an in-custody accused who invokes his right to counsel); Saffle v. Parks, 494 U.S. 484 (1990) (*habeas* petitioner's request that capital sentencing be reversed because of an instruction that the jury "avoid any influence of sympathy" is a request for a new rule not "compel[led]" by *Eddings* and *Lockett*, which governed *what* mitigating evidence a jury must be allowed to consider, not *how* it must consider that evidence); Sawyer v. Smith, 497 U.S. 227 (1990) (1985 ruling in *Caldwell v. Mississippi*, although a "predictable development in Eighth Amendment law," established a "new rule" that false prosecutorial comment on jurors' responsibility can violate the Eighth Amendment by creating an unreasonable risk of arbitrary imposition of the death penalty, since no case prior to Caldwell had invalidated a prosecutorial comment on Eighth Amendment grounds). *But see* Stringer v. Black, 503 U.S. 222 (1992) (neither Maynard v. Cartwright, 486 U.S. 356 (1988), nor Clemons v. Mississippi, 494 U.S. 738 (1990), announced a "new rule").

[165] Lewis v. Jeffers, 497 U.S. 764, 781 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[166] Lewis v. Jeffers, 497 U.S. 764, 780–84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant's case was consistent with other applications.

[167] Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an "extraordinarily high" threshold of proof of innocence to warrant federal *habeas* relief).

[168] Dissenting Justices Blackmun, Stevens, and Souter (506 U.S. at 430); and concurring Justices O'Connor, Kennedy (id. at 419) and White (id. at 429).

[169] Chief Justice Rehnquist's opinion of the Court was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. The Court distinguished Ford v. Wainwright, 477 U.S. 399 (1986) (minimal requirements of due process—i.e., the right to be heard—must be accorded to an insane prisoner in a proceeding in which the governor determines whether execution is to go forward), as involving "a matter of

Third, a different harmless error rule is applied when constitutional errors are alleged in *habeas* proceedings. The *Chapman v. California* [170] rule applicable on direct appeal, requiring the State to prove beyond a reasonable doubt that a constitutional error is harmless, is inappropriate for *habeas* review, the Court concluded, given the "secondary and limited" role of federal *habeas* proceedings. [171] The appropriate test is that previously used only for non-constitutional errors: "whether the error has substantial and injurious effect or influence in determining the jury's verdict." [172]

A fourth rule was devised to prevent successive "abusive" or defaulted *habeas* petitions. Federal courts are barred from hearing such claims unless the defendant can show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him *eligible* for the death penalty under applicable state law. [173]

The Antiterrorism and Effective Death Penalty Act prohibits federal *habeas* relief based on claims that were adjudicated on the merits in state court unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [174] The Court's decision in *Bell v. Cone*, [175] rejecting a claim that an attorney's failure to present mitigating evidence during the capital sentencing phase of a trial and his waiver of a closing argument at sentencing should entitle a condemned prisoner to relief, illustrates how these restrictions can operate to defeat challenges to state-imposed death sentences. [176]

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punishment" rather than guilt or innocence. The guilt or innocence determination allegedly "becomes more uncertain with time for evidentiary reasons." 506 U.S. at 406.

[170] 386 U.S. 18 (1967).

[171] Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

[172] Brecht v. Abrahamson, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *Brecht* was a non-capital case, but the rule was subsequently applied in a capital case. Calderon v. Coleman, 525 U.S. 141 (1998) (*per curiam*).

[173] Sawyer v. Whitley, 505 U.S. 333 (1992). The focus on eligibility limits inquiry to elements of the crime and to aggravating factors, and thereby prevents presentation of mitigating evidence. Here the court was barred from considering an allegation of ineffective assistance of counsel for failure to introduce the defendant's mental health records as a mitigating factor at sentencing.

[174] 28 U.S.C. § 2254(d)(1).

[175] 122 S. Ct. 1843 (2002).

[176] The state court's decision, which applied the rule from Strickland v. Washington, 466 U.S. 668 (1984), rather than the rule from United States v. Cronic, 466 U.S. 648 (1984), to hold that the attorney's performance was not constitutionally inadequate, was not "contrary to" clearly established law. *Cronic* had held that there are some situations, *e.g.*, when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," so presumptively unfair as to obviate the need to show actual prejudice to the defendant's case. The *Bell v. Cone* Court em-

The Court has also ruled that a death row inmate has no constitutional right to an attorney to help prepare a petition for state collateral review.[177]

**Proportionality**

Justice Field in *O'Neil v. Vermont*[178] argued in dissent that in addition to prohibiting punishments deemed barbarous and inhumane the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In *Weems v. United States*,[179] this view was adopted by the Court in striking down a sentence in the Philippine Islands of 15 years incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance, for the offense of falsifying public documents. The Court compared the sentence with those meted out for other offenses and concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[180] Punishments as well as fines, therefore, can be condemned as excessive.[181]

In *Robinson v. California*[182] the Court carried the principle to new heights, setting aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an ad-

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phasized the word "entirely," noting that the petitioner challenged the defense attorney's performance only "at specific points" in the process. Nor was the second statutory test met. *Strickland*, a "highly deferential" test asking whether an attorney's performance fell below an "objective standard of reasonableness," was not "unreasonably applied." The attorney could reasonably have concluded that evidence presented during the guilt phase of the trial was still "fresh" to the jury, and that repetition through the presentation of mitigating evidence and/or through a closing statement was unnecessary to counter the state's presentation of aggravating circumstances justifying a death sentence.

[177] Murray v. Giarratano, 492 U.S. 1 (1989) ("unit attorneys" assigned to prisons were available for some advice prior to filing a claim).

[178] 144 U.S. 323, 339–40 (1892). *See also* Howard v. Fleming, 191 U.S. 126, 135–36 (1903).

[179] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines which it interpreted as having the same meaning. Id. at 367.

[180] 217 U.S. at 381.

[181] "The Eighth Amendment succinctly prohibits 'excessive' sanctions." Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002) (applying proportionality review to determine whether execution of the mentally retarded is cruel and unusual). Proportionality in the context of capital punishment is considered supra under "Limitations on Capital Punishment: Proportionality."

[182] 370 U.S. 660 (1962).

dict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the State or had committed any act at all within the State's power to proscribe, and because addiction is an illness which—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act,[183] or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct he is unable to control, a holding of far-reaching importance.[184] In *Powell v. Texas*,[185] a majority of the Justices took the latter view of *Robinson*, but the result, because of a view of the facts held by one Justice, was a refusal to invalidate a conviction of an alcoholic for public drunkenness. Whether the Eighth Amendment or the due process clauses will govern the requirement of the recognition of capacity defenses to criminal charges, or whether either will, remains to be decided in future cases.

The Court has gone back and forth in its acceptance of proportionality analysis in noncapital cases. It appeared that such anal-

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[183] A different approach to essentially the same problem was Thompson v. Louisville, 362 U.S. 199 (1960), in which a conviction for loitering and disorderly conduct was set aside as being supported by "no evidence whatever" that defendant had done anything. *Cf.* Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was "wandering or strolling around" in violation of vagrancy law).

[184] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, *see* Lambert v. California, 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the due process clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See* Rivera v. Delaware, 429 U.S. 877 (1976), Patterson v. New York, 432 U.S. 197, 202–05 (1977). In Solem v. Helm, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[185] 392 U.S. 514 (1968). The plurality opinion by Justice Marshall, joined by Justices Black and Harlan and Chief Justice Warren, interpreted *Robinson* as proscribing only punishment of "status," and not punishment for "acts," and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus*, *mens rea*, insanity, mistake, justification, and duress. Id. at 532–37. Justice White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice White was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. Id. at 548. Dissenting Justices Fortas, Douglas, Brennan, and Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. Id. at 554, 567.

ysis had been closely cabined in *Rummel v. Estelle*,[186] upholding a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies had netted him a total of less than $230. The Court reasoned that the unique quality of the death penalty rendered capital cases of limited value, and *Weems* was distinguished on the basis that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the post-release denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference with state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the challenge to punishment goes to the length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appeared to be that States may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter legislative grace.[187] The Court dismissed as unavailing the factors relied on by the defendant. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime, and the determination of what is a "small" amount of money, being so subjective, was a legislative task. In any event, the State could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdictions was found unhelpful, differences and similarities being more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same State ignored the recidivism aspect.[188]

*Rummel* was distinguished in *Solem v. Helm*,[189] the Court stating unequivocally that the cruel and unusual punishments clause "prohibits not only barbaric punishments, but also sentences

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[186] 445 U.S. 263 (1980). The opinion, by Justice Rehnquist, was concurred in by Chief Justice Burger and Justices Stewart, White, and Blackmun. Dissenting were Justices Powell, Brennan, Marshall, and Stevens. Id. at 285.

[187] In Hutto v. Davis, 454 U.S. 370 (1982), on the authority of Rummel, the Court summarily reversed a decision holding disproportionate a prison term of 40 years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

[188] *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id. at 285, 295–303.

[189] 463 U.S. 277 (1983). The case, as *Rummel*, was decided by 5–4 vote, with the *Rummel* dissenters, joined by Justice Blackmun from the *Rummel* majority, composing the majority, and with Justice O'Connor taking Justice Stewart's place in opposition to holding the sentence invalid. Justice Powell wrote the opinion of the Court in *Helm*, and Chief Justice Burger wrote the dissent.

that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[190] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[191] The difference was that Helm's sentence of life imprisonment without possibility of parole was viewed as "far more severe than the life sentence we described in *Rummel*."[192] Rummel, the Court pointed out, had been eligible for parole after 12 years' imprisonment, while Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an *ad hoc* exercise of clemency.'"[193] In *Helm* the Court also spelled out the "objective criteria" by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[194] Measured by these criteria Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnapping, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.[195]

The Court remained closely divided in holding in *Harmelin v. Michigan*[196] that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. There was an opinion of the Court only on the issue of the mandatory nature of the penalty, the Court rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.[197]

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[190] 463 U.S. at 284, 288.

[191] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." 463 U.S. at 296–97.

[192] 463 U.S. at 297.

[193] 463 U.S. at 303.

[194] 463 U.S. at 292.

[195] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, *see* Justice Powell's concurring opinion in Bowers v. Hardwick, 478 U.S. 186, 197 (1986).

[196] 501 U.S. 957 (1991).

[197] "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense." 501 U.S. at 994. The Court's opinion, written by Justice Scalia, then elaborated an understanding of "unusual"—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual

As to the length of sentence, three majority Justices—Kennedy, O'Connor, and Souter—would recognize a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed.[198]

**Prisons and Punishment**

"It is unquestioned that '[c]onfinement' in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards."[199] "Conditions in prison must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . . , alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[200] These general principles apply both to the treatment of individuals[201] and to the creation or maintenance of prison conditions that are inhumane to inmates generally.[202] Ordinarily there is both a subjective and an objective inquiry. Before conditions of confinement not formally meted out as punishment by the statute or sentencing judge can qualify as "punishment," there must be a

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in the constitutional sense because they have "been employed in various form throughout our Nation's history." This is an application of Justice Scalia's belief that cruelty and unusualness are to be determined solely by reference to the punishment at issue, and without reference to the crime for which it is imposed. *See* id. at 975–78 (not opinion of Court—only Chief Justice Rehnquist joined this portion of the opinion). Because a majority of other Justices indicated in the same case that they do recognize at least a narrow proportionality principle (*see* id. at 996 (Justices Kennedy, O'Connor, and Souter concurring); id. at 1009 (Justices White, Blackmun, and Stevens dissenting); id. at 1027 (Justice Marshall dissenting)), the fact that three of those Justices (Kennedy, O'Connor, and Souter) joined Justice Scalia's opinion on mandatory penalties should probably not be read as representing agreement with Justice Scalia's general approach to proportionality.

[198] Because of the "serious nature" of the crime, the 3-Justice plurality asserted that there was no need to apply the other *Solem* factors comparing the sentence to sentences imposed for other crimes in Michigan, and to sentences imposed for the same crime in other jurisdictions. 501 U.S. at 1004. Dissenting Justice White, joined by Justices Blackmun and Stevens (Justice Marshall also expressed agreement on this and most other points, id. at 1027), asserted that Justice Kennedy's approach would "eviscerate" *Solem*. Id. at 1018.

[199] Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)).

[200] 452 U.S. at 347.

[201] *E.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (beating prisoner with leather strap violates Amendment); Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand "environmental" tobacco smoke stated a cause of action under the Eighth Amendment).

[202] *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

culpable, "wanton" state of mind on the part of prison officials.[203] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[204] in the context of emergency actions, e.g., actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind is culpable.[205] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[206]

Beginning with *Holt v. Sarver*,[207] federal courts found prisons or entire prison systems violative of the cruel and unusual punishments clause, and broad remedial orders directed to improving prison conditions and ameliorating prison life were imposed in more than two dozen States.[208] But while the Supreme Court expressed general agreement with the thrust of the lower court actions, it set aside two rather extensive decrees and cautioned the federal courts to proceed with deference to the decisions of state legislatures and prison administrators.[209] In both cases, the prisons involved were of fairly recent vintage and the conditions, while harsh, did not approach the conditions described in many of the lower court decisions that had been left undisturbed.[210] Thus, con-

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[203] Wilson v. Seiter, 501 U.S. 294 (1991).

[204] 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994).

[205] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[206] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate).

[207] 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971), district court ordered to retain jurisdiction until unconstitutional conditions corrected, 505 F.2d 194 (8th Cir. 1974). The Supreme Court ultimately sustained the decisions of the lower courts in Hutto v. Finney, 437 U.S. 678 (1978).

[208] Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Justice Brennan concurring) (collecting cases). *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

[209] Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981).

[210] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (describing conditions of "horrendous overcrowding," inadequate sanitation, infested food, and "rampant violence"); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1981) (describing conditions "unfit for human habitation"). The primary issue in both *Wolfish* and *Chapman* was that of "double-celling," the confinement of two or more prisoners in a cell designed

cerns of federalism and of judicial restraint apparently actuated the Court to begin to curb the lower federal courts from ordering remedial action for systems in which the prevailing circumstances, given the resources States choose to devote to them, "cannot be said to be cruel and unusual under contemporary standards."[211]

Congress initially encouraged litigation over prison conditions by enactment in 1980 of the Civil Rights of Institutionalized Persons Act,[212] but then in 1996 added restrictions through enactment of the Prison Litigation Reform Act.[213] The Court upheld the latter law's provision for an automatic stay of prospective relief upon the filing of a motion to modify or terminate that relief, ruling that separation of powers principles were not violated.[214]

**Limitation of the Clause to Criminal Punishments**

The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amendment inapplicable to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, the Court explained that the cruel and unusual punishments clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[215] These limitations, the Court thought, should not be extended outside the criminal process.

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for one. In both cases, the Court found the record did not support orders ending the practice.

[211] Rhodes v. Chapman, 452 U.S. 337, 347 (1981). *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).

[212] Pub. L. No. 96–247, 94 Stat. 349, 42 U.S.C. §§ 1997 et seq.

[213] Pub. L. No. 104–134, title VIII, 110 Stat. 1321–66 et seq.

[214] Miller v. French, 530 U.S. 327 (2000). *See also* Porter v. Nussle, 122 S. Ct. 983 (2002) (applying the Act's requirement that prisoners exhaust administrative remedies).

[215] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the due process clause if at all.

## UNENUMERATED RIGHTS

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## NINTH AMENDMENT

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

### RIGHTS RETAINED BY THE PEOPLE

Aside from contending that a bill of rights was unnecessary, the Federalists responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that inasmuch as it would be impossible to list all rights it would be dangerous to list some because there would be those who would seize on the absence of the omitted rights to assert that government was unrestrained as to those.[1] Madison adverted to this argument in presenting his proposed amendments to the House of Representatives. "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution."[2] It is clear from its text and from Madison's statement that the Amendment states but a rule of construction, making clear that a Bill of Rights might not by implication be taken to increase the powers of the national government in areas

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[1] THE FEDERALIST No. 84 (Modern Library ed. 1937).

[2] 1 ANNALS OF CONGRESS 439 (1789). Earlier, Madison had written to Jefferson: "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." 5 WRITINGS OF JAMES MADISON, 271-72 (G. Hunt ed., 1904). *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1898 (1833).

not enumerated, and that it does not contain within itself any guarantee of a right or a proscription of an infringement.[3] Recently, however, the Amendment has been construed to be positive affirmation of the existence of rights which are not enumerated but which are nonetheless protected by other provisions.

The Ninth Amendment had been mentioned infrequently in decisions of the Supreme Court[4] until it became the subject of some exegesis by several of the Justices in *Griswold v. Connecticut*.[5] There a statute prohibiting use of contraceptives was voided as an infringement of the right of marital privacy. Justice Douglas, writing the opinion of the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[6] Thus, while privacy is nowhere mentioned, it is one of the values served and protected by the First Amendment through its protection of associational rights, and by the Third, the Fourth, and the Fifth Amendments as well. The Justice recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference. Justice Goldberg, concurring, devoted several pages to the Amendment.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . 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

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[3] To some extent, the Ninth and Tenth Amendments overlap with respect to the question of unenumerated powers, one of the two concerns expressed by Madison, more clearly in his letter to Jefferson but also in his introductory speech.

[4] In United Public Workers v. Mitchell, 330 U.S. 75, 94-95 (1947), upholding the Hatch Act, the Court said: "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth, and Tenth Amendments." *See* Ashwander v. TVA, 297 U.S. 288, 300-11 (1936), and Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143-44 (1939). *See also* Justice Chase's opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798), and Justice Miller for the Court in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1875).

[5] 381 U.S. 479 (1965).

[6] Id. at 484. The opinion was joined by Chief Justice Warren and by Justices Clark, Goldberg, and Brennan.

Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." [7]

While, therefore, neither opinion sought to make of the Ninth Amendment a substantive source of constitutional guarantees, both did read it as indicating a function of the courts to interpose a veto over legislative and executive efforts to abridge other fundamental rights. In this case, both opinions seemed to concur that the fundamental right claimed and upheld was derivative of several express rights and in this case, really, the Ninth Amendment added almost nothing to the argument. But if there is a claim of a fundamental right which cannot reasonably be derived from one of the provisions of the Bill of Rights, even with the Ninth Amendment, how is the Court to determine, first, that it is fundamental, and second, that it is protected from abridgment? [8]

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[7] Id. at 488, 491, 492. Chief Justice Warren and Justice Brennan joined this opinion. Justices Harlan and White concurred id. at 499, 502, without alluding to the Ninth Amendment, but instead basing their conclusions on substantive due process, finding that the state statute "violates basic values implicit in the concept of ordered liberty," (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Id. at 500. It would appear that the source of the fundamental rights to which Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former's express rejection of this ground. Id. at 481-82. Justices Black and Stewart dissented. Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

[8] As Justice Scalia recently observed, "the [Ninth Amendment's] refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people" Troxel v. Granville, 530 U.S. 57, 91 (2000), (dissenting from recognition of due-process-derived parental right to direct the upbringing of their children).

Notice the recurrence to the Ninth Amendment as a "constitutional 'saving clause'" in Chief Justice Burger's plurality opinion in Richmond Newspapers v. Virginia, 448 U.S. 555, 579-80 & n.15 (1980). Scholarly efforts to establish the clause as a substantive protection of rights include J. ELY, DEMOCRACY AND DISTRUST—A THEORY OF JUDICIAL REVIEW 34-41 (1980); and C. BLACK, DECISION ACCORDING TO LAW (1981), critically reviewed in W. Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L. J. 207 (1981). For a collection of articles

on the Ninth Amendment, *see* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989).

# TENTH AMENDMENT

## RESERVED POWERS

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# RESERVED POWERS

## TENTH AMENDMENT

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.

### RESERVED POWERS

#### Scope and Purpose

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified." [1] "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." [2] That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was firmly settled by the refusal of both Houses of Congress to insert the word "expressly" before the word "delegated," [3] and was confirmed by Madison's remarks in the course of the debate, which took place while the proposed amendment was pending, concerning Hamilton's plan to establish a national bank. "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not

[1] United States v. Sprague, 282 U.S. 716, 733 (1931).

[2] United States v. Darby, 312 U.S. 100, 124 (1941). "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' [citing *Darby*], it is not without significance. The 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." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). This policy was effectuated, at least for a time, in National League of Cities v. Usery, 426 U.S. 833 (1976).

[3] ANNALS OF CONGRESS 767-68 (1789) (defeated in House 17 to 32); 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150-51 (1971) (defeated in Senate by unrecorded vote).

given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."[4] Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes.

In *McCulloch v. Maryland*,[5] Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause[6] to counter the argument. The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about the possible swallowing up of states' rights and referred to the Tenth Amendment to allay these apprehensions, all in support of his claim that the power to create corporations was reserved by that Amendment to the States.[7] Stressing the fact that the Amendment, unlike the cognate section of the Articles of Confederation, omitted the word "expressly" as a qualification of granted powers, Marshall declared that its effect was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument."[8]

**Effect of Provision on Federal Powers**

***Federal Taxing Power***.—Not until after the Civil War was the idea that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case, *Collector v. Day*.[9] Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of state officers, Justice Nelson made the sweeping statement that "the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the

[4] 2 ANNALS OF CONGRESS 1897 (1791).

[5] 17 U.S. (4 Wheat.) 316 (1819).

[6] *See* discussion under "Necessary and Proper Clause," supra.

[7] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 372 (1819) (argument of counsel).

[8] Id. at 406. "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." United States v. Darby, 312 U.S. 100, 124 (1941).

[9] 78 U.S. (11 Wall.) 113 (1871).

States." [10] In 1939, *Collector v. Day* was expressly overruled. [11] Nevertheless, the problem of reconciling state and national interest still confronts the Court occasionally, and was elaborately considered in *New York v. United States*, [12] where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a State. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that "[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it." [13] Justices Frankfurter and Rutledge found in the Tenth Amendment "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." [14] Justices Douglas and Black dissented, saying: "If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have." [15]

***Federal Police Power***.—A year before *Collector v. Day* was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils. [16] The Court did not refer to the Tenth Amendment. Instead, it asserted that the "express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested." [17] Similarly, in the *Employers' Liability Cases*, [18] an act of Congress making every carrier engaged in interstate commerce liable to "any" employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a

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[10] Id. at 124.

[11] Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). The Internal Revenue Service is authorized to sue a state auditor personally and recover from him an amount equal to the accrued salaries which, after having been served with notice of levy, he paid to state employees delinquent in their federal income tax. Sims v. United States, 359 U.S. 108 (1959).

[12] 326 U.S. 572 (1946).

[13] Id. at 589.

[14] Id. at 584.

[15] Id. at 595. Most recently, the issue was canvassed, but inconclusively, in Massachusetts v. United States, 435 U.S. 444 (1978).

[16] United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

[17] Id. at 44.

[18] 207 U.S. 463 (1908). *See also* Keller v. United States, 213 U.S. 138 (1909).

closely divided Court, without explicit reliance on the Tenth Amendment. Not until it was confronted with the Child Labor Law, which prohibited the transportation in interstate commerce of goods produced in establishments in which child labor was employed, did the Court hold that the state police power was an obstacle to adoption of a measure which operated directly and immediately upon interstate commerce. In *Hammer v. Dagenhart*,[19] five members of the Court found in the Tenth Amendment a mandate to nullify this law as an unwarranted invasion of the reserved powers of the States. This decision was expressly overruled in *United States v. Darby*.[20]

During the twenty years following *Hammer v. Dagenhart*, a variety of measures designed to regulate economic activities, directly or indirectly, were held void on similar grounds. Excise taxes on the profits of factories in which child labor was employed,[21] on the sale of grain futures on markets which failed to comply with federal regulations,[22] on the sale of coal produced by nonmembers of a coal code established as a part of a federal regulatory scheme,[23] and a tax on the processing of agricultural products, the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government,[24] were all found to invade the reserved powers of the States. In *Schechter Corp. v. United States*,[25] the Court, after holding that the commerce power did not extend to local sales of poultry, cited the Tenth Amendment to refute the argument that the existence of an economic emergency justified the exercise of what Chief Justice Hughes called "extraconstitutional authority."[26]

In 1941, the Court came full circle in its exposition of this Amendment. Having returned four years earlier to the position of John Marshall when it sustained the Social Security Act[27] and National Labor Relations Act,[28] it explicitly restated Marshall's thesis in upholding the Fair Labor Standards Act in *United States v. Darby*.[29] Speaking for a unanimous Court, Chief Justice Stone

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[19] 247 U.S. 251 (1918).
[20] 312 U.S. 100 (1941).
[21] Child Labor Tax Case, 259 U.S. 20, 26, 38 (1922).
[22] Hill v. Wallace, 259 U.S. 44 (1922). *See also* Trusler v. Crooks, 269 U.S. 475 (1926).
[23] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[24] United States v. Butler, 297 U.S. 1 (1936).
[25] 295 U.S. 495 (1935).
[26] Id. at 529.
[27] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).
[28] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[29] 312 U.S. 100 (1941). *See also* United States v. Carolene Products Co., 304 U.S. 144, 147 (1938); Case v. Bowles, 327 U.S. 92, 101 (1946).

wrote: "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered." [30]

But even prior to 1937 not all measures taken to promote objectives which had traditionally been regarded as the responsibilities of the States had been held invalid. In *Hamilton v. Kentucky Distilleries Co.*, [31] a unanimous Court, speaking by Justice Brandeis, upheld "War Prohibition," saying: "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power." [32] And in a series of cases, which today seem irreconcilable with *Hammer v. Dagenhart*, it sustained federal laws penalizing the interstate transportation of lottery tickets, [33] of women for immoral purposes, [34] of stolen automobiles, [35] and of tick-infected cattle, [36] as well as a statute prohibiting the mailing of obscene matter. [37] It affirmed the power of Congress to punish the forgery of bills of lading purporting to cover interstate shipments of merchandise, [38] to subject prison-made goods moved from one State to another to the laws of the receiving State, [39] to regulate prescriptions for the medicinal use of liquor as an appropriate measure for the enforcement of the Eighteenth Amendment, [40] and to control extortionate means of collecting and attempting to collect payments on loans, even when all aspects of the credit transaction took place within one

[30] 312 U.S. 100, 114, 123, 124 (1941). *See also* Fernandez v. Wiener, 326 U.S. 340, 362 (1945).
[31] 251 U.S. 146 (1919).
[32] Id. at 156.
[33] Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
[34] Hoke v. United States, 227 U.S. 308 (1913).
[35] Brooks v. United States, 267 U.S. 432 (1925).
[36] Thornton v. United States, 271 U.S. 414 (1926).
[37] Roth v. United States, 354 U.S. 476 (1957).
[38] United States v. Ferger, 250 U.S. 199 (1919).
[39] Kentucky Whip & Collar Co. v. Illinois C. R.R., 299 U.S. 334 (1937).
[40] Everard's Breweries v. Day, 265 U.S. 545 (1924).

State's boundaries.[41] More recently, the Court upheld provisions of federal surface mining law that could be characterized as "land use regulation" traditionally subject to state police power regulation.[42]

Reversing this trend, the Court in 1995 in *United States v. Lopez*[43] struck down a statute prohibiting possession of a gun at or near a school, rejecting an argument that possession of firearms in school zones can be punished under the Commerce Clause because it impairs the functioning of the national economy. Acceptance of this rationale, the Court said, would eliminate "a[ny] distinction between what is truly national and what is truly local," would convert Congress' commerce power into "a general police power of the sort retained by the States," and would undermine the "first principle" that the Federal Government is one of enumerated and limited powers.[44] Application of the same principle led five years later to the Court's decision in *United States v. Morrison*[45] invalidating a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Congress may not regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," the Court concluded. "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[46]

Notwithstanding these federal inroads into powers otherwise reserved to the States, the Court has held that Congress could not itself undertake to punish a violation of state law; in *United States v. Constantine*,[47] a grossly disproportionate excise tax imposed on retail liquor dealers carrying on business in violation of local law was held unconstitutional. However, Congress does not contravene reserved state police powers when it levies an occupation tax on all

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[41] Perez v. United States, 402 U.S. 146 (1971).
[42] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981).
[43] 514 U.S. 549 (1995).
[44] United States v. Lopez, 514 U.S. at 552, 567-68 (1995).
[45] 529 U.S. 598 (2000).
[46] 529 U.S. at 617.
[47] 296 U.S. 287 (1935). The Civil Rights Act of 1875, which made it a crime for one person to deprive another of equal accommodations at inns, theaters or public conveyances was found to exceed the powers conferred on Congress by the Thirteenth and Fourteenth Amendments and hence to be an unlawful invasion of the powers reserved to the States by the Tenth Amendment. Civil Rights Cases, 109 U.S. 3, 15 (1883). Congress has now accomplished this end under its commerce powers, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964), but it is clear that the rationale of the *Civil Rights Cases* has been greatly modified if not severely impaired. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (13th Amendment); Griffin v. Breckenridge, 403 U.S. 88 (1971) (13th Amendment); United States v. Guest, 383 U.S. 745 (1966) (14th Amendment).

persons engaged in the business of accepting wagers regardless of whether those persons are violating state law, and imposes severe penalties for failure to register and pay the tax.[48]

***Federal Regulations Affecting State Activities and Instrumentalities***.—Since the mid-1970s, the Court has been closely divided over whether the Tenth Amendment or related constitutional doctrine constrains congressional authority to subject state activities and instrumentalities to generally applicable requirements enacted pursuant to the commerce power.[49] Under *Garcia v. San Antonio Metropolitan Transit Authority*,[50] the Court's most recent ruling directly on point, the Tenth Amendment imposes practically no judicially enforceable limit on generally applicable federal legislation, and states must look to the political process for redress. *Garcia*, however, like *National League of Cities v. Usery*,[51] the case it overruled, was a 5-4 decision, and there are recent indications that the Court may be ready to resurrect some form of Tenth Amendment constraint on Congress.

In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was "undoubtedly within the scope of the Commerce Clause,"[52] but it cautioned that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[53] The Court approached but did not reach the conclusion that the Tenth Amendment was the prohibition here, not that it directly interdicted federal power because power which is delegated is *not* reserved, but that it implicitly embodied a policy against impairing the States' integrity or ability to function.[54] But, in the end, the Court held that the legislation was invalid, not because it violated a prohibition found in the Tenth Amendment or elsewhere, but because the law was "not within the authority granted Congress."[55] In subsequent cases applying or distinguishing *National League of Cities*, the Court and

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[48] United States v. Kahriger, 345 U.S. 22, 25-26 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[49] The matter is discussed more fully under "Supremacy Clause Versus the Tenth Amendment," supra.

[50] 469 U.S. 528 (1985).

[51] 426 U.S. 833 (1976).

[52] Id. at 841.

[53] Id. at 845.

[54] Id. at 843.

[55] Id. at 852.

dissenters wrote as if the Tenth Amendment was the prohibition.[56] Whatever the source of the constraint, it was held not to limit the exercise of power under the Reconstruction Amendments.[57]

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Auth.*[58] Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair."[59] With only passing reference to the Tenth Amendment the Court nonetheless clearly reverted to the Madisonian view of the Amendment reflected in *Unites States v. Darby*.[60] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[61] The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes.[62] "Freestanding conceptions of state sovereignty" such as the *National League of Cities* test subvert the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[63] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards

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[56] *E.g.*, FERC v. Mississippi, 456 U.S. 742, 771 (1982) (Justice Powell dissenting); id. at 775 (Justice O'Connor dissenting); EEOC v. Wyoming , 460 U.S. 226 (1983). The *EEOC* Court distinguished *National League of Cities*, holding that application of the Age Discrimination in Employment Act to state fish and game wardens did not directly impair the state's ability to structure integral operations in areas of traditional governmental function, since the state remained free to assess each warden's fitness on an individualized basis and retire those found unfit for the job.

[57] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156 (1980); Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (plurality opinion of Chief Justice Burger).

[58] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection.

[59] Id. at 557.

[60] 312 U.S. 100, 124 (1941), discussed supra. Madison's views were quoted by the Court in *Garcia*, 469 U.S. at 549.

[61] 469 U.S. at 549.

[62] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.

[63] 469 U.S. at 550, 546.

Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits."[64] In sum, the Court in *Garcia* seems to have said that most but not necessarily all disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. What it would take for legislation to so threaten the "special and specific position" that states occupy in the constitutional system as to require judicial rather than political resolution was not delineated.

The first indication was that it would take a very unusual case indeed. In *South Carolina v. Baker* the Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will apply substantive judicial review standards to claims that Congress has regulated state activities in violation of the Tenth Amendment.[65] A claim that Congress acted on incomplete information would not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[66] Thus, the general rule was that "limits on Congress' authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[67]

Later indications are that the Court may be looking for ways to back off from *Garcia*. One device is to apply a "clear statement" rule requiring unambiguous statement of congressional intent to displace state authority. After noting the serious constitutional issues that would be raised by interpreting the Age Discrimination in Employment Act to apply to appointed state judges, the Court in *Gregory v. Ashcroft*[68] explained that, because *Garcia* "con-

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[64] 469 U.S. at 556.

[65] 485 U.S. 505, 512 (1988). Justice Scalia, in a separate concurring opinion, objected to this language as departing from the Court's assertion in *Garcia* that the "constitutional structure" imposes some affirmative limits on congressional action. Id. at 528.

[66] Id. at 513.

[67] Id. at 512.

[68] 501 U.S. 452, 464 (1991). The Court left no doubt that it considered the constitutional issue serious. "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at 'the heart of representative government' [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." Id. at 463. In the latter context the Court's opinion by Justice O'Connor cited Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). *See also* McConnell, Federalism: Evaluating

strained" consideration of "the limits that the state-federal balance places on Congress' powers," a plain statement rule was all the more necessary. "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."

The Court's 1992 decision in *New York v. United States*,[69] may portend a more direct retreat from *Garcia*. The holding in *New York*, that Congress may not "commandeer" state regulatory processes by ordering states to enact or administer a federal regulatory program, applied a limitation on congressional power previously recognized in dictum[70] and in no way inconsistent with the holding in *Garcia*. Language in the opinion, however, sounds more reminiscent of *National League of Cities* than of *Garcia*. First, the Court's opinion by Justice O'Connor declares that it makes no difference whether federalism constraints derive from limitations inherent in the Tenth Amendment, or instead from the absence of power delegated to Congress under Article I; "the Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[71] Second, the Court, without reference to *Garcia*, thoroughly repudiated *Garcia*'s "structural" approach requiring states to look primarily to the political processes for protection. In rejecting arguments that New York's sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, the Court declared that "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals." Consequently, "State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[72] The stage appears to be set, therefore, for some relaxation of *Garcia*'s obstacles to federalism-based challenges to legislation enacted pursuant to the commerce power.

Extending the principle applied in *New York*, the Court in *Printz v. United States*[73] held that Congress may not "circumvent"

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the Founders' Design, 54 U. CHI. L. REV. 1484 (1987) (also cited by the Court); and Van Alystyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

[69] 505 U.S. 144 (1992).

[70] *See, e.g.*, Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 288 (1981); FERC v. Mississippi, 456 U.S. 742, 765 (1982); South Carolina v. Baker, 485 U.S. 505, 513-15 (1988).

[71] 505 U.S. at 157.

[72] Id. at 2431-32.

[73] 521 U.S. 898 (1997).

the prohibition on commandeering a state's regulatory processes "by conscripting the State's officers directly."[74] Struck down in *Printz* were interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[75]

In *Reno v. Condon*,[76] the Court distinguished *New York* and *Printz* in upholding the Driver's Privacy Protection Act of 1994 (DPPA), a federal law that restricts the disclosure and resale of personal information contained in the records of state motor vehicles departments. The Court returned to a principle articulated in *South Carolina v. Baker* that distinguishes between laws which improperly seek to control the manner in which States regulate private parties, and those which merely regulate state activities directly.[77] Here, the Court found that the DPPA "does not require the States in their sovereign capacities to regulate their own citizens," but rather "regulates the States as the owners of databases."[78] The Court saw no need to decide whether a federal law may regulate the states exclusively, since the DPPA is a law of general applicability that regulates private resellers of information as well as states.[79]

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[74] 521 U.S. at 935.
[75] Id.
[76] 528 U.S. 141 (2000).
[77] 484 U.S. 505, 514-15 (1988).
[78] 528 U.S. at 151.
[79] Id.

# ELEVENTH AMENDMENT

## SUITS AGAINST STATES

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# SUITS AGAINST STATES

## ELEVENTH AMENDMENT

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.

### STATE SOVEREIGN IMMUNITY

#### Purpose and Early Interpretation

Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions inconsistent. At the same time, it is a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states." [1] Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability of the States and their officers to federal constitutional standards, it has occasioned considerable dispute within and without the Court. [2]

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793 [3] provoked such angry reaction in Georgia and such anxieties in other States that at the first meeting of Congress following the decision the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with, what was for that day, "vehement

[1] C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 at 286 (4th ed. 1983).

[2] An extraordinary amount of writing on the Amendment and its interpretation has appeared in recent years. *See, e.g.*, Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423; Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

[3] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

speed."[4] *Chisholm* had been brought under that part of the jurisdictional provision of Article III that authorized cognizance of "controversies ... between a State and Citizens of another State." At the time of the ratification debates, opponents of the proposed Constitution had objected to the subjection of a State to suits in federal courts and had been met with conflicting responses—on the one hand, an admission that the accusation was true and that it was entirely proper so to provide, and, on the other hand, that the accusation was false and the clause applied only when a State was the party plaintiff.[5] So matters stood when Congress, in enacting the Judiciary Act of 1789, without recorded controversy gave the Supreme Court original jurisdiction of suits between States and citizens of other States.[6] *Chisholm v. Georgia* was brought under this jurisdictional provision to recover under a contract for supplies executed with the State during the Revolution. Four of the five Justices agreed that a State could be sued under this Article III jurisdictional provision and that under section 13 the Supreme Court properly had original jurisdiction.[7]

The Amendment proposed by Congress and ratified by the States was directed specifically toward overturning the result in *Chisholm* and preventing suits against States by citizens of other States or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, altogether bar suits against States in the federal courts.[8] That is, it

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[4] The phrase is Justice Frankfurter's, from Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House; ratification occurred on February 7, 1795, when the twelfth State acted, there then being fifteen States in the Union.

[5] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 423–25 (rev. ed. 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making States subject to suit, 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (1836), but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied States could be made party defendants, id. at 533, 555–56, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that States could be and ought to be subject to suit. Id. at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that States would be subject to suit. 2 id. at 491. *See* Hamilton, in THE FEDERALIST No. 81 (Modern Library ed. 1937), also denying state suability. *See* Fletcher, supra at 1045–53 (discussing sources and citing other discussions).

[6] Ch. 20, § 13, 1 Stat. 80 (1789). *See also* Fletcher, supra, at 1053–54. For a thorough consideration of passage of the Act itself, *see* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. 1, ANTECEDENTS AND BEGINNINGS TO 1801 457–508 (1971).

[7] Id. at 723–34; Fletcher, supra, at 1054–58.

[8] Id. at 1058–63; Goebel, supra, at 736.

barred suits against States based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter.[9] The early decisions seemed to reflect this understanding of the Amendment, although the point was not necessary to the decisions and thus the language is dictum.[10] In *Cohens v. Virginia*,[11] Chief Justice Marshall ruled for the Court that the prosecution of a writ of error to review a judgment of a state court alleged to be in violation of the Constitution or laws of the United States did not commence or prosecute a suit against the State but was simply a continuation of one commenced by the State, and thus could be brought under § 25 of the Judiciary Act of 1789.[12] But in the course of the opinion, the Chief Justice attributed adoption of the Eleventh Amendment not to objections to subjecting States to suits *per se* but to well-founded concerns about creditors being able to maintain suits in federal courts for payment,[13] and stated his view that the Eleventh Amendment did not

[9] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[10] One square holding, however, was that of Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (C.C.D.Pa. 1809) (No. 14,647), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that States were subject to suits in admiralty. This understanding, *see* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 J. STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 560–61 (1833), did not receive a holding of the Court during this period, *see Georgia v. Madrazo*, supra; United States v. Peters, 9 U.S. (5 Cr.) 115 (1809); Ex parte Madrazo, 32 U.S. (7 Pet.) 627 (1833), and was held to be in error in Ex parte New York (No. 1), 256 U.S. 490 (1921).

[11] 19 U.S. (6 Wheat.) 264 (1821).

[12] 1 Stat. 73, 85.

[13] "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." 19 U.S. at 406-07.

bar suits against the States under federal question jurisdiction [14] and did not in any case reach suits against a State by its own citizens. [15]

In *Osborn v. Bank of the United States*, [16] the Court, again through Chief Justice Marshall, held that the Bank of the United States [17] could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the State itself. This ruling embodied two principles, one of which has survived and one of which the Marshall Court itself soon abandoned. The latter holding was that a suit is not one against a State unless the State is a named party of record. [18] The former holding, the primary rationale through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and thus

[14] "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." 19 U.S. at 382-83.

[15] "If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." 19 U.S. at 412.

[16] 22 U.S. (9 Wheat.) 738 (1824).

[17] The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

[18] 22 U.S. at 850-58. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, *see* id. at 857–58. *But compare* id. at 849. The holding was repudiated in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a State "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." In re Ayers, 123 U.S. 443, 487 (1887).

can derive no protection from an unconstitutional statute of a State.[19]

***Expansion of the Immunity of the States***.—Until the period following the Civil War, Chief Justice Marshall's understanding of the Amendment generally prevailed. But in the aftermath of that conflict, Congress for the first time effectively gave the federal courts general federal question jurisdiction,[20] and a large number of States in the South defaulted upon their revenue bonds in violation of the Contracts Clause of the Constitution.[21] As bondholders sought relief in federal courts, the Supreme Court gradually worked itself into the position of holding that the Eleventh Amendment, or more properly speaking the principles "of which the Amendment is but an exemplification,"[22] is a bar not only of suits against a State by citizens of other States, but also of suits brought by citizens of that State itself.[23]

Expansion as a formal holding occurred in *Hans v. Louisiana*,[24] a suit against the State by a resident of that State brought in federal court under federal question jurisdiction, alleging a violation of the Contracts Clause in the State's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only the entertaining of a suit against a State by citizens of another State, or citizens or subjects of a foreign state, the Court nonetheless thought the literal language was an insufficient basis for decision. Rather, wrote Justice Bradley for the Court, the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the *Chisholm* decision and reflected the determination that the decision was wrong and that federal jurisdiction did not extend to making defendants of unwilling States.[25]

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[19] 22 U.S. at 858-59, 868. For the flowering of the principle, *see* Ex parte Young, 209 U.S. 123 (1908).

[20] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See* discussion under "Development of Federal Question Jurisdiction" supra.

[21] *See, e.g.*, Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747 (1981); Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. LAW. 2 (1980); Orth, *The Virginia State Debt and the Judicial Power of the United States*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 106 (D. Bodenhamer & J. Ely eds., 1983).

[22] Ex parte New York (No. 1), 256 U.S. 490, 497 (1921).

[23] *E.g.*, In re Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); The Virginia Coupon Cases, 114 U.S. 269 (1885); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Louisiana v. Jumel, 107 U.S. 711 (1882). In Antoni v. Greenhow, 107 U.S. 769, 783 (1883), three concurring Justices propounded the broader reading of the Amendment which soon prevailed.

[24] 134 U.S. 1 (1890).

[25] 134 U.S. at 11.

Under this view, the amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. The views of the opponents of subjecting States to suit "were most sensible and just" and those views "apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."[26] "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law."[27] Thus, while the literal terms of the Amendment did not so provide, "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing,"[28] led the Court unanimously to hold that States could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

Then, in *Ex parte New York (No. 1)*,[29] the Court held that, absent consent to suit, a State was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification. . . . It is true the Amendment speaks only of suits in law or equity; but this is because . . . the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia* . . . from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case."[30] Just as *Hans v. Louisiana* had demonstrated the "impropriety of construing the Amendment" so as to permit federal question suits against a State, so "it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its

[26] 134 U.S. at 14-15.
[27] 134 U.S. at 15-16.
[28] 134 U.S. at 18-19. The Court acknowledged that Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382–83, 406–07, 410–12 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." 134 U.S. at 20.
[29] 256 U.S. 490 (1921).
[30] 256 U.S. at 497-98.

citizens or not."[31] An *in rem* admiralty action may be brought, however, if the State is not in possession of the *res*.[32]

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. "Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"[33]

In the 1980s four Justices, led by Justice Brennan, argued that *Hans* was incorrectly decided, that the Amendment was intended only to deny jurisdiction against the States in diversity cases, and that *Hans* and its progeny should be overruled.[34] But the remaining five Justices adhered to *Hans* and in fact stiffened it with a rule of construction quite severe in its effect.[35] The *Hans* interpretation was further solidified with the Court's ruling in *Seminole*

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[31] 256 U.S. at 498. *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982). *And see* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

[32] California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (application of the Abandoned Shipwreck Act) (distinguishing Ex parte New York and Treasure Salvors as involving in rem actions against property actually in possession of the State).

[33] Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) (quoting THE FEDERALIST, No. 81); Breard v. Greene, 523 U.S. 371, 377 (1998) (foreign nation may not contest validity of criminal conviction after State's failure at time of arrest to comply with notice requirements of Vienna Convention on Consular Relations). Similarly, the Court has recently held, relying on *Monaco*, the Amendment bars suits by Indian tribes against non-consenting states. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

[34] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (dissenting); Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (dissenting); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (concurring). Joining Justice Brennan were Justices Marshall, Blackmun, and Stevens. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

[35] *E.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–103 (1984) (opinion of the Court by Justice Powell); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237–40, 243–44 n.3 (1985) (opinion of the Court by Justice Powell); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472–74, 478–95 (1987) (plurality opinion of Justice Powell); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Justice Scalia concurring in part and dissenting in part); Dellmuth v. Muth, 491 U.S. 223, 227–32 (opinion of the Court by Justice Kennedy); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (plurality opinion of Justice White); id. at 105 (concurring opinions of Justices O'Connor and Scalia); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice O'Connor).

*Tribe of Florida v. Florida*,[36] that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment, and with its ruling in *Alden v. Maine*[37] that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in *state* courts as well as federal.

Having previously reserved the question of whether federal statutory rights could be enforced in *state* courts,[38] the Court in *Alden v. Maine*[39] held that states could also assert Eleventh Amendment "sovereign immunity" in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a "misnomer"[40] as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent "compelling evidence" that the States had surrendered such by the ratification of the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court's decision effectively limited the application of significant portions of federal law to state governments. Both *Seminole Tribe* and *Alden* were also 5–4 decisions with the four dissenting Justices maintaining that *Hans* was wrongly decided.[41]

This now institutionalized 5-4 split continued with the Court's ruling in *Federal Maritime Commission v. South Carolina State Ports Authority*,[42] which held that state sovereign immunity also applies to quasi-judicial proceedings in federal agencies. The operator of a cruise ship devoted to gambling had been denied entry to the Port of Charleston, and subsequently filed a complaint with the Federal Maritime Commission, alleging a violation of the Shipping Act of 1984.[43] Justice Breyer, writing for the four dissenting justices, emphasized the executive (as opposed to judicial nature) of such agency adjudications, and pointed out that the ultimate enforcement of such proceedings in federal court was exercised by a

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[36] 517 U.S. 44 (1996).

[37] 527 U.S. 706 (1999).

[38] Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 287 (1973).

[39] Alden v. Maine, 527 U.S. 706 (1999).

[40] 527 U.S. at 713.

[41] Chief Justice Rehnquist wrote the opinion of the Court in *Seminole Tribe*, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens dissented, as did Justice Souter, whose opinion was joined by Justices Ginsburg and Breyer. In Alden, Justice Kennedy wrote the opinion of the Court, joined by the Chief Justice, and by Justices O'Connor, Scalia, and Thomas. Justice Souter's dissenting opinion was joined by Justices Stevens, Ginsburg, and Breyer.

[42] 122 S. Ct. 1864 (2002). Justice Breyer's dissenting opinion describes a need for "continued dissent" of the majority's sovereign immunity holdings. 122 S. Ct. at 1889.

[43] 46 U.S.C. App. §1701 *et. seq.* (1994 ed. And Supp V).

federal agency (as is allowed under the doctrine of sovereign immunity). The majority, however, while admitting to a "relatively barren historical record," presumed that when a proceeding was "unheard of" at the time of the founding of the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism.[44]

**The Nature of the States' Immunity**

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of *Hans v. Louisiana*, *Ex parte New York*, and *Principality of Monaco*, is that *Chisholm* was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding" that Article III's grants of federal court jurisdiction did not extend to suits against the States. That view finds present day expression.[45] It explains the decision in *Edelman v. Jordan*,[46] in which the Court held that a State could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[47] But that the bar is not wholly jurisdictional seems established as well.[48]

Moreover, if under Article III there is no jurisdiction of suits against States, the settled principle that States may consent to suit[49] becomes conceptually difficult, inasmuch as it is not possible

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[44] 122 S. Ct. at 1872, 1874.

[45] *E.g.*, Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291–92 (1973) (Justice Marshall concurring); Nevada v. Hall, 440 U.S. 410, 420–21 (1979); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (Justice Powell dissenting); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64 (1996).

[46] 415 U.S. 651 (1974).

[47] 415 U.S. at 678. The Court relied on Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the State's immunity. Edelman has been followed in Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion.

[48] *See* Patsy v. Florida Board of Regents, 457 U.S. 496, 515–16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. *See* id. at 520 (Justice Powell dissenting).

[49] Clark v. Barnard, 108 U.S. 436 (1883).

to confer jurisdiction where it is lacking through the consent of the parties.[50] And there is jurisdiction under Article III of some suits against States, such as those brought by the United States or by other States.[51] And, furthermore, Congress is able in at least some instances to legislate away state immunity,[52] although it may not enlarge Article III jurisdiction.[53] The Court has recently declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived."[54]

Another explanation of the Eleventh Amendment is that it recognizes the doctrine of sovereign immunity, which was clearly established at the time: a state was not subject to suit without its consent.[55] This view also has support in modern case law: "the State's immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . ."[56] The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with federal governmental immunity.[57] Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver.[58] The limited effect of the doctrine in this context in federal court arises

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[50] *E.g.*, People's Band v. Calhoun, 102 U.S. 256, 260–61 (1880). *See* Justice Powell's explanation in Patsy v. Florida Board of Regents, 457 U.S. 496, 528 n.13 (1982) (dissenting) (no jurisdiction under Article III of suits against *unconsenting* States).

[51] *See, e.g.*, the Court's express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[52] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[53] The principal citation is, of course, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[54] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 99 (1984).

[55] As Justice Holmes explained, the doctrine is based "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." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting). On the sovereign immunity of the United States, *see* supra pp. 746–48. For the history and jurisprudence, *see* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[56] Alden v. Maine, 527 U.S. 706, 713 (1999).

[57] *See, e.g.*, United States v. Lee, 106 U.S. 196, 210–14 (1882); Belknap v. Schild, 161 U.S. 10, 18 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642–43, 645 (1911).

[58] A sovereign may consent to suit. *E.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940).

from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the States surrendered their sovereignty to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but which is more than their coequal.[59]

Thus, outside the area of federal court jurisdiction, there is the case of *Nevada v. Hall*,[60] which perfectly illustrates the difficulty. The case arose when a California resident sued a Nevada state agency in a California court because one of the agency's employees negligently injured him in an automobile accident in California. While recognizing that the rule during the framing of the Constitution was that a State could not be sued without its consent in the courts of another sovereign, the Court discerned no evidence in the federal constitutional structure, in the specific language, or in the intention of the Framers that would impose a general, federal constitutional constraint upon the action of a State in authorizing suit in its own courts against another State. The Court did imply that in some cases a "substantial threat to our constitutional system of cooperative federalism" might arise and occasion a different result, but this was not such a case.[61]

Within the area of federal court jurisdiction, the issue becomes the extent to which the States upon entering the Union gave up their immunity to suit in federal court. *Chisholm* held, and the Eleventh Amendment reversed the holding, that the States had given up their immunity to suit in diversity cases based on common law or state law causes of action; *Hans v. Louisiana* and subsequent cases held that the Amendment in effect codified an understanding of broader immunity to suits based on federal causes of action.[62] Other cases have held that the States did give up their immunity to suits by the United States or by other States and that subjection to suit continues.[63]

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[59] *See* Fletcher, supra.

[60] 440 U.S. 410 (1979).

[61] 440 U.S. at 424 n.24. The Court looked to the full faith and credit clause as a possible constitutional limitation. The dissent would have found implicit constitutional assurance of state immunity as an essential component of federalism. Id. at 427 (Justice Blackmun), 432 (Justice Rehnquist).

[62] For a while only Justice Brennan advocated this view, Parden v. Terminal Ry., 377 U.S. 184 (1964); Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 298 (1973) (dissenting), but in time he was joined by three others. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissenting).

[63] *E.g.*, United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904). *See* Kansas v. Colorado, 533 U.S. 1 (2001) (state may

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal Government.[64] In this respect, the federal courts may not act without congressional guidance in subjecting States to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially-created doctrines requiring it to be explicit when it legislates against state immunity.[65]

**Suits Against States**

Aside from suits against States by the United States and by other States, there are permissible suits by individuals against States upon federal constitutional and statutory grounds and indeed upon grounds expressly covered by the Eleventh Amendment in somewhat fewer circumstances.

***Consent to Suit and Waiver***.—The immunity of a State from suit is a privilege which it may waive at its pleasure. It may do so by a law specifically consenting to suit in the federal courts.[66] But the conclusion that there has been consent or a waiver is not lightly inferred; the Court strictly construes statutes alleged to consent to suit. Thus, a State may waive its immunity in its own courts without consenting to suit in federal court,[67] and a general authorization "to sue and be sued" is ordinarily insufficient to constitute consent.[68] "The Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' . . .

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seek damages from another state, including damages to its citizens, provided it shows that the state has an independent interest in the proceeding).

[64] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Quern v. Jordan, 440 U.S. 332, 337 (1979).

[65] *See* Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves on the degree of explicitness required. *See also* Quern v. Jordan, 440 U.S. 332, 343–45 (1979). Later cases stiffened the rule of construction. *See* n.56, infra, and text at nn. 79–84. The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching States, while in Maryland v. Wirtz, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law.

[66] Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906).

[67] Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909); Graves v. Texas Co., 298 U.S. 393, 403–04 (1936); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[68] Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1947); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). *Compare* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 519 n.* (1982) (Justice White concurring), *with* id. at 522 and n.5 (Justice Powell dissenting).

A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts . . . and '[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.'" [69]

Thus, in *Port Authority Trans-Hudson Corp. v. Feeney,* [70] an expansive consent "to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . ." was deemed too "ambiguous and general" to waive immunity in federal court, since it might be interpreted to reflect only a State's consent to suit in its own courts. But when combined with language specifying that consent was conditioned on venue being laid "within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District," waiver was effective. [71]

While the Court in a few cases has found a waiver by implication, the current vitality of these cases is questionable. Thus, in *Parden v. Terminal Railway*, [72] the Court ruled that employees of a state-owned railroad could sue the State for damages under the Federal Employers' Liability Act. One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, enacted some 20 years previously, the State had effectively accepted the imposition of the Act and consented to suit. [73] Distinguishing *Parden* as involving a proprietary activity, the Court subsequently refused to find any implied consent to suit by States participating in federal spending programs; participation was insufficient, and only when waiver has been "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," will it be found. [74] This aspect of

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[69] Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305–06 (1990) (internal citations omitted; emphasis in original).

[70] 495 U.S. 299 (1990).

[71] 495 U.S. at 306-07. *See*, on the other hand, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

[72] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress' power to withdraw immunity. *See also* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[73] Edelman v. Jordan, 415 U.S. 651, 671–72 (1974). For the same distinction in the Tenth Amendment context, *see* National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).

[74] Edelman v. Jordan, 415 U.S. 651 (1974) (quoting id. at 673, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Marshall and Blackmun found waiver through knowing participation, 415 U.S. at 688. In *Florida Dep't*, Justice Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. Id. at 151.

*Parden* has now been overruled, a plurality of the Court emphasizing that congressional abrogation of immunity must be express and unmistakable.[75]

Similarly, a State may waive its immunity by initiating or participating in litigation. In *Clark v. Barnard*,[76] the State had filed a claim for disputed money deposited in a federal court, and the Court held that the State could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because of the decision of an official or an attorney representing the State to litigate the merits of a suit, so that a State may at any point in litigation raise a claim of immunity based on whether that official has the authority under state law to make a valid waiver.[77] However, this argument is only available when the State is brought into federal court involuntarily. If a State voluntarily agrees to removal of a state action to federal court, the Court has held it may not then invoke a defense of sovereign immunity and thereby gain an unfair tactical advantage.[78]

With respect to governmental entities that derive their authority from the State, but are not the State, the Court closely examines state law to determine what the nature of the entity is, whether it is an arm of the State or whether it is to be treated like a municipal corporation or other political subdivision. An arm of the State has immunity: "agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."[79] Municipal corporations, though they partake under state law of the State's immunity, do not have immunity in federal court and the

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[75] Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987). Justice Powell's plurality opinion was joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Scalia, concurring, thought *Parden* should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that *Hans v. Louisiana* shielded states from immunity. Id. at 495.

[76] 108 U.S. 436 (1883).

[77] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466–467 (1945); Edelman v. Jordan, 415 U.S. 651, 677–678 (1974).

[78] Lapides v. Board of Regents of University System of Georgia, 122 S. Ct. 1640 (2002).

[79] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979), citing Edelman v. Jordan, 415 U.S. 651 (1974); and Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. Regents of the University of California v. Doe, 519 U.S. 425 (1997).

States may not confer it.[80] Entities created through interstate compacts (subject to congressional approval) generally also are subject to suit.[81]

***Congressional Withdrawal of Immunity***.—The Constitution grants to Congress power to legislate in ways that affect the States. At least in some instances when Congress does so, it may subject the States themselves to suit at the initiation of individuals to implement the legislation. The clearest example arises from the Reconstruction Amendments, which are direct restrictions upon state powers and which expressly provide for congressional implementing legislation.[82] Thus, "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment."[83] Dwelling on the fact that the Fourteenth Amendment was ratified after the Eleventh became part of the Constitution, the Court implied that earlier grants of legislative power to Congress in the body of the Constitution might not contain a similar power to authorize suits against the States.[84] The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress' judgment will promote compliance.[85] The principal judicial brake on this power to abrogate state immunity has been application of a

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[80] Lincoln County v. Luning, 133 U.S. 529 (1890); Chicot County v. Sherwood, 148 U.S. 529 (1893); Workman v. City of New York, 179 U.S. 552 (1900); Moor v. County of Alameda, 411 U.S. 693 (1973); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Notice that in National League of Cities v. Usery, 426 U.S. 833 (1976), the Court extended the state immunity from regulation in that case to political subdivisions as well.

[81] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[82] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678 (1978); City of Rome v. United States, 446 U.S. 156 (1980). More recent cases affirming Congress' § 5 powers include: Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[83] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[84] 427 U.S. at 456 (under the Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.")

[85] In Maher v. Gagne, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys' fees on the State following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. Maine v. Thiboutot, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys' fees were awarded against States are Hutto v. Finney, 437 U.S. 678 (1978); and New York Gaslight Club v. Carey, 447 U.S. 54 (1980).

clear statement rule requiring that congressional intent to subject States to suit must be clearly expressed.[86]

In the 1989 case of *Pennsylvania v. Union Gas Co.*,[87] the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty five years earlier the Court had stated that same principle,[88] but only as an alternative holding, and a later case had set forth a more restrictive rule.[89] The premises of *Union Gas* were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that the exercises of Congress' powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the

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[86] Even prior to the recent tightening of the rule to require clear expression in the statutory language itself (*see* n. and accompanying text, infra), application of the rule curbed congressional enforcement. Fitzpatrick v. Bitzer, 427 U.S. 445 451–53 (1976); Hutto v. Finney, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in Quern v. Jordan, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include States within the term "person" for the purpose of subjecting them to suit. The question arose after Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), reinterpreted "person" to include municipal corporations. *Cf.* Alabama v. Pugh, 438 U.S. 781 (1978). The Court has reserved the question whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against States, Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in Scheuer v. Rhodes, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. *But see* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976) (refusing money damages under the Fourteenth Amendment), appeal dismissed sub nom. Rabinovitch v. Nyquist, 433 U.S. 901 (1977). The Court declined in Ex parte Young, 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

[87] 491 U.S. 1 (1989). The plurality opinion of the Court was by Justice Brennan and was joined by the three other Justices who believed *Hans* was incorrectly decided. *See* id. at 23 (Justice Stevens concurring). The fifth vote was provided by Justice White, id. at 45, 55–56 (Justice White concurring), although he believed *Hans* was correctly decided and ought to be maintained and although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Scalia thought the statutes were express enough but that Congress simply lacked the power. Id. at 29. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.

[88] Parden v. Terminal Railway, 377 U.S. 184, 190–92 (1964). *See also* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 283, 284, 285–86 (1973).

[89] Edelman v. Jordan, 415 U.S. 651, 672 (1974).

states to enforce congressional enactments. The dissenters denied each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, would have held that none existed under Article I.

*Pennsylvania v. Union Gas* lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.[90] Chief Justice Rehnquist, writing for a 5–4 majority, concluded that there is "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause [at issue in *Seminole Tribe*] and the Interstate Commerce Clause [relied upon in *Union Gas*]."[91] In the majority's view, *Union Gas* had deviated from a line of cases tracing back to *Hans v. Louisiana*[92] that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[93] Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[94] Subsequent cases have confirmed this interpretation.[95]

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[96] "based upon a rationale wholly inapplicable to the Interstate Commerce Clause, *viz.*, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power

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[90] 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

[91] 517 U.S. at 63.

[92] 134 U.S. 1 (1890).

[93] 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

[94] 517 U.S. at 72-73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in Hans v. Louisiana was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." Id. at 160.

[95] College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (the Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid).

[96] 427 U.S. 445 (1976).

achieved by Article III and the Eleventh Amendment," remains good law.[97]

At the same time as these developments, however, a different majority secured a victory in circumscribing the manner in which Congress could express its decision to abrogate state immunity. Henceforth, and even with respect to statutes that were enacted prior to promulgation of the judicial rule of construction, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute*" itself.[98] This means that no legislative history will suffice at all.[99] Indeed, at one time a plurality of the Court was of the apparent view that only if Congress refers specifically to state sovereign immunity and the Eleventh Amendment will its language be unmistakably clear.[100] Thus, the Court held in *Atascadero* that general language subjecting to suit in federal court "any recipient of Federal assistance" under the Rehabilitation Act was deemed insufficient to satisfy this test, not because of any question about whether States are "recipients" within the meaning of the provision but because "given their constitutional role, the States are not like any other class of recipients of federal aid."[101] As a result of these rulings, Congress began to utilize the "magic words" the Court appeared to insist on.[102] More recently, however, the Court has accepted less precise language.[103]

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[97] 517 U.S. at 65-66.

[98] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (emphasis supplied).

[99] See, particularly, Dellmuth v. Muth, 491 U.S. 223, 230 (1989) ("legislative history generally will be irrelevant"), and Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 103-04 (1989).

[100] Justice Kennedy for the Court in *Dellmuth*, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakably clarity because, inter alia, it "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." Justice Scalia, one of four concurring Justices, expressed an "understanding" that the Court's reasoning would allow for clearly expressed abrogation of immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment." Id. at 233.

[101] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). And see Dellmuth v. Muth, 491 U.S. 223 (1989).

[102] Following *Atascadero*, in 1986 Congress provided that States were not to be immune under the Eleventh Amendment from suits under several laws barring discrimination by recipients of federal financial assistance. Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (1986), 42 U.S.C. § 2000d-7. Following *Dellmuth*, Congress amended the statute to insert the explicit language. Pub. L. No. 101-476, § 103, 104 Stat. 1106 (1990), 20 U.S.C. § 1403. *See also* the Copyright Remedy Clarification Act, Pub. L. No. 101-553, § 2, 104 Stat. 2749 (1990), 17 U.S.C. § 511 (making States and state officials liable in damages for copyright violations).

[103] Kimel v. Florida Board of Regents, 528 U.S. 62, 74-78 (2000). In *Kimel*, statutory language authorized age discrimination suits "against any employer (including a public agency)," and a "public agency" was defined to include "the government of a State or political subdivision thereof." The Court found this language to be suffi-

Although acknowledging that the Eleventh Amendment was not an issue because the § 1983 suit had been pursued in state court, nonetheless the Court applied its strict rule of construction, requiring "unmistakable clarity" by Congress in order to subject States to suit, in holding that States and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts.[104] While the Court is willing to recognize exceptions to the clear statement rule when the issue involves subjection of states to suit in state courts, the Court will normally opt for "symmetry" that treats the states' liability or immunity the same in both state and federal courts.[105]

**Suits Against State Officials**

Mitigation of the wrongs possible when the State is immune from suit has been achieved under the doctrine that sovereign immunity, either of the States or of the Federal Government, does not ordinarily prevent a suit against an official to restrain him from commission of a wrong, even though the government is thereby restrained.[106] The doctrine is built upon a double fiction: that for purposes of the sovereign's immunity, a suit against the official is not a suit against the government, but for the purpose of finding state action to which the Constitution applies, the official's conduct is that of the State.[107] The doctrine preceded but is most noteworthily associated with the decision in *Ex parte Young*,[108] a case truly deserving the overworked adjective, seminal.

*Young* arose when a state legislature passed a law reducing railroad rates and providing severe penalties for any railroad that failed to comply with the law. Plaintiff railroad stockholders brought an action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that

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ciently clear evidence of intent to abrogate state sovereign immunity. The relevant portion of the opinion was written by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsberg, Breyer and Stevens. *But see* Raygor v. Regents of the University of Minnesota, 122 S. Ct. 999 (2002) (federal supplemental jurisdiction statute which tolls limitations period for state claims during pendency of federal case not applicable to claim dismissed on the basis of 11th Amendment immunity) .

[104] Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

[105] Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991) (interest in "symmetry" is outweighed by stare decisis, the FELA action being controlled by *Parden v. Terminal Ry.*

[106] *See, e.g.*, Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), where the majority and dissenting opinions utilize both federal and Eleventh Amendment cases in a suit against a federal official. *See also* Tindal v. Wesley, 167 U.S. 204, 213 (1897), applying to the States the federal rule of United States v. Lee, 106 U.S. 196 (1882).

[107] C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 (4th ed. 1983).

[108] 209 U.S. 123 (1908).

they would suffer irreparable harm if he were not prevented from acting. An injunction was granted forbidding Young from acting on the law, an injunction he violated by bringing an action in state court against noncomplying railroads; for this action he was adjudged in contempt. If the Supreme Court had held that the injunction was not impermissible, because the suit was one against the State, there would have been no practicable way for the railroads to attack the statute without placing themselves in great danger. They could have disobeyed it and alleged its unconstitutionality in the enforcement proceedings, but if they were wrong about the statute's validity the penalties would have been devastating.[109] In the modern context, the effectuation of federal constitutional rights against state action often depends upon the imposition of affirmative obligations through injunctions, and this relief would be impossible if such an injunction were in effect a suit against a State.

In deciding *Young*, the Court was confronted with inconsistent lines of cases, including numerous precedents for permitting suits against state officers. Chief Justice Marshall had begun the process in *Osborn* by holding that suit was barred only when the State was formally named a party,[110] although he was presently required to modify that decision and preclude suit when an official, the governor of a State, was sued in his official capacity.[111] Relying on *Osborn* and reading *Madrazo* narrowly, the Court, seeming to treat the barrier to suit as common-law sovereign immunity, held in a series of cases that an official of a State could be sued to prevent him from executing a state law in conflict with the Constitution or a law of the United States, and the fact that the officer may be acting on behalf of the State or in response to a statutory obligation of the State does not make the suit one against the State.[112] Soon, however, the Court began developing a more expansive concept of the Eleventh Amendment and sovereign immunity, beginning with the first case in which the sovereign immunity of the United States was claimed and rejected[113] and the *Hans v. Louisiana* decision

[109] In fact, the statute was eventually held to be constitutional. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352 (1913).

[110] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[111] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[112] Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Board of Liquidation v. McComb, 92 U.S. 531 (1875); Allen v. Baltimore & Ohio R.R., 114 U.S. 311 (1885); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Smyth v. Ames, 169 U.S. 466 (1898); Scranton v. Wheeler, 179 U.S. 141 (1900).

[113] United States v. Lee, 106 U.S. 196 (1882). *See* "Suits Against United States Officials" under Article III. The Court sustained the suit against the federal officers by only a 5-to-4 vote, the dissent presenting the arguments that were soon to inform Eleventh Amendment cases.

reading broadly the effect of the adoption of the Eleventh Amendment.[114]

The two leading cases, as were many cases of this period, were suits attempting to prevent Southern States from defaulting on bonds.[115] In *Louisiana v. Jumel*,[116] a Louisiana citizen sought to compel the state treasurer to apply a sinking fund that had been created under the earlier constitution for the payment of the bonds after a subsequent constitution had abolished this provision for retiring the bonds. The proceeding was held to be a suit against the State.[117] Then, *In re Ayers*[118] purported to supply a rationale for the cases permitting the issuance of mandamus or injunctive relief against state officers in a way that would have severely curtailed federal judicial power. Suit against a state officer was not barred when his action, aside from any official authority claimed as its justification, was a wrong simply as an individual act, such as a trespass, but if the act of the officer did not constitute an individual wrong and was something that only a State, through its officers, could do, the suit was in actuality a suit against the State and was barred.[119] That is, the unconstitutional nature of the state statute under which the officer acted stripped him of the State's shield against suit, but it did not itself constitute a private cause of action. For that, one must be able to point to an independent violation of a common law right.[120]

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[114] 134 U.S. 1 (1890).

[115] *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968–2003 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423.

[116] 107 U.S. 711 (1882).

[117] "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." 107 U.S. at 721. *See also* Christian v. Atlantic & N.C. R.R., 133 U.S. 233 (1890).

[118] 123 U.S. 443 (1887).

[119] 123 U.S. at 500-01, 502.

[120] *Ayers* was a suit by plaintiffs seeking to enjoin state officials from bringing suit under an allegedly unconstitutional statute purporting to overturn a contract between the State and the bondholders to receive the bond coupons for tax payments. The Court asserted that the State's contracts impliedly contained the State's immunity from suit, so that express withdrawal of a supposed consent to be sued was not a violation of the contract; but, in any event, inasmuch as any violation of the assumed contract was an act of the State, to which the officials were not parties, their actions as individuals in bringing suit did not breach the contract. 123 U.S. at 503, 505-06. The rationale had been asserted by a four-Justice concurrence in Antoni v. Greenhow, 107 U.S. 769, 783 (1882). *See also* Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Hagood v. Southern, 117 U.S. 52 (1886); North

Although *Ayers* was in all relevant points on all fours with *Young*,[121] the *Young* Court held that the injunction had properly issued against the state attorney general, even though the State was in effect restrained as well. "The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official, in attempting by the use of the name of the state to enforce a legislative enactment which is void, because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct."[122] Justice Harlan was the only dissenter, arguing that in law and fact the suit was one only against the State and that the suit against the individual was a mere "fiction."[123]

The "fiction" remains a mainstay of our jurisprudence.[124] It accounts for a great deal of the litigation brought by individuals to

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Carolina v. Temple, 134 U.S. 22 (1890); In re Tyler, 149 U.S. 164 (1893); Baltzer v. North Carolina, 161 U.S. 240 (1896); Fitts v. McGhee, 172 U.S. 516 (1899); Smith v. Reeves, 178 U.S. 436 (1900).

[121] *Ayers* "would seem to be decisive of the *Young* litigation." C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 at 288 (4th ed. 1983). The *Young* Court purported to distinguish and to preserve Ayers but on grounds that either were irrelevant to *Ayers* or that had been rejected in the earlier case. Ex parte Young, 209 U.S. 123, 151, 167 (1908). Similarly, in a later case, the Court continued to distinguish *Ayers* but on grounds that did not in fact distinguish it from the case before the Court, in which it permitted a suit against a state revenue commissioner to enjoin him from collecting allegedly unconstitutional taxes. Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

[122] Ex parte Young, 209 U.S. 123, 159–60 (1908). The opinion did not address the issue of how an officer "stripped of his official . . . character" could violate the Constitution, inasmuch as the Constitution restricts only "state action," but the double fiction has been expounded numerous times since. Thus, for example, it is well settled that an action unauthorized by state law is state action for purposes of the Fourteenth Amendment. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The contrary premise of Barney v. City of New York, 193 U.S. 430 (1904), though eviscerated by *Home Tel. & Tel.* was not expressly disavowed until United States v. Raines, 362 U.S. 17, 25–26 (1960).

[123] Ex parte Young, 209 U.S. 123, 173–74 (1908). In the process of limiting application of *Young*, a Court majority has recently referred to "the *Young* fiction." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).

[124] *E.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n.6 (1978) (rejecting request of state officials being sued to restrain enforcement of state statute as preempted by federal law that *Young* be overruled); Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).

challenge the carrying out of state policies. Thus, suits against state officers alleging that they are acting pursuant to an unconstitutional statute are the standard device by which to test the validity of state legislation in federal courts prior to enforcement and thus interpretation in the state courts.[125] Similarly, suits to restrain state officials from taking certain actions in contravention of federal statutes[126] or to compel the undertaking of affirmative obligations imposed by the Constitution or federal laws[127] are common. For years, moreover, the accepted rule was that suits prosecuted against state officers in federal courts upon grounds that they are acting in excess of state statutory authority[128] or that they are not doing something required by state law[129] are not precluded by the Eleventh Amendment or its emanations of sovereign immunity, provided only that there are grounds to obtain federal jurisdiction.[130]

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[125] *See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Truax v. Raich, 239 U.S. 33 (1915); Cavanaugh v. Looney, 248 U.S. 453 (1919); Terrace v. Thompson, 263 U.S. 197 (1923); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Massachusetts State Grange v. Benton, 272 U.S. 525 (1926); Hawks v. Hamill, 288 U.S. 52 (1933). *See also* Graham v. Richardson, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); Milliken v. Bradley, 433 U.S. 267 (1977) (imposing half the costs of mandated compensatory education programs upon State through order directed to governor and other officials). On injunctions against governors, *see* Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Sterling v. Constantin, 287 U.S. 378 (1932). Applicable to suits under this doctrine are principles of judicial restraint, constitutional, statutory, and prudential, discussed under Article III.

[126] *E.g.*, Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[127] *E.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Quern v. Jordan, 440 U.S. 332, 346–49 (1979).

[128] *E.g.*, Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Scully v. Bird, 209 U.S. 481 (1908); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1977); Louisville & Nashville R.R. v. Greene, 244 U.S. 522 (1917). Property held by state officials on behalf of the State under claimed state authority may be recovered in suits against the officials, although the court may not conclusively resolve the State's claims against it in such a suit. South Carolina v. Wesley, 155 U.S. 542 (1895); Tindal v. Wesley, 167 U.S. 204 (1897); Hopkins v. Clemson College, 221 U.S. 636 (1911). *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), in which the eight Justices agreeing the Eleventh Amendment applied divided 4-to-4 over the proper interpretation.

[129] *E.g.*, Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Johnson v. Lankford, 245 U.S. 541, 545 (1918); Lankford v. Platte Iron Works Co., 235 U.S. 461, 471 (1915); Davis v. Wallace, 257 U.S. 478, 482–85 (1922); Glenn v. Field Packing Co., 290 U.S. 177, 178 (1933); Lee v. Bickell, 292 U.S. 415, 425 (1934).

[130] Typically, the plaintiff would be in federal court under diversity jurisdiction, *cf.* Martin v. Lankford, 245 U.S. 547, 551 (1918), perhaps under admiralty jurisdiction, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), or under federal question jurisdiction. Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002). In the last instance, federal courts are obligated first to consider

However, in *Pennhurst State School & Hosp. v. Halderman*,[131] the Court, five-to-four, held that *Young* did not permit suits in federal courts against state officers alleging violations of *state* law. In the Court's view, *Young* was necessary to promote the supremacy of federal law, a basis that disappears if the violation alleged is of state law. The Court also still adheres to the doctrine, first pronounced in *Madrazo*,[132] that some suits against officers are "really" against the State[133] and are barred by the State's immunity, such as when the suit involves state property or asks for relief which clearly calls for the exercise of official authority, such as paying money out of the treasury to remedy past harms.

For example, a suit to prevent tax officials from collecting death taxes arising from the competing claims of two States as being the last domicile of the decedent floundered upon the conclusion that there could be no credible claim of violation of the Constitution or federal law; state law imposed the obligation upon the officials and "in reality" the action was against the State.[134] Suits against state officials to recover taxes have also been made increasingly difficult to maintain. Although the Court long ago held that the sovereign immunity of the State prevented a suit to recover money in the state treasury,[135] it also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[136] Beginning, however, with *Great Northern Life Ins. Co. v. Read*,[137] the Court has held that this kind of suit cannot be maintained unless the State expressly consents to suits in the federal courts. In this case, the state statute provided for the payment of taxes under protest and for suits afterward

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whether the issues presented may be decided on state law grounds before reaching federal constitutional grounds, and thus relief may be afforded on state law grounds solely. *Cf.* Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909); Hagans v. Lavine, 415 U.S. 528, 546–47 & n.12 (1974). In a case removed from state court, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over non-barred claims. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998).

[131] 465 U.S. 89 (1984).

[132] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[133] *E.g.*, Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945).

[134] Worcester County Co. v. Riley, 302 U.S. 292 (1937). *See also* Old Colony Trust Co. v. Seattle, 271 U.S. 426 (1926). *Worcester County* remains viable. Cory v. White, 457 U.S. 85 (1982). The actions were under the Federal Interpleader Act, 49 Stat. 1096 (1936), 28 U.S.C. § 1335, under which other actions against officials have been allowed. *E.g.*, Treines v. Sunshine Mining Co., 308 U.S. 66 (1939) (joinder of state court judge and receiver in interpleader proceeding in which State had no interest and neither judge nor receiver was enjoined by final decree). *See also* Missouri v. Fiske, 290 U.S. 18 (1933).

[135] Smith v. Reeves, 178 U.S. 436 (1900).

[136] Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912).

[137] 322 U.S. 47 (1944).

against state tax collection officials for the recovery of taxes illegally collected, which revenues were required to be kept segregated.[138]

In *Edelman v. Jordan*,[139] the Court appeared to begin to lay down new restrictive interpretations of what the Eleventh Amendment proscribed. The Court announced that a suit "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[140] What the Court actually held, however, was that it was permissible for federal courts to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking, or issue orders directing, payment of funds found to be wrongfully withheld.[141] Conceding that some of the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the treasury, and that this was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State."[142]

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[138] *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946). States may confine to their own courts suits to recover taxes. Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151 (1909); Chandler v. Dix, 194 U.S. 590 (1904).

[139] 415 U.S. 651 (1974).

[140] 415 U.S. at 663.

[141] 415 U.S. at 667-68. Where the money at issue is not a State's, but a private party's, then the distinction between retroactive and prospective obligations is not important . In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002), the Court held that a challenge to a State agency decision regarding a private party's past and future contractual liabilities does not violate the Eleventh Amendment. Id. at 1760. In fact, three judges questioned whether the Eleventh Amendment is even implicated where there is a challenge to a state's determination of liability between private parties. Id. at 1762-63 (Souter, J., concurring).

[142] 415 U.S. at 668. *See also* Quern v. Jordan, 440 U.S. 332 (1979) (reaffirming *Edelman*, but holding that state officials could be ordered to notify members of the class that had been denied retroactive relief in that case that they might seek back benefits by invoking state administrative procedures; the order did not direct the payment but left it to state discretion to award retroactive relief). *But cf.* Green v. Mansour, 474 U.S. 64 (1985). "Notice relief" permitted under *Quern v. Jordan* is consistent with the Eleventh Amendment only insofar as it is ancillary to valid prospective relief designed to prevent ongoing violations of federal law. Thus, where

That *Edelman* in many instances will be a formal restriction rather than an actual one is illustrated by *Milliken v. Bradley*,[143] in which state officers were ordered to spend money from the state treasury in order to finance remedial educational programs to counteract the effects of past school segregation; the decree, the Court said, "fits squarely within the prospective-compliance exception reaffirmed by *Edelman*."[144] Although the payments were a result of past wrongs, of past constitutional violations, the Court did not view them as "compensation," inasmuch as they were not to be paid to victims of past discrimination but rather used to better conditions either for them or their successors.[145] The Court also applied *Edelman* in *Papasan v. Allain*,[146] holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a 19th century grant of public lands for benefit of education of the Chickasaw Indian Nation is barred by the Eleventh Amendment as indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

In *Idaho v. Coeur d'Alene Tribe*,[147] the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, due to the narrowness of the Court's holding, the closeness of the vote (5–4), and the inability of the majority to agree on a rationale. The holding was that the Tribe's suit against state officials for a declaratory judgment and injunction to establish the Tribe's ownership and control of the submerged lands of Lake Coeur d'Alene is barred by the Eleventh Amendment. The Tribe's claim was based on federal law—Executive Orders issued in the 1870s, prior to Idaho Statehood. The portion of Justice Kennedy's opinion that represented the opinion of the Court concluded that the Tribe's "unusual" suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests."[148] The case was "unusual" because state ownership of submerged lands traces to the Constitution through the "equal footing doctrine," and because

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Congress has changed the AFDC law and the State is complying with the new law, an order to state officials to notify claimants that past payments may have been inadequate conflicts with the Eleventh Amendment.

[143] 433 U.S. 267 (1977).

[144] 433 U.S. at 289.

[145] 433 U.S. at 290 n.22. *See also* Hutto v. Finney, 437 U.S. 678, 690–91 (1978) (affirming order to pay attorney's fees out of state treasury as an "ancillary" order because of bad faith of State).

[146] 478 U.S. 265 (1986).

[147] 521 U.S. 261 (1997).

[148] 521 U.S. at 281.

navigable waters "uniquely implicate sovereign interests."[149] This was therefore no ordinary property dispute in which the State would retain regulatory control over land regardless of title. Rather, grant of the "far-reaching and invasive relief" sought by the Tribe "would diminish, even extinguish, the State's control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory."[150]

A separate part of Justice Kennedy's opinion, joined only by Chief Justice Rehnquist, advocated more broadscale diminishment of *Young*. The two would apply case-by-case balancing, taking into account the availability of a state court forum to resolve the dispute and the importance of the federal right at issue. Concurring Justice O'Connor, joined by Justices Scalia and Thomas, rejected such balancing. *Young* was inapplicable, Justice O'Connor explained, because "it simply cannot be said" that a suit to divest the State of all regulatory power over submerged lands "is not a suit against the State."[151]

Thus, as with the cases dealing with suits facially against the States themselves, the Court's recent greater attention to state immunity in the context of suits against state officials has resulted in a mixed picture, of some new restrictions, of the lessening of others. But a number of Justices have resorted to the Eleventh Amendment increasingly, as one means of reducing federal-state judicial conflict.[152] One may, therefore, expect this to be a continuingly contentious area.

***Tort Actions Against State Officials***.—In *Tindal v. Wesley*,[153] the Court adopted the rule of *United States v. Lee*,[154] a tort suit against federal officials, to permit a tort action against state officials to recover real property held by them and claimed by the State and to obtain damages for the period of withholding. The immunity of a State from suit has long been held not to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws.[155] The reach of the rule is evident in *Scheuer v. Rhodes*,[156] in which the Court held that plain-

[149] 521 U.S. at 284.
[150] 521 U.S. at 282.
[151] 521 U.S. at 296.
[152] *See, e.g.*, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 702 (1982) (dissenting opinion); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (dissenting opinion). *And see* Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973).
[153] 167 U.S. 204 (1897).
[154] 106 U.S. 196 (1883).
[155] Johnson v. Lankford, 245 U.S. 541 (1918); Martin v. Lankford, 245 U.S. 547 (1918).
[156] 416 U.S. 233 (1974).

tiffs were not barred by the Eleventh Amendment or other immunity doctrines from suing the governor and other officials of a State alleging that they deprived plaintiffs of federal rights under color of state law and seeking damages, when it was clear that plaintiffs were seeking to impose individual and personal liability on the officials. There was no "executive immunity" from suit, the Court held; rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.[157]

[157] These suits, like suits against local officials and municipal corporations, are typically brought pursuant to 42 U.S.C. § 1983 and typically involve all the decisions respecting liability and immunities thereunder. On the scope of immunity of federal officials, *see* "Suits Against United States Officials," supra.

## ELECTION OF PRESIDENT

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### TWELFTH AMENDMENT

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, 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.

### ELECTION OF PRESIDENT

This Amendment,[1] which supersedes clause 3 of § 1 of Article II, was adopted so as to make impossible the situation occurring after the election of 1800 in which Jefferson and Burr received tie votes in the electoral college, thus throwing the selection of a President into the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice-President.[2] The difference between the procedure which it defines and that which was laid down originally is in the provision it makes for a separate designation by the electors of their choices for President and Vice-President, respectively. As a consequence of the disputed election of 1870, Congress has enacted a statute providing that if the vote of a State is not certified by the governor under seal, it shall not be counted unless both Houses of Congress concur.[3]

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[1] A number of provisions of the Amendment have been superseded by the Twentieth Amendment.

[2] Cunningham, *Election of 1800*, in 1 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 101 (A. Schlesinger ed., 1971).

[3] 3 U.S.C. § 15.

# THIRTEENTH AMENDMENT

## SLAVERY AND INVOLUNTARY SERVITUDE

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## SLAVERY AND INVOLUNTARY SERVITUDE

### THIRTEENTH AMENDMENT

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.

### ABOLITION OF SLAVERY

#### Origin and Purpose

In 1863, President Lincoln issued an Emancipation Proclamation [1] declaring, based on his war powers, that within named States and parts of States in rebellion against the United States "all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; . . . ." The Proclamation did not allude to slaves held in the loyalist States, and moreover, there were questions about the Proclamation's validity. Not only was there doubt concerning the President's power to issue his order at all, but also there was a general conviction that its effect would not last beyond the restoration of the seceded States to the Union. [2] Because the power of Congress was similarly deemed not to run to legislative extirpation of the "peculiar institution," [3] a constitutional amendment was then sought. After first failing to muster a two-thirds vote in the House of Representatives, the amendment was forwarded to the States on February 1, 1865, and ratified by the following December 18. [4]

In selecting the text of the Amendment, Congress "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory, and gave them unrestricted application

[1] 12 Stat. 1267.

[2] The legal issues were surveyed in Welling, *The Emancipation Proclamation*, 130 NO. AMER. REV. 163 (1880). *See also* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–404 (rev. ed. 1951).

[3] K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

[4] The congressional debate on adoption of the Amendment is conveniently collected in 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS 25–96 (1970).

within the United States."[5] By its adoption, Congress intended, said Senator Trumbull, one of its sponsors, to "take this question [of emancipation] entirely away from the politics of the country. We relieve Congress of sectional strifes . . . ."[6] An early Supreme Court decision, rejecting a contention that the Amendment reached servitudes on property as it did on persons, observed in dicta that the "word servitude is of larger meaning than slavery, . . . and the obvious purpose was to forbid all shades and conditions of African slavery."

While the Court was initially in doubt whether persons other than African Americans could share in the protection afforded by the Amendment, it did continue to say that although "[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."[7]

"This Amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom."[8] These words of the Court in 1883 have generally been noncontroversial and have evoked little disagreement in the intervening years. The "force and effect" of the Amendment itself has been invoked only a few times by the Court to strike down state legislation which it considered to have reintroduced servitude of persons, and the Court has not used section 1 of the Amendment against private parties.[9] In 1968, however, the Court overturned almost century-old precedent and held that Congress may regulate private activity in exercise of its section 2 power to enforce section 1 of the Amendment.

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[5] Bailey v. Alabama, 219 U.S. 219, 240 (1911). During the debate, Senator Howard noted that the language was "the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals. . . ." CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

[6] CONG. GLOBE at 1313-14.

[7] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69, 71–72 (1873). This general applicability was again stated in Hodges v. United States, 203 U.S. 1, 16–17 (1906), and confirmed by the result of the peonage cases, discussed under the next topic.

[8] Civil Rights Cases, 109 U.S. 3, 20 (1883).

[9] In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968), the Court left open the question whether the Amendment itself, unaided by legislation, would reach the "badges and incidents" of slavery not directly associated with involuntary servitude, and it continued to reserve the question in City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981). *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Justice Harlan dissenting). The Court drew back from the possibility in Palmer v. Thompson, 403 U.S. 217, 226–27 (1971).

Certain early cases suggested broad congressional powers,[10] but the *Civil Rights Cases*[11] of 1883 began a process, culminating in *Hodges v. United States*,[12] which substantially curtailed these powers. In the former decision, the Court held unconstitutional an 1875 law[13] guaranteeing equality of access to public accommodations. Referring to the Thirteenth Amendment, the Court conceded that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Appropriate legislation under the Amendment, the Court continued, could go beyond nullifying state laws establishing or upholding slavery, because the Amendment "has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States," and thereby empowering Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[14]

These badges and incidents as perceived by the Court, however, were those which Congress had in its 1866 legislation[15] sought "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."[16] But the Court could not see that the refusal of accommodations at an inn or a place of public amusement, without any sanction or support from any state law, could inflict upon such person any manner of servitude or form of slavery, as those terms were commonly understood. "It would be running the slavery argu-

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[10] United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C. Ky. 1866) (Justice Swayne on circuit): United States v. Cruikshank, 25 F. Cas. 707 (No. 14,897) (C.C. La. 1874) (Justice Bradley on circuit), aff'd on other grounds, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629, 640 (1883); Blyew v. United States, 80 U.S. 581, 601 (1871) (dissenting opinion, majority not addressing the issue).

[11] 109 U.S. 3 (1883).

[12] 203 U.S. 1 (1906). *See also* Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896); Corrigan v. Buckley, 271 U.S. 323, 331 (1926); Hurd v. Hodge, 334 U.S. 24, 31 (1948).

[13] Ch. 114, 18 Stat. 335.

[14] Civil Rights Cases, 109 U.S. 3, 20 (1883).

[15] Ch. 31, 14 Stat. 27 (1886), now 42 U.S.C. §§ 1981–82.

[16] Civil Rights Cases, 109 U.S. 3, 22 (1883).

ment into the ground to make it apply to every act of discrimination which a person may see fit to make. . . .”[17]

Then in *Hodges v. United States*,[18] the Court set aside the convictions of three men for conspiring to drive several African Americans from their employment in a lumber mill. The Thirteenth Amendment operated to abolish, and to authorize Congress to legislate to enforce abolition of, conditions of enforced compulsory service of one to another, and no attempt to analogize a private impairment of freedom to a disability of slavery would suffice to give the Federal Government jurisdiction over what was constitutionally a matter of state remedial law.

*Hodges* was overruled by the Court in a far-reaching decision in which it concluded that the 1866 congressional enactment,[19] far from simply conferring on all persons the *capacity* to buy and sell property, also prohibited private denials of the right through refusals to deal,[20] and that this statute was fully supportable by the Thirteenth Amendment. “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. . . . Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. . . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.”[21]

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[17] 109 U.S. at 24.

[18] 203 U.S. 1 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[19] Ch. 31, 14 Stat. 27 (1866). The portion at issue is now 42 U.S.C. § 1982.

[20] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420–37 (1968). Justices Harlan and White dissented from the Court’s interpretation of the statute. Id. at 449. Chief Justice Burger joined their dissent in Sullivan v. Little Hunting Park, 396 U.S. 229, 241 (1969). The 1968 Civil Rights Act forbidding discrimination in housing on the basis of race was enacted a brief time before the Court’s decision. Pub. L. No. 90–284, 82 Stat. 81, 42 U.S.C. § 3601–31.

[21] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–43 (1968). *See also* City of Memphis v. Greene, 451 U.S. 100, 124–26 (1981).

The Thirteenth Amendment, then, could provide the constitutional support for the various congressional enactments against private racial discrimination which Congress had previously based on the commerce clause.[22] Because the 1866 Act contains none of the limitations written into the modern laws, it has a vastly extensive application.[23] Whether the Court will yet carry its interpretation of the statute to the fullest extent possible is, of course, not now knowable.

**Peonage**

Notwithstanding its early acknowledgment in the *Slaughter-House Cases* that peonage was comprehended within the slavery and involuntary servitude proscribed by the Thirteenth Amendment,[24] the Court has had frequent occasion to determine whether state legislation or the conduct of individuals has contributed to re-establishment of that prohibited status. Defined as a condition of enforced servitude by which the servitor is compelled to labor against his will in liquidation of some debt or obligation, either real or pretended, peonage was found to have been unconstitutionally sanctioned by an Alabama statute, directed at defaulting sharecroppers, which imposed a criminal liability and subjected to imprisonment farm workers or tenants who abandoned their employment, breached their contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion

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[22] *E.g.*, federal prohibition of racial discrimination in public accommodations, found lacking in constitutional basis under the Thirteenth and Fourteenth Amendments in the Civil Rights Cases, 109 U.S. 3 (1883), was upheld as an exercise of the commerce power in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1965), and Katzenbach v. McClung, 379 U.S. 294 (1965).

[23] The 1968 statute on housing and the 1866 act are compared in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413–17 (1968). The expansiveness of the 1866 statute and of congressional power is shown by Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (1866 law protects share in neighborhood recreational club which ordinarily went with the lease or ownership of house in area); Runyon v. McCrary, 427 U.S. 160 (1976) (guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons protects the right of black children to gain admission to private, commercially operated, nonsectarian schools); Johnson v. Railway Express Agency, 421 U.S. 454, 459–60 (1975) (statute affords a federal remedy against discrimination in private employment on the basis of race); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285–96 (1976) (statute protects against racial discrimination in private employment against whites as well as nonwhites). *See also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). The Court has also concluded that pursuant to its Thirteenth Amendment powers Congress could provide remedial legislation for African Americans deprived of their rights because of their race. Griffin v. Breckenridge, 403 U.S. 88, 104–05 (1971). Conceivably, the reach of the 1866 law could extend to all areas in which Congress has so far legislated and to other areas as well, justifying legislative or judicial enforcement of the Amendment itself in such areas as school segregation.

[24] 83 U.S. (16 Wall.) 36 (1873).

of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.[25]

Several years later, in *Bailey v. Alabama*,[26] the Court voided another Alabama statute which made the refusal without just cause to perform the labor called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder, *prima facie* evidence of an intent to defraud, and punishable as a criminal offense, and which was enforced subject to a local rule of evidence which prevented the accused, for the purpose of rebutting the statutory presumption, from testifying as to his "uncommunicated motives, purpose, or intention." Inasmuch as a state "may not compel one man to labor for another in payment of a debt by punishing him as a criminal if he does not perform the service or pay the debt," the Court refused to permit it "to accomplish the same result [indirectly] by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction."[27]

In 1914, in *United States v. Reynolds*,[28] a third Alabama enactment was condemned as conducive to peonage through the permission it accorded to persons, fined upon conviction for a misdemeanor, to confess judgment with a surety in the amount of the fine and costs, and then to agree with said surety, in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms approved by the court, which, the Court pointed out, might prove more onerous than if the convict had been sentenced to imprisonment at hard labor in the first place. Fulfillment of such a contract with the surety was viewed as being virtually coerced by the constant fear it induced of rearrest, a new prosecution, and a new fine for breach of contract, which new penalty the convicted person might undertake to liquidate in a similar manner attended by similar consequences.

*Bailey v. Alabama* was followed in *Taylor v. Georgia*[29] and *Pollock v. Williams*,[30] in which statutes of Georgia and Florida, not materially different from that voided in the *Bailey* case, were found

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[25] Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

[26] 219 U.S. 219 (1911). Justice Holmes, joined by Justice Lurton, dissented on the ground that a State was not forbidden by this Amendment from punishing a breach of contract as a crime. "Compulsory work for no private master in a jail is not peonage." Id. at 247.

[27] 219 U.S. at 244.

[28] 235 U.S. 133 (1914).

[29] 315 U.S. 25 (1942).

[30] 322 U.S. 4 (1944). Justice Reed, with Chief Justice Stone concurring, contended in a dissenting opinion that a State is not prohibited by the Thirteenth Amendment from "punishing the fraudulent procurement of an advance in wages." Id. at 27.

to be unconstitutional. Although the Georgia statute prohibited the defendant from testifying under oath, it did not prevent him from entering an unsworn denial both of the contract and of the receipt of any cash advancement thereunder, a factor which, the Court emphasized, was no more controlling than the customary rule of evidence in *Bailey*. In the Florida case, notwithstanding the fact that the defendant pleaded guilty and accordingly obviated the necessity of applying the *prima facie* presumption provision, the Court reached an identical result, chiefly on the ground that the presumption provision, despite its nonapplication, "had a coercive effect in producing the plea of guilty."

Pursuant to its section 2 enforcement powers, Congress enacted a statute by which it abolished peonage and prohibited anyone from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage.[31]

The Court looked to the meaning of the Thirteenth Amendment in interpreting two enforcement statutes, one prohibiting conspiracy to interfere with exercise or enjoyment of constitutional rights,[32] the other prohibiting the holding of a person in a condition of involuntary servitude.[33] For purposes of prosecution under these authorities, the Court held, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[34]

**Situations in Which the Amendment Is Inapplicable**

The Thirteenth Amendment has been held inapplicable in a wide range of situations. Thus, under a rubric of "services which have from time immemorial been treated as exceptional," the Court held that contracts of seamen, involving to a certain extent the surrender of personal liberty, may be enforced without regard to the Amendment.[35] Similarly, enforcement of those duties which individuals owe the government, such as service in the military and on

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[31] Ch. 187, § 1, 14 Stat. 546, now in 42 U.S.C. § 1994 and 18 U.S.C. § 1581. Upheld in Clyatt v. United States, 197 U.S. 207 (1905); *and see* United States v. Gaskin, 320 U.S. 527 (1944). *See also* 18 U.S.C. § 1584, which is a merger of 3 Stat. 452 (1818), and 18 Stat. 251 (1874), dealing with involuntary servitude. *Cf.* United States v. Shackney, 333 F.2d 475, 481–83 (2d Cir. 1964).

[32] 18 U.S.C. § 241.

[33] 18 U.S.C. § 1584.

[34] United States v. Kozminski, 487 U.S. 931 (1988). Compulsion of servitude through "psychological coercion," the Court ruled, is not prohibited by these statutes.

[35] Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

juries, is not covered.[36] A state law requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation was sustained.[37] A Thirteenth Amendment challenge to conscription for military service was summarily rejected.[38] A state law making it a misdemeanor for a lessor, or his agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper and customary use of the building was held not to create an involuntary servitude.[39] A federal statute making it unlawful to coerce, compel, or constrain a communications licensee to employ persons in excess of the number of the employees needed to conduct his business was held not to implicate the Amendment.[40] Injunctions and cease and desist orders in labor disputes requiring return to work do not violate the Amendment.[41]

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[36] Butler v. Perry, 240 U.S. 328, 333 (1916).

[37] Butler v. Perry, 240 U.S. 328 (1916).

[38] Selective Draft Law Cases, 245 U.S. 366 (1918). The Court's analysis, in full, of the Thirteenth Amendment issue raised by a compulsory military draft was the following: "As we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." Id. at 390.

While the Supreme Court has never squarely held that conscription need not be premised on a declaration of war, indications are that the power is not constrained by the need for a formal declaration of war by "the great representative body of the people." During the Vietnam War (an undeclared war) the Court, upholding a conviction for burning a draft card, declared that the power to classify and conscript manpower for military service was "beyond question." United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* United States v. Holmes, 387 F.2d 781, 784 (7th Cir. 1968) ("the power of Congress to raise armies and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment or the absence of a military emergency"), *cert. denied* 391 U.S. 956.

[39] Marcus Brown Co. v. Feldman, 265 U.S. 170, 199 (1921).

[40] United States v. Petrillo, 332 U.S. 1, 12–13 (1947).

[41] UAW v. WERB, 336 U.S. 245 (1949).

# FOURTEENTH AMENDMENT

## RIGHTS GUARANTEED
## PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS AND EQUAL PROTECTION

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## RIGHTS GUARANTEED

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### FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and 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.

#### THE FOURTEENTH AMENDMENT AND STATES' RIGHTS

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the States. The Civil War had been fought over issues of States' rights, including the right to control the institution of slavery. In the wake of the war, the Congress submitted, and the States ratified, the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of the three "Reconstruction Amendments."

#### CITIZENS OF THE UNITED STATES

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a State or nation were citizens thereof. In the *Dred Scott Case*,[1] however, Chief Justice Taney, writing for the Court, ruled that this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of individuals: (1) white persons born in the United States as descendants

[1] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, which this case stirred and still stirs, is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? (1967).

of "persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and [who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein. Freed slaves fell into neither of these categories.

The Court further held that, although a State could confer state citizenship upon whomever it chose, it could not make the recipient of such status a citizen of the United States. Thus, the "Negro," as an enslaved race, was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States. Even a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution was held ineligible for citizenship.[2] Congress subsequently repudiated this concept of citizenship, first in section 1 of the Civil Rights Act of 1866[3] and then in section 1 of the Fourteenth Amendment.[4] In doing so, Congress set aside the *Dred Scott* holding, and restored the traditional precepts of citizenship by birth.[5]

Based on the first sentence of section 1,[6] the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship.[7] The requirement that a person be "subject to the jurisdiction thereof," however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation,[8] or children of members of Indian tribes subject to tribal laws.[9] In addition, the citizenship of children born on vessels in United States territorial waters or on the

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[2] Scott v. Sandford, 60 U.S. (19 How.) at 404–06, 417–18, 419–20 (1857).

[3] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . ." Ch. 31, 14 Stat. 27.

[4] The proposed amendment as it passed the House contained no such provision, and it was decided in the Senate to include language like that finally adopted. CONG. GLOBE, 39th Cong., 1st Sess. 2560, 2768–69, 2869 (1866). The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." Id. at 2890. The legislative history is discussed at some length in Afroyim v. Rusk, 387 U.S. 253, 282–86 (1967) (Justice Harlan dissenting).

[5] United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).

[6] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."

[7] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[8] 169 U.S. at 682 (these are recognized exceptions to the common-law rule of acquired citizenship by birth).

[9] 169 U.S. at 680-82; Elk v. Wilkins, 112 U.S. 94, 99 (1884).

high seas has generally been held by the lower courts to be determined by the citizenship of the parents.[10] Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.[11]

In *Afroyim v. Rusk*,[12] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew from the Government of the United States the power to expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit."[13] In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of section 1 and

[10] United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861) (No. 15,231); *In re* Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).

[11] Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable "to claim the protection of that clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State." Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in Article IV, § 2. *See also* Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Tobacco Growers, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

[12] 387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in Mackenzie v. Hare, 239 U.S. 299 (1915), the subject first received extended judicial treatment in Perez v. Brownell, 356 U.S. 44 (1958), in which the Court, by a five-to-four decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress' power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. *See* discussion of "Expatriation" under Article I, supra. In the years before *Afroyim*, a series of decisions had curbed congressional power.

[13] Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967). The Court went on to say "It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted." Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court's reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter's previous reasoning in Perez. Id. at 268.

that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.[14] Between these two decisions there is a tension which should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

## PRIVILEGES OR IMMUNITIES

Unique among constitutional provisions, the clause prohibiting state abridgement of the "privileges or immunities" of United States citizens was rendered a "practical nullity" by a single decision of the Supreme Court issued within five years of its ratification. In the *Slaughter-House Cases*,[15] the Court evaluated a Louisiana statute which conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the "privileges" of other butchers, the Court frustrated the aims of the most aggressive sponsors of the Privileges or Immunities Clause. According to the Court, these sponsors had sought to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" by converting the rights of the citizens of each State at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference by limiting state laws "abridging" these privileges.

According to the Court, however, such an interpretation would have "transfer[red] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment . . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . . We are convinced that no such results were intended by the Congress . . . , nor by the legislatures . . . which ratified"

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[14] Rogers v. Bellei, 401 U.S. 815 (1971). This, too, was a five-to-four decision, Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

[15] 83 U.S. (16 Wall.) 36, 71, 77–79 (1873).

this amendment, and that the sole "pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Based on these conclusions, the Court held that none of the rights alleged by the competing New Orleans butchers to have been violated were derived from the butcher's national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one which "belonged to the citizens of the States as such." Despite the broad language of this clause, the Court held that the privileges and immunities of state citizenship had been "left to the state governments for security and protection" and had not been placed by the clause "under the special care of the Federal Government." The only privileges which the Fourteenth Amendment protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[16] These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The *Slaughter-House Cases*, therefore, reduced the privileges or immunities clause to a superfluous reiteration of a prohibition already operative against the states.

Although the *Slaughter-House Cases* Court expressed a reluctance to enumerate those privileges and immunities of United States citizens which are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those which it then identified were the right of access to the seat of Government and to the seaports, subtreasuries, land officers, and courts of justice in the several States, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of *habeas corpus*, the right to use the navigable waters of the United States, and rights secured by treaty.[17] In *Twining v. New Jersey*,[18] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from State to State,[19] the right to petition Congress for a redress

[16] 83 U.S. at 78-79.

[17] 83 U.S. at 79-80.

[18] 211 U.S. 78, 97 (1908).

[19] *Citing* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It was observed in United States v. Wheeler, 254 U.S. 281, 299 (1920), that the statute at issue in Crandall was actually held to burden directly the performance by the United States of its governmental functions. *Cf.* Passenger Cases, 48 U.S. (7 How.) 282, 491–92 (1849) (Chief Justice Taney dissenting). Four concurring Justices in Edwards v. California, 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the privileges or immunities clause. More recently, the Court declined to ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson, 394 U.S. 618, 629–31

of grievances,[20] the right to vote for national officers,[21] the right to enter public lands,[22] the right to be protected against violence while in the lawful custody of a United States marshal,[23] and the right to inform the United States authorities of violation of its laws.[24] Earlier, in a decision not mentioned in *Twining*, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."[25]

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint which it imposes upon state action.[26] In *Hague v. CIO*,[27] two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and in *Edwards v. California*[28] four Justices were prepared to rely on the clause.[29] In many other respects, however, claims based on this clause have been rejected.[30]

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(1969). Three Justices ascribed the source to this clause in Oregon v. Mitchell, 400 U.S. 112, 285–87 (1970) (Justices Stewart and Blackmun and Chief Justice Burger, concurring in part and dissenting in part).

[20] *Citing* United States v. Cruikshank, 92 U.S. 542 (1876).

[21] *Citing* Ex parte Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900). Note Justice Douglas' reliance on this clause in Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).

[22] *Citing* United States v. Waddell, 112 U.S. 76 (1884).

[23] *Citing* Logan v. United States, 144 U.S. 263 (1892).

[24] *Citing* In re Quarles and Butler, 158 U.S. 532 (1895).

[25] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[26] Colgate v. Harvey, 296 U.S. 404 (1935), which was overruled five years later, *see* Madden v. Kentucky, 309 U.S. 83, 93 (1940), represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the privileges or immunities clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." In *Harvey*, the Court declared that the right of a citizen to engage in lawful business in other states, such as by entering into contracts or by loaning money, was a privilege of national citizenship, and this privilege was abridged by a state income tax law which excluded interest received on money from loans from taxable income only if the loan was made within the State.

[27] 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. Id. at 532). Justices Stone and Reed preferred to base the decision on the due process clause. Id. at 518.

[28] 314 U.S. 160, 177–83 (1941).

[29] *See also* Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Justice Douglas); id. at 285–87 (Justices Stewart and Blackmun and Chief Justice Burger).

[30] *E.g.*, Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the State); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane

In *Oyama v. California*,[31] the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law, which resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against

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v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the State); Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); In re Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another State and secured by mortgage of land in the debtor's State); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); In re Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the Governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association (other than benevolent orders, and the like) with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a State to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the State are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a State in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

[31] 332 U.S. 633, 640 (1948).

state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.[32]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause,[33] as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the State of their prior residence, the Court found a violation of the right of newly-arrived citizens to be treated the same as other state citizens.[34] Despite suggestions that this opinion will open the door to "guaranteed equal access to all public benefits,"[35] it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence.[36]

## DUE PROCESS OF LAW

### Generally

Due process under the Fourteenth Amendment can be broken down into two categories—procedural due process and substantive due process. Procedural due process, based on principles of "fundamental fairness," addresses which legal procedures are required to be followed in state proceedings. Relevant issues, as discussed in detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, while also based on principles of "fundamental fairness," is used to evaluate whether a law can fairly be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due

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[32] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now 42 U.S.C. § 1982, as amended.

[33] *See* The Right to Travel, infra.

[34] Saenz v. Roe, 526 U.S. 489 (1999).

[35] 526 U.S. at 525 (Thomas, J., dissenting).

[36] The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the 14th Amendment "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

process has had greater political import, as significant portions of a state legislature's substantive jurisdiction can be restricted by its application.

While the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens,[37] and one of the most important doctrines flowing from this is the application of the Bill of Rights to the states through the due process clause.[38] Through the process of "selective incorporation," most of the provisions of the first eight Amendments such as free speech, freedom of religion, and protection against unreasonable searches and seizures are applied against the states as they are against the federal government. Though application of these rights against the states is no longer controversial, the incorporation of other substantive rights, as is discussed in detail below, has been.

**Definitions**

***"Person"***.—The due process clause provides that no States shall deprive any "person" of "life, liberty or property" without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word was substituted for the word "citizen" with a view to protecting corporations from oppressive state legislation.[39] As early as the 1877 *Granger Cases*[40] the Supreme Court upheld various regulatory state laws without raising any question as to whether a corporation could advance due process claims. Further, there is no doubt that a corporation may not be deprived of its property without due proc-

[37] The Privileges or Immunities Clause, more so than the Due Process Clause, appears at first glance to speak directly to the issue of state intrusions on substantive rights and privileges— "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .". *See* AKHIL REED AMAR, THE BILL OF RIGHTS 163-180 (1998). As discussed earlier, however, the Court limited the effectiveness of that clause soon after the ratification of the 14th Amendment. *See* Privileges or Immunities, supra. Instead, the Due Process Clause, though selective incorporation, has become the basis for the Court to recognize important substantive rights against the states.

[38] See Bill of Rights, Fourteenth Amendment, supra.

[39] *See* Graham, *The 'Conspiracy Theory' of the Fourteenth Amendment*, 47 YALE L. J. 371 (1938).

[40] Munn v. Illinois, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." Sinking Fund Cases, 99 U.S. 700, 718–19 (1879).

ess of law.[41] While various decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural,[42] not artificial, persons,[43] nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.[44]

A separate question is the ability of a government official to invoke the due process clause to protect the interests of his office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, has not been deemed adequate to enable him to challenge the constitutionality of a law under the Fourteenth Amendment.[45] Similarly, municipal corporations have no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.[46] However, state officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of laws in relation to which they have official duties," and, accordingly, may apply to federal courts for the "review of decisions of state courts declaring state statutes which [they] seek to enforce to be repugnant to the" Fourteenth Amendment.[47]

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[41] Smyth v. Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923); Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[42] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

[43] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Earlier, in Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."

[44] Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See* id. at 778 n.14 (reserving question). *But see* id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).

[45] Pennie v. Reis, 132 U.S. 464 (1889); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus v. Foxworth, 231 U.S. 162 (1913); Columbus & G. Ry. v. Miller, 283 U.S. 96 (1931).

[46] City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). *But see* Madison School Dist. v. WERC, 429 U.S. 167, 175 n. 7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against State).

[47] Coleman v. Miller, 307 U.S. 433, 441, 442, 443, 445 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Hwy. Dept. v. Barnwell Bros.,

***"Property" and Police Power***.—States have an inherent "police power" to promote public safety, health, morals, public convenience, and general prosperity,[48] but the extent of the power may vary based on the subject matter over which it is exercised.[49] If a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid.[50] Thus, the means employed to affect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.[51]

An ulterior public advantage, however, may justify a comparatively insignificant taking of private property for what seems to be

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303 U.S. 177 (1938). The converse is not true, however, and the interest of a state official in vindicating the Constitution gives him no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Marshall v. Dye, 231 U.S. 250 (1913); Stewart v. Kansas City, 239 U.S. 14 (1915). *See also* Coleman v. Miller, 307 U.S. 433, 437–46 (1939).

[48] This power is not confined to the suppression of what is offensive, disorderly, or unsanitary. Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). *See* California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. Richmond, 226 U.S. 137 (1912); Schmidinger v. Chicago, 226 U.S. 578 (1913); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Nebbia v. New York, 291 U.S. 502 (1934); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976).

[49] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Eubank v. Richmond, 226 U.S. 137, 142 (1912); Erie R.R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613, 622 (1935). "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise." Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).

[50] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). *See* also analysis of "Regulatory Takings" under the Fifth Amendment. Although the Fourteenth Amendment does not contain a "takings" provisions such as is found in the Fifth Amendment, the Court has held that such provision has been incorporated. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 (1980).

[51] Liggett Co. v. Baldridge , 278 U.S. 105, 111–12 (1928); Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936).

a private use.[52] Mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."[53] Moreover, it is elementary that enforcement of a law passed in the legitimate exertion of the police power is not a taking without due process of law, even if the cost is borne by the regulated.[54] Initial compliance with a regulation which is valid when adopted, however, does not preclude later protest if that regulation subsequently becomes confiscatory in its operation.[55]

***"Liberty"***.—As will be discussed in detail below, the "liberty" guaranteed by the due process clause has been variously defined by the Court. In the early years, it meant almost exclusively "liberty of contract," but with the demise of liberty of contract came a general broadening of "liberty" to include personal, political and social rights and privileges.[56] Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.[57]

### The Rise and Fall of Economic Substantive Due Process: Overview

Long before the passage of the 14th Amendment, the due process clause of the Fifth Amendment was recognized as a restraint upon the Federal Government, but only in the narrow sense that a legislature needed to provide procedural "due process" for the en-

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[52] Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (bank may be required to contribute to fund to guarantee the deposits of contributing banks).

[53] Erie R.R. v. Williams, 233 U.S. 685, 700 (1914).

[54] New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930).

[55] Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931).

[56] *See* the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n. 23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's due process clause and necessarily therefore the Fourteenth's.

[57] *See* the substantial confinement of the concept in Meachum v. Fano, 427 U.S. 215 (1976); and Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous due process-liberty analysis. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972). For more recent cases, *see* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 503 U.S. 115 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment); County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process).

forcement of law.[58] Although individual justices suggested early on that particular legislation could be so in conflict with precepts of natural law as to render it wholly unconstitutional,[59] the potential of the due process clause of the 14th Amendment as a substantive restraint on state action appears to have been grossly underestimated in the years immediately following its adoption.[60]

Thus, early invocations of "substantive" due process were unsuccessful. In the *Slaughter-House Cases*,[61] discussed previously in the context of the Privileges or Immunities Clause,[62] a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the prohibition against a deprivation of property without due process "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitution of nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."

Four years later, in *Munn v. Illinois*,[63] the Court reviewed the regulation of rates charged for the transportation and warehousing of grain, and again refused to interpret the due process clause as invalidating substantive state legislation. Rejecting contentions

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[58] The conspicuous exception to this was the holding in the Dred Scott case that former slaves, as non-citizens, could not claim the protections of the clause. Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

[59] *See, e.g.,* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("[a]n act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority").

[60] In the years following the ratification of the 14th Amendment, the Court often observed that the due process clause "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," Hibben v. Smith, 191 U.S. 310, 325 (1903), and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the 14th Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See AKHIL REED AMAR, THE BILL OF RIGHTS 181-197 (1998).

[61] 83 U.S. (16 Wall.) 36, 80–81 (1873).

[62] *See* Privileges or Immunities Clause

[63] 94 U.S. 113, 134 (1877).

that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring an interest in a private enterprise to the public, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

In *Davidson v. New Orleans*,[64] Justice Miller also counseled against a departure from these conventional applications of due process, although he acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental of law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom . . . in

[64] 96 U.S. 97, 103–04 (1878).

the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require . . . ."

A bare half-dozen years later, however, in *Hurtado v. California*,[65] the Justices gave warning of an impending modification of their views. Justice Mathews, speaking for the Court, noted that due process under the United States Constitution differed from due process in English common law in that the latter only applied to executive and judicial acts, while the former additionally applied to legislative acts. Consequently, the limits of the due process under the 14th Amendment could not be appraised solely in terms of the "sanction of settled usage" under common law. The Court then declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." By this language, the States were put on notice that all types of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

What induced the Court to overcome its fears of increased judicial oversight and of upsetting the balance of powers between the Federal Government and the states was state remedial social legislation, enacted in the wake of industrial expansion, and the impact of such legislation on property rights. The added emphasis on the due process clause also afforded the Court an opportunity to compensate for its earlier nullification of much of the privileges or immunities clause of the Amendment. Legal theories about the relationship between the government powers and private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. In the meantime, however, the *Slaughter-*

[65] 110 U.S. 516, 528, 532, 536 (1884).

*House Cases* and *Munn v. Illinois* had to be overruled at least in part.

About twenty years were required to complete this process, in the course of which two strands of reasoning were developed. The first was a view advanced by Justice Field in a dissent in *Munn v. Illinois*,[66] namely, that state police power is solely a power to prevent injury to the "peace, good order, morals, and health of the community."[67] This reasoning was adopted by the Court in *Mugler v. Kansas*,[68] where, despite upholding a state alcohol regulation, the Court held that "[i]t does not at all follow that every statute enacted ostensibly for the promotion of [public health, morals or safety] is to be accepted as a legitimate exertion of the police powers of the state." The second strand, which had been espoused by Justice Bradley in his dissent in the *Slaughter-House Cases*,[69] tentatively transformed ideas embodying the social compact and natural rights into constitutionally enforceable limitations upon government.[70] The consequence was that the States in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with fundamental natural rights of liberty and property. As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.[71]

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[66] 94 U.S. 113, 141–48 (1877).

[67] "It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose." 94 U.S. at 145-46.

[68] 123 U.S. 623, 661 (1887).

[69] 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

[70] Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . ."

[71] "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when

Having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court proceeded to incorporate into due process theories of *laissez faire* economics, reinforced by the doctrine of Social Darwinism (as elaborated by Herbert Spencer). Thus, "liberty" became synonymous with governmental non-interference in the field of private economic relations. For instance, in *Budd v. New York*,[72] Justice Brewer declared in *dictum*: "[t]he paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."

Next, the Court watered down the accepted maxim that a state statute must be presumed to be valid until clearly shown to be otherwise, by shifting focus to whether facts existed to justify a particular law.[73] The original position could be seen in earlier cases such as *Munn v. Illinois*,[74] where the Court sustained legislation before it by presuming that such facts existed: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." Ten years later, however, in *Mugler v. Kansas*,[75] rather than presume the relevant facts, the Court sustained a statewide anti-liquor law based on the proposition that the deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them.[76] This opened the door for future Court appraisals of the facts which had induced the legislature to enact the statute.[77]

The implications of *Mugler* were significant, as it carried the inference that unless the Court found by judicial notice the exist-

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chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Justice Bradley dissenting).

[72] 143 U.S. 517, 551 (1892).

[73] *See* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810).

[74] 94 U.S. 113, 123, 182 (1877).

[75] 123 U.S. 623 (1887).

[76] 123 U.S. at 662. "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil."

[77] The following year the Court, confronted with an act restricting the sale of oleomargarine, of which the Court could not claim a like measure of common knowledge, briefly retreated to the doctrine of presumed validity, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law." Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

ence of justifying fact, it would invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter—namely, health, morals, or safety. Interestingly, the Court found the rule of presumed validity quite serviceable for appraising state legislation affecting neither liberty nor property, but for legislation constituting governmental interference in the field of economic relations, especially labor-management relations, the Court found the principle of judicial notice more advantageous. In litigation embracing the latter type of legislation, the Court would also tend to shift the burden of proof, which had been with litigants challenging legislation, to the State seeking enforcement. Thus, the State had the task of demonstrating that a statute interfering with a natural right of liberty or property was in fact "authorized" by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same. As will be discussed in detail below, this approach was utilized from the turn of the century through the mid 1930s to strike down numerous laws which were seen as restricting economic liberties.

As a result of the Depression, however, the *laissez faire* approach to economic regulation lost favor to the dictates of the New Deal. Thus, in 1934, the Court in *Nebbia v. New York*[78] discarded this approach to economic legislation. The modern approach is exemplified by the 1955 decision, *Williamson v. Lee Optical Co.*,[79] which upheld a statutory scheme regulating the sale of eyeglasses which favored ophthalmologists and optometrists in private professional practice and disadvantaged opticians and those employed by or using space in business establishments. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"[80] The Court did go on to assess the reasons which might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that *some* regulation might be found unreasonable.[81] More recent decisions have limited this inquiry to whether the legislation is arbi-

[78] 291 U.S. 502 (1934).

[79] 348 U.S. 483 (1955).

[80] 348 U.S. at 488.

[81] 348 U.S. at 487, 491.

trary or irrational, and have abandoned any requirement of "reasonableness." [82]

**Regulation of Labor Conditions**

***Liberty of Contract***.—One of the most important concepts utilized during the ascendancy of economic due process was liberty of contract. The original idea of economic liberties was advanced by Justices Bradley and Field in the *Slaughter-House Cases*, [83] and elevated to the status of accepted doctrine in *Allgeyer v. Louisiana*. [84] It was then used repeatedly during the early part of this century to strike down state and federal labor regulations. "The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." [85]

The Court, however, did sustain some labor regulations by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions

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[82] The Court has pronounced a strict "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 314, 333 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen and Engineers v. Chicago, R.I. & P. R.R., 393 U.S. 129, 143 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

[83] 83 U.S. (16 Wall.) 36 (1873).

[84] 165 U.S. 578 (1897). Freedom of contract was also alluded to as a property right, as is evident in the language of the Court in Coppage v. Kansas, 236 U.S. 1, 14 (1915). "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right bestruck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

[85] 165 U.S. at 589.

imposed in the interest of the community. . . . In dealing with the relation of the employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[86]

Still, the Court was committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To serve this end, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of *Holden v. Hardy*[87] and *Lochner v. New York*.[88] In *Holden v. Hardy*,[89] the Court, in reliance upon the principle of presumed validity, allowed the burden of proof to remain with those attacking a Utah act limiting the period of labor in mines to eight hours per day. Taking cognizance of the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a law which the state legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice. In *Lochner v. New York*,[90] the Court found that a law restricting employment in bakeries to ten hours per day and 60 hours per week was not a true health measure, but was merely a labor regulation, and thus was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the State was a "question that must be answered by the Court." Then, in disregard of the medical evidence proffered, the Justice stated: "[i]n 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 trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occu-

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[86] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567, 570 (1911). *See also* Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923).

[87] 169 U.S. 366 (1898).

[88] 198 U.S. 45 (1905).

[89] 169 U.S. 366, 398 (1898).

[90] 198 U.S. 45 (1905).

pations more or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?" [91]

Justice Harlan, in dissent, asserted that the law was a health regulation, pointing to the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages. He concluded that the very existence of such evidence left the reasonableness of the measure open to discussion and thus within the discretion of the legislature. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [T]he public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." [92]

A second dissenting opinion, written by Justice Holmes, has received the greater measure of attention as a forecast of the line of reasoning to be followed by the Court some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations 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

[91] 198 U.S. at 58-59.
[92] 198 U.S. at 71, 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).

the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[93]

It should be noted that Justice Holmes did not reject the basic concept of substantive due process, but rather the Court's presumption against economic regulation.[94] Thus, Justice Holmes, whether consciously or not, was prepared to support, along with his opponents in the majority, a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the use of the doctrine of judicial notice by the former and the doctrine of presumed validity by the latter.

The Holmes dissent soon bore fruit in *Muller v. Oregon*[95] and *Bunting v. Oregon*,[96] which allowed, respectively, regulation of hours worked by women and by men in certain industries. The doctrinal approach employed was to find that the regulation was supported by evidence despite the shift in the burden of proof entailed by application of the principle of judicial notice. Thus, counsel defending the constitutionality of social legislation developed the practice of submitting voluminous factual briefs, known as "Brandeis Briefs,"[97] replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work,[98] it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing a minimum wage for women and children,[99] it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safe-

[93] 198 U.S. at 75-76.

[94] Thus, Justice Holmes' criticism of his colleagues was unfair, as even a "rational and fair man" would be guided by some preferences or "economic predilections."

[95] 208 U.S. 412 (1908).

[96] 243 U.S. 426 (1917).

[97] Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support the regulation of women's working hours in Muller v. Oregon, 208 U.S. 412 (1908).

[98] *E.g.*, Muller v. Oregon; Bunting v. Oregon.

[99] *See, e.g.,* Adkins v. Children's Hospital, 261 U.S. 525 (1923).

ty, and condemned the statute as an arbitrary interference with freedom of contract.

During the great Depression, however, the *laissez faire* tenet of self-help was replaced by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain this remedial legislation, the Court had to extensively revise its previously formulated concepts of "liberty" under the due process clause. Thus, the Court, in overturning prior holdings and sustaining minimum wage legislation,[100] took judicial notice of the demands for relief arising from the Depression. And, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court reconsidered the scope of an employer's liberty of contract, and recognized a correlative liberty of employees that state legislatures could protect.

To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of private individuals no less than by public officials, the Court in effect transformed the due process clause into a source of encouragement to state legislatures to intervene affirmatively to mitigate the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government, was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors.

***Laws Regulating Working Conditions and Wages***.—As noted, even during the *Lochner* era, the due process clause was construed as permitting enactment by the States of maximum hours laws applicable to women workers[101] and to all workers in specified lines of work thought to be physically demanding or otherwise worthy of special protection.[102] Similarly, the regulation of how wages were to be paid was allowed, including the form of pay-

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[100] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 45–46 (1937).

[101] Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to 8 hours/day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (10 hours/day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

[102] *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting the hours of labor in mines and smelters to eight hours per day); Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of 3 hours per day of overtime at time-and-a-half pay, work in any mill, factory, or manufacturing establishment).

ment,[103] its frequency,[104] and how such payment was to be calculated.[105] And, because of the almost plenary powers of the State and its municipal subdivisions to determine the conditions for work on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.[106] Further, states could prohibit the employment of persons under 16 years of age in dangerous occupations and require employers to ascertain whether their employees were in fact below that age.[107]

The regulation of mines represented a further exception to the *Lochner* era's anti-discrimination tally. As such health and safety regulation was clearly within a State's police power, a State's laws providing for mining inspectors (paid for by mine owners),[108] licensing mine managers and mine examiners, and imposing liability upon mine owners for failure to furnish a reasonably safe place for workmen were upheld during this period.[109] Other similar regulations which were sustained included laws requiring that underground passageways meet or exceed a minimum width,[110] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[111] and that washhouses be provided for employees.[112]

One of the more significant negative holdings of the *Lochner* era was that states could not regulate how much wages were to be paid to employees.[113] As with the other condition and wage issues, however, concern for the welfare of women and children seemed to weigh heavily on the justices, and restrictions on

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[103] Statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages did not violate liberty of contract. Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901); Dayton Coal and Iron Co. v. Barton, 183 U.S. 23 (1901); Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

[104] Laws requiring railroads to pay their employees semimonthly, Erie R.R. v. Williams, 233 U.S. 685 (1914), or to pay them on the day of discharge, without abatement or reduction, any funds due them, St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899), do not violate due process.

[105] Freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission. Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915). *See also* McLean v. Arkansas, 211 U.S. 539 (1909).

[106] Atkin v. Kansas, 191 U.S. 207 (1903).

[107] Sturges & Burn v. Beauchamp, 231 U.S. 320 (1913).

[108] St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902).

[109] Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).

[110] Barrett v. Indiana, 229 U.S. 26 (1913).

[111] Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

[112] Booth v. Indiana, 237 U.S. 391 (1915).

[113] Adkins v. Children's Hospital, 261 U.S. 525 (1923); Stettler v. O'Hara, 243 U.S. 629 (1917); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

minimum wages for these groups were discarded in 1937.[114] Ultimately, the reasoning of these cases was extended to more broadly based minimum wage laws, as the Court began to offer significant deference to the states to enact economic and social legislation benefitting labor.

The modern theory regarding substantive due process and wage regulation was explained by Justice Douglas in 1952 in the following terms: "Our recent decisions make plain that we do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."[115]

The Justice further noted that "many forms of regulation reduce the net return of the enterprise. . . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to

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[114] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), a Fifth Amendment case); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[115] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (sustaining a Missouri statute giving employees the right to absent themselves for four hours while the polls were open on election day without deduction of wages for their absence). The Court in *Day-Brite Lighting, Inc.* recognized that the legislation in question served as a form of wage control for men, which had previously found unconstitutional. Justice Douglas, however, wrote that "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the states' police power.

legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases." [116]

***Workers' Compensation Laws***.—Workers' compensation laws also evaded the ravages of *Lochner*. The Court "repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." [117] Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers for disabling injuries and death caused by accident in certain hazardous occupations, [118] irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, was held not to work a denial of due process. [119] Likewise, an act which allowed an injured employee, though guilty of contributory negligence, an election of remedies between restricted recovery under a compensation law or full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law. [120] A variety of other statutory schemes have also been upheld. [121]

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[116] 342 U.S. at 424-25. *See also* Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[117] New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917). "These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." Arizona Employers' Liability Cases, 250 U.S. 400, 419–20 (1919).

[118] In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." Ward & Gow v. Krinsky, 259 U.S. 503, 520 (1922).

[119] Nor does it violate due process to deprive an employee or his dependents of the higher damages which, in some cases, might be rendered under these doctrines. New York Central R.R. v. White, 243 U.S. 188 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[120] Arizona Employers' Liability Cases, 250 U.S. 400 (1919).

[121] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911) (prohibiting contracts limiting liability for injuries and stipulating that acceptance of benefits under such contracts shall not constitute satisfaction of a claim); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) (forbidding contracts exempting employers hired-in-state from liability for injuries outside the State); Thornton v. Duffy, 254 U.S. 361 (1920) (required contribution to a state insurance fund by an employer even though employer had obtained protection from an insurance company under previous statutory scheme); Booth Fisheries v. Industrial Comm'n, 271 U.S. 208 (1926) (finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance, right to come under a workmen's com-

Even the imposition upon coal mine operators of the liability of compensating *former* employees who terminated work in the industry before passage of the law for black lung disabilities was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[122] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, *i.e.,* that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law. Consequently, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

***Collective Bargaining***.—During the *Lochner* era, liberty of contract, as translated into what one Justice labeled the *Allgeyer- Lochner- Adair- Coppage* doctrine,[123] was used to strike down legislation calculated to enhance the bargaining capacity of

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pensation statute is optional with employer); Staten Island Ry. v. Phoenix Co., 281 U.S. 98 (1930) (wrongdoer is obliged to indemnify employer or the insurance carrier of the employer in the amount which the latter were required to contribute into special compensation funds); Sheehan Co. v. Shuler, 265 U.S. 371 (1924) (where an injured employee dies without dependents, employer or carrier required to make payments into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments); New York State Rys. v. Shuler, 265 U.S. 379 (1924) (same holding as above case); New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919) (attorneys are not deprived of property or their liberty of contract by restriction imposed by the State on the fees which they may charge in cases arising under the workmen's compensation law); Yeiser v. Dysart, 267 U.S. 540 (1925) (compensation need not be based exclusively on loss of earning power, and award authorized for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work).

[122] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). *But see* id. at 38 (Justice Powell concurring).

[123] Justice Black in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949). In his concurring opinion, contained in the companion case of AFL v. American Sash & Door Co., 335 U.S. 538, 543–44 (1949), Justice Frankfurter summarized the now obsolete doctrines employed by the Court to strike down state laws fostering unionization. "[U]nionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earners' bargaining power. With that attitude as a premise, *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), followed logically enough; not even *Truax v. Corrigan*, 257 U.S. 312 (1921), could be considered unexpected."

workers as against that already possessed by their employers.[124] The Court did, however, on occasion sustain measures affecting the employment relationship, such as a statute requiring every corporation to furnish a departing employee a letter setting forth the nature and duration of the employee's service and the true cause for leaving.[125] In *Senn v. Tile Layers Union*,[126] however, the Court began to show a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments.

The significance of *Senn*[127] was, in part, that the case upheld a statute that was not appreciably different from a law voided five years earlier in *Truax v. Corrigan*.[128] In *Truax,* the Court found that a statute forbidding injunctions on labor protest activities was unconstitutional as applied to a labor dispute involving picketing, libelous statements, and threats. The statute subsequently upheld in *Senn*, on the other hand, authorized publicizing labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct.[129] The difference between these statutes, according to the Court, was that the law in *Senn* applied to "peaceful" picketing only, while the law in *Truax* "was . . . applied to legalize conduct which was not simply

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[124] In *Adair* and *Coppage* the Court voided statutes outlawing "yellow dog" contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union; these laws, the Court ruled, impaired the employer's "freedom of contract"—the employer's unrestricted right to hire and fire. In Truax, the Court on similar grounds invalidated an Arizona statute which denied the use of injunctions to employers seeking to restrain picketing and various other communicative actions by striking employees. And in Wolff Packing Co. v. Industrial Court, 262 U.S. 522 (1923); 267 U.S. 552 (1925) and Dorchy v. Kansas, 264 U.S. 286 (1924), the Court had also ruled that a statute compelling employers and employees to submit their controversies over wages and hours to state arbitration was unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.

[125] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). Added provisions that such letters should be on plain paper selected by the employee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property. Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others. On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee. Dorchy v. Kansas, 272 U.S. 306 (1926).

[126] 301 U.S. 486 (1937).

[127] 301 U.S. 468 (1937).

[128] 257 U.S. 312 (1921).

[129] The statute was applied to deny an injunction to a tiling contractor being picketed by a union because he refused to sign a closed shop agreement containing a provision requiring him to abstain from working in his own business as a tile layer or helper.

peaceful picketing." Inasmuch as the enhancement of job opportunities for members of the union was a legitimate objective, the State was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.

Years later, after regulations protective of labor allowed unions to amass enormous economic power, many state legislatures attempted to control the abuse of this power, and the Court's new found deference to state labor regulation was also applied to restrictions on unions. Thus the Court upheld state prohibitions on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union's right to choose its members, abridged its property rights, or violated its liberty of contract. Inasmuch as the union "[held] itself out to represent the general business needs of employees" and functioned "under the protection of the State," the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion. [130]

Similarly, state laws outlawing closed shops were upheld in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company* [131] and *AFL v. American Sash & Door Co.* [132] When labor unions attempted to invoke freedom of contract, the Court, speaking through Justice Black, announced its refusal "to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers." [133]

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[130] Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945). Justice Frankfurter, concurring, declared that "the insistence by individuals of their private prejudices . . . , in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." Id. at 98.

[131] 335 U.S. 525 (1949).

[132] 335 U.S. 538 (1949).

[133] 335 U.S. at 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor practices,' and if so, whether legislative correction is

And, in *UAW v. WERB*,[134] the Court upheld the Wisconsin Employment Peace Act, which had been used to proscribe unfair labor practices by a union. In *UAW*, the Union, acting after collective bargaining negotiations had become deadlocked, had attempted to coerce an employer through calling frequent, irregular, and unannounced union meetings during working hours, resulting in a slowdown in production. "No one," declared the Court, can question "the State's power to police coercion by . . . methods" which involve "considerable injury to property and intimidation of other employees by threats."[135]

**Regulation of Business Enterprises: Price Controls**

In examining whether the due process clause allows the regulation of business prices, the Supreme Court, almost from the inception of the Fourteenth Amendment, has devoted itself to the examination of two questions: (1) whether the clause restricted such regulation to certain types of business, and (2) the nature of the regulation allowed as to those businesses.

***Types of Businesses That May be Regulated***.—For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court found the due process clause to impose no substantive restraint on the power of States to fix rates chargeable by any industry. Thus, in *Munn v. Illinois*,[136] the first of the "*Granger Cases*," maximum charges established by a state for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose.[137] The Court, in an opinion that was largely *dictum*, declared that the due process clause did not operate as a safeguard against oppressive rates, and that if regulation was permissible, the severity thereof was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal

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more appropriate than self-discipline and pressure of public opinion. . . ." Id. at 538, 549–50.

[134] 336 U.S. 245 (1949).

[135] 336 U.S. at 253. *See also* Giboney v. Empire Storage Co., 336 U.S. 490 (1949) (upholding state law forbidding agreements in restraint of trade as applied to union ice peddlers picketing wholesale ice distributor to induce the latter not to sell to nonunion peddlers). Other cases regulating picketing are treated under the First Amendment topics, "Picketing and Boycotts by Labor Unions" and "Public Issue Picketing and Parading," supra.

[136] 94 U.S. 113 (1877). *See also* Davidson v. New Orleans, 96 U.S. 97 (1878); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877);

[137] The Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the States' police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision.

from this position, and by 1890[138] it had fully converted the due process clause into a restriction on state agencies seeking to impose rates which, in a judge's estimation, were arbitrary or unreasonable. This state of affairs continued for more than fifty years.

Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, this standard, "business affected with a public interest," never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes which invariably distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft.[139] "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . . (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Through application of this formula, the Court sustained state laws regulating charges made by grain elevators,[140] stockyards,[141] and tobacco warehouses,[142] and fire insurance rates[143] and commissions paid to fire insurance agents.[144] The Court also voided

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[138] Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890).

[139] Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535–36 (1923).

[140] Munn v. Illinois, 94 U.S. 113 (1877); Budd v. New York, 143 U.S. 517, 546 (1892); Brass v. North Dakota ex rel. Stoesser, 153 U.S. 391 (1894).

[141] Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).

[142] Townsend v. Yeomans, 301 U.S. 441 (1937).

[143] German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928).

[144] O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931).

statutes regulating business not "affected with a public interest," including state statutes fixing the price at which gasoline may be sold,[145] regulating the prices for which ticket brokers may resell theater tickets,[146] and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage therein.[147]

In the 1934 case of *Nebbia v. New York,*[148] however, the Court finally shelved the concept of "a business affected with a public interest,"[149] upholding, by a vote of five-to-four, a depression-induced New York statute fixing fluid milk prices. "Price control, like any other form of regulation, is [now] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."[150] Conceding that "the dairy industry is not, in the accepted sense of the phrase, a public utility," that is, a "business affected with a public interest," the Court in effect declared that price control henceforth is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions which due process imposes on arbitrary interference with liberty and property.[151]

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[145] Williams v. Standard Oil Co., 278 U.S. 235 (1929).

[146] Tyson & Bro. v. Banton, 273 U.S. 418 (1927).

[147] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932). *See also* Adams v. Tanner, 244 U.S. 590 (1917); Weaver v. Palmer Bros., 270 U.S. 402 (1926).

[148] 291 U.S. 502, 531–32, 535–37, 539 (1934).

[149] In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik v. McBride, 277 U.S. 350, 359–60 (1928), had declared: "Price regulation is within the State's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932), Justice Brandeis had also observed: "The notion of a distinct category of business 'affected with a public interest' employing property 'devoted to a public use' rests upon historical error. In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."

[150] Older decisions overturning price regulation were now viewed as resting upon this basis, *i.e.*, that due process was violated because the laws were arbitrary in their operation and effect.

[151] The Court was not disturbed by the "scientific validity" that had been claimed for the theory of Adam Smith that "price that will clear the market," and was content to note that the "due process clause makes no mention of prices" and that the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the practicability of the law enacted to forward it. The minority continued to stress the unreasonableness of any state regulation interfering with the determination of prices by "natural forces." Justice McReynolds, speaking for the dissenting Justices, labeled the controls imposed by the challenged statute as a "fanciful scheme to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold." Intimating that the New York statute was as efficacious as a safety regulation which required "householders

Having thus concluded that it is no longer the nature of the business that determines the validity of a price regulation, the Court had little difficulty in upholding a state law prescribing the maximum commission which private employment agencies may charge. Rejecting contentions that the need for such protective legislation had not been shown, the Court, in *Olsen v. Nebraska* [152] held that differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the States;" and that there was "no necessity for the State to demonstrate before us that evils persist despite the competition" between public, charitable, and private employment agencies. [153]

***Substantive Review of Price Controls***.—Ironically, private businesses, once they had been found subject to price regulation, seemed to have less protection than public entities. Thus, unlike operators of public utilities who, in return for a government grant of virtually monopolistic privileges must provide continuous service, proprietors of other businesses receive no similar special advantages and accordingly are unrestricted in their right to liquidate and close. Owners of ordinary businesses, therefore, are at liberty to escape the consequences of publicly imposed charges by dissolution, and have been found less in need of protection through judicial review. Thus, case law upholding challenges to price controls deals predominantly with governmentally imposed rates and charges for public utilities.

In 1886, Chief Justice Waite, in the *Railroad Commission Cases*, [154] warned that the "power to regulate is not a power to destroy; [and] the State cannot do that in law which amounts to a taking of property for public use without just compensation or without due process of law." In other words, a confiscatory rate could not be imposed by government on a regulated entity. By treating "due process of law" and "just compensation" as equivalents, [155] the Court was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be

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to pour oil on their roofs as a means of curbing the spread of a neighborhood fire," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must determine "whether the means proposed have reasonable relation to something within legislative power." 291 U.S. 556, 558 (1934).

[152] 313 U.S. 236, 246 (1941).

[153] The older case of Ribnik v. McBride, which had invalidated similar legislation upon the now obsolete concept of a "business affected with a public interest," was expressly overruled. 277 U.S. 350 (1928). Adams v. Tanner, 244 U.S. 590 (1917), was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963), and Tyson & Bro. v. Banton, 273 U.S. 418 (1927), was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965), without the Court hearing argument on it.

[154] 116 U.S. 307 (1886).

[155] This was contrary to its earlier holding in Davidson v. New Orleans, 96 U.S. 97 (1877).

an exercise of a State's police power and became one of eminent domain. Nevertheless, even this doctrine proved inadequate to satisfy public utilities, as it allowed courts to intervene only to prevent imposition of a confiscatory rate, *i.e.,* a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the "reasonableness" of legislative rates.

Although as late as 1888 the Court doubted that it possessed the requisite power to challenge this doctrine,[156] it finally acceded to the wishes of the utilities in 1890 in *Chicago, M. & St. P. Railway v. Minnesota.*[157] In this case, the Court ruled that "[t]he question of the reasonableness of rates . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Although the Court made a last-ditch attempt to limit the ruling of *Chicago, M. & S.P. Railway* to rates fixed by a commission as opposed to rates imposed by a legislature,[158] the Court in *Reagan v. Farmer's Loan and Trust Co.*[159] finally removed all lingering doubts over the scope of judicial intervention. In *Reagan*, the Court declared that, "if a carrier . . . attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, would pass on the reasonableness of its rates, and has "jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate . . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of a carrier prescribes the rates."[160] Reiterating virtually the same principle in *Smyth v. Ames*,[161] the Court not

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[156] Dow v. Beidelman, 125 U.S. 680 (1888).

[157] 134 U.S. 418, 458 (1890).

[158] Budd v. New York, 143 U.S. 517 (1892).

[159] 154 U.S. 362, 397 (1894).

[160] Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.

[161] 169 U.S. 466 (1898). Of course the validity of rates prescribed by a State for services wholly within its limits must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business and vice versa. Thus a State has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if

only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court further determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

***Early Limitations on Review***.—Even while reviewing the reasonableness of rates the Court recognized some limits on judicial review. As early as 1894, the Court asserted that "[t]he courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; . . . [however, there can be no doubt] of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable . . . and if found so to be, to restrain its operation."[162] One can also infer from these early holdings a distinction between unreviewable fact questions that relate only to the wisdom or expediency of a rate order, and reviewable factual determinations that bear on a commission's power to act.[163]

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a railroad receives adequate revenues from the intrastate long haul and the interstate lumber haul taken together. On the other hand, in determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the State (including sleeping, parlor, and dining cars) should be embraced in the computation, and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs. *See* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 434–35 (1913); Chicago, M. & St. P. Ry. v. Public Util. Comm'n, 274 U.S. 344 (1927); Groesbeck v. Duluth, S.S. & A. Ry., 250 U.S. 607 (1919). The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. To prevent a holding of invalid delegation of legislative power, the legislature must constrain the board with a certain course of procedure and certain rules of decision in the performance of its functions, with which the agency must substantially comply to validate its action. Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48 (1922).

[162] Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 397 (1894). And later, in 1910, the Court made a similar observation that courts may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission merely because such power was unwisely or expediently exercised. ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910). This statement, made in the context of federal ratemaking, appears to be equally applicable to judicial review of state agency actions.

[163] This distinction was accorded adequate emphasis by the Court in Louisville & Nashville R.R. v. Garrett, 231 U.S. 298, 310–13 (1913), in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights . . . by imposing confiscatory requirements." The carrier contesting the rate was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate the carrier charged prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding

Further, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,[164] but he must present a case of "manifest constitutional invalidity."[165] And, if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted.[166] Moreover, even the Court was inclined to withhold judgement on the application of a rate until the practical effect could be surmised.[167]

In the course of time this distinction solidified. Thus, the Court initially adopted the position that it would not disturb findings of fact insofar as these were supported by substantial evidence. For instance, in *San Diego Land Company v. National City*,[168] the Court declared that after a legislative body had fairly and fully investigated and acted, by fixing what it believed to be reasonable rates, the courts cannot step in and set aside the action due to a different conclusion about the reasonableness of the rates. "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in a similar later case[169] the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations. It is not bound "to reexamine and weigh all the evidence . . . or to proceed according to . . . [its] independent opinion as to what are proper rates. It is enough if . . . [the Court] cannot say that it was impossible for a fair-minded board to come to the result which was reached."[170]

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whereby the commission determined that the existing rate was excessive, but not the expediency or wisdom of the commission's having superseded that rate with a rate regulation of its own.

[164] Des Moines Gas Co. v. Des Moines, 238 U.S. 153 (1915).

[165] Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 452 (1913).

[166] Knoxville v. Water Co., 212 U.S. 1 (1909).

[167] Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909). However, a public utility which has petitioned a commission for relief from allegedly confiscatory rates need not await indefinitely for the commission's decision before applying to a court for equitable relief. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).

[168] 174 U.S. 739, 750, 754 (1899). *See also* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913).

[169] San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 441, 442 (1903). *See also* Van Dyke v. Geary, 244 U.S. 39 (1917); Georgia Ry. v. Railroad Comm'n, 262 U.S. 625, 634 (1923).

[170] Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years, chose to be guided by approximately the same standards it had originally formulated for examining regulations of state commissions. The following excerpt from its holding in ICC v. Union Pacific R.R., 222 U.S. 541, 547–48 (1912) represents an adequate summation of the law as it stood prior to 1920: "[Q]uestions of fact may be involved in the determination of questions of law,

These standards of review were, however, abruptly rejected by the Court in *Ohio Valley Co. v. Ben Avon Borough* [171] as being no longer sufficient to satisfy the requirements of due process, ushering in a long period where courts substantively evaluated the reasonableness of rate settings. Although the state court in *Ben Avon* had in fact reviewed the evidence and ascertained that the state commission's findings of fact were supported by substantial evidence, [172] it also construed the statute providing for review as denying to state courts "the power to pass upon the weight of such evidence." Largely on the strength of this interpretation of the applicable state statute, the Court held that when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." [173]

***History of the Valuation Question***.—For almost fifty years the Court wandered through a maze of conflicting formulas and factors for valuing public service corporation property including

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so that an order, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory . . . ; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling . . . [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *See also* ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910).

[171] 253 U.S. 287 (1920).

[172] Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal. 253 U.S. at 289. In injunctive proceedings, evidence is freshly introduced whereas in the cases received on appeal from state courts, the evidence is found within the record.

[173] Without departing from the ruling previously enunciated in Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298 (1913) that the failure of a State to grant a statutory right of judicial appeal from a commission's regulation is not violative of due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that "where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review." 253 U.S. 287, 291, 295 (1920).

>'fair value,"[174] "reproduction cost,"[175] "prudent investment",[176] "depreciation",[177] "going concern value and good will",[178] "salvage value,"[179] and "past losses and gains"[180] only to emerge therefrom

[174] Smyth v. Ames, 169 U.S. 466, 546–47 (1898) ("fair value" necessitated consideration of original cost of construction, permanent improvements, amount and market value of bonds and stock, replacement cost, probable earning capacity, and operating expenses).

[175] Various valuation cases emphasized reproduction costs, *i.e*, the present as compared with the original cost of construction. *See, e.g.*, San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903)

[176] Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923) (Brandeis, J., concurring) (cost includes both operating expenses and capital charges *i.e* interest for the use of capital, allowance for the risk incurred, funds to attract capital). This method would require "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return." As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930's. The sharp decline in prices which occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287 (1933) and Railroad Comm'n v. Pacific Gas Co., 302 U.S. 388, 399, 405 (1938), the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base.

[177] Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909) (considering depreciation as part of cost). Notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, *i.e.*, present value, or at original cost. In the Hope Gas case, 320 U.S. 591, 606 (1944), the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930), insofar as that holding rejected original cost as the basis of annual depreciation allowances.

[178] Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915) (finding "going concern value" in an assembled and established plant, doing business and earning money, over one not thus advanced). Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909); Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 163–64 (1915); Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922); Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287, 313 (1933).

[179] Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 562, 564 (1945) (where a street-surface railroad had lost all value except for scrap or salvage it was permissible for a commission to consider the price at which the utility offered to sell its property to a citizen); Denver v. Denver Union Water Co., 246 U.S. 178 (1918) (where water company franchise has expired, but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant).

[180] FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942) ("The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned"). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory. Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922), any more than profits of the past can be used to sustain confiscatory rates

in 1944 at a point not very far removed from *Munn v. Illinois* and its deference to rate-making authorities.[181] By holding in *FPC v. Natural Gas Pipeline Co.*,[182] that the "Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in *FPC v. Hope Natural Gas Co.*,[183] that "it is the result reached not the method employed which is controlling, . . . [that] it is not the theory but the impact of the rate order which counts, [and that] if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end," the Court, in effect, abdicated from the position assumed in the *Ben Avon* case.[184] Without surrendering the judicial power to declare rates unconstitutional on ground of a substantive deprivation of due process,[185] the Court announced that it would not overturn a result it deemed to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[186]

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for the future Newton v. Consolidated Gas Co., 258 U.S. 165, 175 (1922); Board of Comm'rs v. New York Tel. Co., 271 U.S. 23, 31–32 (1926).

[181] 94 U.S. 113 (1877).

[182] 315 U.S. 575, 586 (1942).

[183] 320 U.S. 591, 602 (1944). Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.

[184] Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[185] In FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942), Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn v. Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, in Driscoll v. Edison Co., 307 U.S. 104, 122 (1939), Justice Frankfurter temporarily adopted a similar position; he declared that "the only relevant function of law . . . [in rate controversies] is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process." However, in his dissent in FPC v. Hope Natural Gas Co., 320 U.S. 591, 625 (1944), he disassociated himself from this proposal, and asserted that "it was decided [more than fifty years ago] that the final say under the Constitution lies with the judiciary."

[186] FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). *See also* Wisconsin v. FPC, 373 U.S. 294, 299, 317, 326 (1963), wherein the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labelled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

In dispensing with the necessity of observing the old formulas for rate computation, the Court did not articulate any substitute guidance for ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making "involves a balancing of the investor and consumer interests," which does not, however, "'insure that the business shall produce net revenues' . . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." [187]

**Regulation of Public Utilities and Common Carriers**

***In General***.—Because of the nature of the business they carry on and the public's interest in it, public utilities and common carriers are subject to state regulation, whether exerted directly by legislatures or under authority delegated to administrative bodies. [188] But because the property of these entities remains under the full protection of the Constitution, it follows that due process is violated when the state regulates in a manner that infringes the right of ownership in what the Court considers to be an "arbitrary" or "unreasonable" way. [189] Thus, when a street railway company lost its franchise, the city could not simply take possession of its equipment, [190] although it could subject the company to the alternative of accepting an inadequate price for its property or of ceasing oper-

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The Court recently reaffirmed Hope Natural Gas's emphasis on the bottom line: "[t]he Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (rejecting takings challenge to Pennsylvania rule preventing utilities from amortizing costs of canceled nuclear plants).

[187] FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (citing Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345–46 (1892)); Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291 (1923).

[188] Atlantic Coast Line R.R. v. Corporation Comm'n, 206 U.S. 1, 19 (1907) (citing Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877)). *See also* Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908) ; Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

[189] Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 344 (1892); Mississippi R.R. Comm'n v. Mobile & Ohio R.R., 244 U.S. 388, 391 (1917). *See also* Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935).

[190] Cleveland Electric Ry. v. Cleveland, 204 U.S. 116 (1907).

ations and removing its property from the streets.[191] Likewise, a city wanting to establish a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise,[192] although a city may compete with a company that has no exclusive charter.[193] However, a municipal ordinance that demanded, as a condition for placing poles and conduits in city streets, that a telegraph company carry the city's wires free of charge, and that required that conduits be moved at company expense, was constitutional.[194]

And, the fact that a State, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation which has elected to enter a State which requires that it operate its local private pipe line as a common carrier. Such foreign corporation is viewed as having waived its constitutional right to be secure against imposition of conditions which amount to a taking of property without due process of law.[195]

***Compulsory Expenditures: Grade Crossings, and the Like***.—Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property in violation of due process.[196] Thus, where a water company laid its lines on an ungraded street, and the applicable rule at the time of the granting of its charter compelled the company to furnish connections at its own expense to one residing

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[191] Detroit United Ry. v. Detroit, 255 U.S. 171 (1921). *See also* Denver v. New York Trust Co., 229 U.S. 123 (1913).

[192] Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919).

[193] Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904). *See also* Skaneateles Water Co. v. Skaneateles, 184 U.S. 354 (1902); Helena Water Works Co. v. Helena, 195 U.S. 383 (1904); Madera Water Works v. Madera, 228 U.S. 454 (1913).

[194] Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912).

[195] Pierce Oil Corp. v. Phoenix Ref. Co., 259 U.S. 125 (1922).

[196] Norfolk Turnpike Co. v. Virginia, 225 U.S. 264 (1912) (requiring a turnpike company to suspend tolls until the road is put in good order not a violation of due process of law, notwithstanding the fact that present patronage does not yield revenue sufficient to maintain the road in proper condition ); International Bridge Co. v. New York, 254 U.S. 126 (1920) (in the absence of proof that the addition will not yield a reasonable return, railroad bridge company not deprived of its property when it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.); Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898) (railroads may be required to repair viaduct under which they operate); Chicago, B. & Q. Ry. v. Drainage Comm'n, 200 U.S. 561 (1906) (reconstruct a bridge or provide means for passing water for drainage through their embankment,); Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) (drainage requirements); Lake Shore & Mich. So. Ry. v. Clough, 242 U.S. 375 (1917) (drainage requirements) Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919) (requirement to sprinkle street occupied by railroad.). *But see* Chicago, St. P., Mo. & O. Ry. v. Holmberg, 282 U.S. 162 (1930) (due process violated by requirement that an underground cattle-pass is be constructed, not as a safety measure but as a convenience to farmers).

on such a street, due process is not violated.[197] Or, where a gas company laid its pipes under city streets, it may validly be obligated to assume the cost of moving them to accommodate a municipal drainage system.[198] Or, railroads may be required to help fund the elimination of grade crossings, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

While the power of the State in this respect is not unlimited, and an "arbitrary" and "unreasonable" imposition on these businesses may be set aside, the Court's modern approach to substantive due process analysis makes this possibility far less likely than it once was. For instance, a 1935 case invalidated a requirement that railroads share 50% of the cost of grade separation, irrespective of the value of such improvements to the railroad, suggesting that railroads could not be required to subsidize competitive transportation modes.[199] But in 1953 the Court distinguished this case, ruling that the costs of grade separation improvements need not be allocated solely on the basis of benefits that would accrue to railroad property.[200] While the Court cautioned that "allocation of costs must be fair and reasonable," it was deferential to local governmental decisions, stating that in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community, "the cost of such improvements *may be* allocated all to the railroads."

***Compellable Services***.—A State may require that common carriers such as railroads provide services in a manner suitable for the convenience of the communities they serve.[201] Similarly, a pri-

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[197] Consumers' Co. v. Hatch, 224 U.S. 148 (1912). However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613 (1935).

[198] New Orleans Gas Co. v. Drainage Comm'n, 197 U.S. 453 (1905).

[199] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Lehigh Valley R.R. v. Commissioners, 278 U.S. 24, 35 (1928) (upholding imposition of grade crossing costs on a railroad although "near the line of reasonableness," and reiterating that "unreasonably extravagant" requirements would be struck down).

[200] Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346, 352 (1953).

[201] Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. at 394-95 (1953). *See* Minneapolis & St. L. R.R. v. Minnesota, 193 U.S. 53 (1904) (obligation to establish stations at places convenient for patrons); Gladson v. Minnesota, 166 U.S. 427 (1897) (obligation to stop all their intrastate trains at county seats); Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910) (obligation to run a regular passenger train instead of a mixed passenger and freight train) Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917) (obligation to furnish passenger service on a branch line previously devoted exclusively to carrying freight); Lake Erie & W.R.R. v. Public Util. Comm'n, 249 U.S. 422 (1919) (obligation to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, a sidetrack ); Western & Atlantic R.R. v. Public

mary duty of a public utility is to serve all those who desire the service it renders, and so it follows that a company cannot pick and choose to serve only those portions of its territory which it finds most profitable. Therefore, compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the State does not result in an unconstitutional deprivation.[202] Likewise, requiring a railway to continue the service of a branch or part of a line is acceptable, even if that portion of the operation is an economic drain.[203] A company, however, cannot be compelled to operate its franchise at a loss, but must be at liberty to surrender it and discontinue operations.[204]

As the standard for regulation of a utility is whether a particular directive is reasonable, the question of whether a state order requiring the provision of services is reasonable could include a consideration of the likelihood of pecuniary loss, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.[205] An example of the kind of regulation where the issue of reasonableness would require an evaluation of numerous practical and economic factors is where railroads are required to lay tracks and otherwise provide the required equipment to facilitate the connection of separate track lines.[206]

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Comm'n, 267 U.S. 493 (1925) (same); Alton R.R. v. Illinois Commerce Comm'n, 305 U.S. 548 (1939) (obligation for upkeep of a switch track leading from its main line to industrial plants.). *But see* Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) (requirement, without indemnification, to install switches on the application of owners of grain elevators erected on right-of-way held void).

[202] United Gas Co. v. Railroad Comm'n, 278 U.S. 300, 308–09 (1929). *See also* New York *ex rel.* Woodhaven Gas Light Co. v. Public Serv. Comm'n, 269 U.S. 244 (1925); New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).

[203] Missouri Pacific Ry. v. Kansas, 216 U.S. 262 (1910); Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917); Fort Smith Traction Co. v. Bourland, 267 U.S. 330 (1925).

[204] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917); Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396 (1920); Railroad Comm'n v. Eastern Tex. R.R., 264 U.S. 79 (1924); Broad River Co. v. South Carolina ex rel. Daniel, 281 U.S. 537 (1930).

[205] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917).

[206] "Since the decision in Wisconsin, M. & P.R. Co. v. Jacobson, 179 U.S. 287 (1900), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those

Generally, regulation of a utility's service to commercial customers attracts less scrutiny [207] than regulations intended to facilitate the operations of a competitor, [208] and governmental power to regulate in the interest of safety has long been conceded. [209] Requirements for service having no substantial relation to a utility's

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duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' . . . Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier." Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912). *See also* Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915); Seaboard Air Line R.R. v. Georgia R.R. Comm'n, 240 U.S. 324, 327 (1916).

[207] Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers. Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902); Missouri Pacific Ry. v. McGrew Coal Co., 244 U.S. 191 (1917). Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment. Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915).

[208] Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use. Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909). But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms, Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915), and to accept cars already loaded and in suitable condition. for reshipment over its lines to points within the State. Chicago, M. & St. P. Ry. v. Iowa, 233 U.S. 334 (1914).

[209] The following cases all concern the operation of railroads: Railroad Co. v. Richmond, 96 U.S. 521 (1878) (prohibition against operation on certain streets); Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914) (restrictions on speed and operations in business sections); Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918) (restrictions on speed and operations in business section) Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919) (or removal of a track crossing at a thoroughfare); Nashville, C. & St. L. Ry. v. White, 278 U.S. 456 (1929) (compelling the presence of a flagman at a crossing notwithstanding that automatic devices might be cheaper and better); Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96 (1888) (compulsory examination of employees for color blindness); Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911) (full crews on certain trains); St. Louis I. Mt. & So. Ry. v. Arkansas, 240 U.S. 518 (1916) (same); Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931) (same); Firemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (1968) (same); Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914) (specification of a type of locomotive headlight ); Erie R.R. v. Solomon, 237 U.S. 427 (1915) (safety appliance regulations); New York, N.H. and H.R.R. v. New York, 165 U.S. 628 (1897) (prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars).

regulated function, however, have been voided, such as requiring railroads to maintain scales to facilitate trading in cattle, or a prohibiting letting down an unoccupied upper berth on a rail car while the lower berth was occupied.[210]

***Imposition of Statutory Liabilities and Penalties Upon Common Carriers***.—Legislators have considerable latitude to impose legal burdens upon common carriers, as long as the carriers are not precluded from shifting such burdens. Thus, a statute may make an initial rail carrier,[211] or the connecting or delivering carrier,[212] liable to the shipper for the nondelivery of goods which results from the fault of another, as long as the carrier has a subrogated right to proceed against the carrier at fault. Similarly, a railroad may be held responsible for damages to the owner of property injured by fire caused by locomotive engines, as the statute also granted the railroad an insurable interest in such property along its route, allowing the railroad to procure insurance against such liability.[213] Equally consistent with the requirements of due process are enactments imposing on all common carriers a penalty for failure to settle claims for freight lost or damaged in shipment within a reasonable specified period.[214]

The Court has, however, established some limits on the imposition of penalties on common carriers. During the *Lochner* era, the Court invalidated an award of $500 in liquidated damages plus reasonable attorney's fees imposed on a carrier that had collected transportation charges in excess of established maximum rates as disproportionate. The Court also noted that the penalty was exacted under conditions not affording the carrier an adequate opportunity to test the constitutionality of the rates before liability attached.[215] Where the carrier did have an opportunity to challenge the reasonableness of the rate, however, the Court indicated that the validity of the penalty imposed need not be determined by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may

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[210] Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915).

[211] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922). *See also* Yazoo & Miss. V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); *cf.* Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

[212] Atlantic Coast Line R.R. v. Glenn, 239 U.S. 388 (1915).

[213] St. Louis & San Francisco Ry. v. Mathews, 165 U.S. 1 (1897).

[214] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) (penalty imposed if claimant subsequently obtained by suit more than the amount tendered by the railroad). *But see* Kansas City Ry. v. Anderson, 233 U.S. 325 (1914) (levying double damages and an attorney's fee upon a railroad for failure to pay damage claims only where the plaintiff had not demanded more than he recovered in court); St. Louis, I. Mt. & So. Ry. v. Wynne, 224 U.S. 354 (1912) (same); Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914) (same).

[215] Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913).

adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." [216]

### Regulation of Businesses, Corporations, Professions, and Trades

***Generally***.—States may impose significant regulations on businesses without violating due process. "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency." [217] Still, the fact the State reserves the power to amend or repeal corporate charters does not support the taking of corporate property without due process of law, as termination of the corporate structure merely results in turning over corporate property to the stockholders after liquidation. [218]

Foreign (out-of-state) corporations also enjoy the protection under the due process clauses, but this does not grant them an unconditional right to enter another State or to continue to do business therein. Language in some early cases suggested that States had plenary power to exclude or to expel a foreign corporation. [219] This power is clearly limited by the modern doctrine of the "negative" commerce clause, which constrains states' authority to discriminate against foreign corporations in favor of local commerce. Still, it has always been acknowledged that states may subject cor-

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[216] In accordance with this standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee was upheld. St. Louis, I. Mt. & So. Ry. v. Williams, 251 U.S. 63, 67 (1919). *See also* Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885) (statute requiring railroads to erect and maintain fences and cattle guards subject to award of double damages for failure to so maintain them upheld); Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889) (same); Chicago, B. & Q.R.R. v. Cram, 228 U.S. 70 (1913) (required payment of $10 per car per hour to owner of livestock for failure to meet minimum rate of speed for delivery upheld). *But see* Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915) (fine of $3,600 imposed on a telephone company for suspending service of patron in arrears in accordance with established and uncontested regulations struck down as arbitrary and oppressive).

[217] Nebbia v. New York, 291 U.S. 502, 527–28 (1934). *See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978) (upholding regulation of franchise relationship).

[218] New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).

[219] National Council U.A.M. v. State Council, 203 U.S. 151, 162–63 (1906).

porate entry or continued operation to reasonable, non-discriminatory conditions. Thus, for instance, a state law which requires the filing of articles with a local official as a prerequisite to the validity of conveyances of local realty to such corporations is not violative of due process.[220] Or, statutes which require a foreign insurance company to maintain reserves computed by a specific percentage of premiums (including membership fees) received in all States,[221] or to consent to direct actions filed against it by persons injured in the host State are valid.[222]

***Laws Prohibiting Trusts, Restraint of Trade or Fraud***.— Even during the period when the Court was invalidating statutes under liberty of contract principles, it recognized the right of states to prohibit combinations in restraint of trade.[223] Thus, states could prohibit agreements to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[224] Further, the Court held that the Fourteenth Amendment does not preclude a State from adopting a policy prohibiting competing corporations from combinations, even when such combinations were induced by good intentions and from which benefit and no injury have resulted.[225] The Court also upheld a variety of statutes prohibiting activities taken by individual businesses intended to harm competitors[226] or restrain the trade of others.[227]

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[220] Munday v. Wisconsin Trust Co., 252 U.S. 499 (1920).

[221] State Farm Ins. Co. v. Duel, 324 U.S. 154 (1945).

[222] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). Similarly a statute requiring a foreign hospital corporation to dispose of farm land not necessary to the conduct of their business was invalid even though the hospital, because of changed economic conditions, was unable to recoup its original investment from the sale. New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).

[223] *See, e.g.,* Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910) (statute prohibiting retail lumber dealers from agreeing not to purchase materials from wholesalers selling directly to consumers in the retailers' localities upheld); Aikens v. Wisconsin, 195 U.S. 194 (1904) (law punishing combinations for "maliciously" injuring a rival in the same business, profession, or trade upheld).

[224] Smiley v. Kansas, 196 U.S. 447 (1905). *See* Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905), also upholding antitrust laws.

[225] International Harvester Co. v. Missouri, 234 U.S. 199 (1914). *See also* American Machine Co. v. Kentucky, 236 U.S. 660 (1915).

[226] Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912) (prohibition on intentionally destroying competition of a rival business by making sales at a lower rate, after considering distance, in one section of the State than in another upheld). *But cf.* Fairmont Co. v. Minnesota, 274 U.S. 1 (1927) (invalidating on liberty of contract grounds similar statute punishing dealers in cream who pay higher prices in one locality than in another, the Court finding no reasonable relation between the statute's sanctions and the anticipated evil).

[227] Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936) (prohibition of contracts requiring that commodities identified by trademark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor upheld); Pep Boys v. Pyroil, 299 U.S. 198 (1936) (same); Safeway Stores v. Okla-

Laws and ordinances tending to prevent frauds by requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power.[228] Thus, a prohibition on the issuance or sale by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where state weighers are stationed is not unconstitutional.[229] Similarly, the power of a State to prescribe standard containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to question.[230]

A variety of other business regulations which tend to prevent fraud have withstood constitutional scrutiny. Thus, a State may require that the nature of a product be fairly set forth, despite the right of a manufacturer to maintain secrecy as to his compounds.[231] Or, a statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and may rescind the contract if the machinery does not prove reasonably adequate, does not violate the due process clause.[232] Further, in the exercise of its power to prevent fraud and imposition, a State may regulate

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homa Grocers, 360 U.S. 334 (1959) (application of an unfair sales act to enjoin a retail grocery company from selling below statutory cost upheld, even though competitors were selling at unlawful prices, as there is no constitutional right to employ retaliation against action outlawed by a State and appellant could enjoin illegal activity of its competitors)

[228] Schmidinger v. City of Chicago, 226 U.S. 578, 588 (1913) (citing McLean v. Arkansas, 211 U.S. 539, 550 (1909)). *See* Hauge v. City of Chicago, 299 U.S. 387 (1937) (municipal ordinance requiring that commodities sold by weight be weighed by a public weighmaster within the city valid even as applied to one delivering coal from state-tested scales at a mine outside the city); Lemieux v. Young, 211 U.S. 489 (1909) (statute requiring merchants to record sales in bulk not made sin the regular course of business valid)); Kidd, Dater Co. v. Musselman Grocer Co., 217 U.S. 461 (1910) (same).

[229] Merchants Exchange v. Missouri, 248 U.S. 365 (1919).

[230] Pacific States Co. v. White, 296 U.S. 176 (1935) (administrative order prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit); Schmidinger v. City of Chicago, 226 U.S. 578 (1913) (ordinance fixing standard sizes is not unconstitutional); Armor & Co. v. North Dakota, 240 U.S. 510 (1916) (law that lard not sold in bulk should be put up in containers holding one, three, or five pounds weight, or some whole multiple of these numbers valid); Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934) (regulations which imposed a rate of tolerance for the minimum weight for a loaf of bread upheld); *But cf.* Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (tolerance of only two ounces in excess of the minimum weight per loaf is unreasonable, given finding that it was impossible to manufacture good bread without frequently exceeding the prescribed tolerance).

[231] Heath & Milligan Co. v. Worst, 207 U.S. 338 (1907); Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919); National Fertilizer Ass'n v. Bradley, 301 U.S. 178 (1937).

[232] Advance-Rumely Co. v. Jackson, 287 U.S. 283 (1932).

trading in securities within its borders, require a license of those engaging in such dealing, make issuance of a license dependent on the good repute of the applicants, and permit, subject to judicial review of his findings, revocation of the license.[233]

The power to regulate also includes the power to forbid certain business practices. Thus, a State may forbid the giving of options to sell or buy any commodity at a future time[234] It may also forbid sales on margin for future delivery,[235] and may prohibit the keeping of places where stocks, grain, and the like, are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.[236] A prohibitive license fee upon the use of trading stamps is not unconstitutional,[237] nor is imposing criminal penalties for any deductions by purchasers from the actual weight of grain, hay, seed, or coal purchased, even when such deduction is made under a claim of custom or under a rule of a board of trade.[238]

***Banking, Wage Assignments and Garnishment***.—Regulation of banks and banking has always been considered well within the police power of states, and the Fourteenth Amendment did not eliminate this regulatory authority.[239] A variety of regulations have been upheld over the years. For example, state banks are not deprived of property without due process by a statute subjecting them to assessments for a depositors' guaranty fund.[240] Also, a law requiring savings banks to turn over deposits inactive for thirty years to the State (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the pro-

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[233] Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Merrick v. Halsey & Co., 242 U.S. 568 (1917).

[234] Booth v. Illinois, 184 U.S. 425 (1902).

[235] Otis v. Parker, 187 U.S. 606 (1903).

[236] Brodnax v. Missouri, 219 U.S. 285 (1911).

[237] Rast v. Van Deman & Lewis, 240 U.S. 342 (1916); Tanner v. Little, 240 U.S. 369 (1916); Pitney v. Washington, 240 U.S. 387 (1916).

[238] House v. Mayes, 219 U.S. 270 (1911).

[239] Doty v. Love, 295 U.S. 64 (1935) (rights of creditors in an insolvent bank not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors) Farmers Bank v. Federal Reserve Bank, 262 U.S. 649 (1923) (Federal Reserve bank not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker).

[240] Noble State Bank v. Haskell, 219 U.S. 104 (1911); Shallenberger v. First State Bank, 219 U.S. 114 (1911); Assaria State Bank v. Dolley, 219 U.S. 121 (1911); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

tective custody of the State deposits that, depending on the nature of the deposit, have been inactive ten or twenty-five years.[241]

A State is acting clearly within its police power in fixing maximum rates of interest on money loaned within its border, and such regulation is within legislative discretion if not unreasonable or arbitrary.[242] Equally valid is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be accepted in writing by the employer, consented to by the assignors, and filed in public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law.[243]

***Insurance***.—Those engaged in the insurance business[244] as well as the business itself have been peculiarly subject to supervision and control.[245] Even during the *Lochner* era the Court recognized that government may fix insurance rates and regulate the compensation of insurance agents,[246] and over the years the Court has upheld a wide variety of regulation. For instance, a state may impose a fine on "any person 'who shall act in any manner in the negotiation or transaction of unlawful insurance . . . with a foreign insurance company not admitted to do business [within said State].'"[247] Or, a state may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.[248] Further, foreign casualty and surety insurers were not deprived of due process by a Virginia law which prohibited the making of contracts of casualty or surety insurance except through registered agents, which required that such contracts applicable to persons or property in the State be countersigned by a registered local agent, and which prohibited such agents from sharing more than 50% of a commission

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[241] Provident Savings Inst. v. Malone, 221 U.S. 660 (1911); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944). When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders' liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the preexisting statute, it cannot be said that the new statute, in suspending the right of a depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without the due process of law. The depositor has no property right in any particular form of remedy. Gibbes v. Zimmerman, 290 U.S. 326 (1933).

[242] Griffith v. Connecticut, 218 U.S. 563 (1910).

[243] Mutual Loan Co. v. Martell, 222 U.S. 225 (1911).

[244] La Tourette v. McMaster, 248 U.S. 465 (1919); Stipich v. Insurance Co., 277 U.S. 311, 320 (1928).

[245] German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914).

[246] O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931).

[247] Nutting v. Massachusetts, 183 U.S. 553, 556 (1902) (distinguishing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). *See also* Hoper v. California, 155 U.S. 648 (1895).

[248] Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

with a nonresident broker.[249] And just as all banks may be required to contribute to a depositors' guaranty fund, so may automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.[250]

However, the Court has discerned some limitations to such regulations. A statute which prohibited the insured from contracting directly with a marine insurance company outside the State for coverage of property within the State was held invalid as a deprivation of liberty without due process of law.[251] For the same reason, the Court held, a State may not prevent a citizen from concluding a policy loan agreement with a foreign life insurance company at its home office whereby the policy on his life is pledged as collateral security for a cash loan to become due upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness. Authority to subject such an agreement to the conflicting provisions of domestic law is not deducible from the power of a State to license a foreign insurance company as a condition of its doing business therein.[252]

A stipulation that policies of hail insurance shall take effect and become binding twenty-four hours after the hour in which an application is taken and further requiring notice by telegram of rejection of an application was upheld.[253] No unconstitutional restraint was imposed upon the liberty of contract of surety companies by a statute providing that, after enactment, any bond executed for the faithful performance of a building contract shall inure to the benefit of material men and laborers, notwithstanding any provision of the bond to the contrary.[254] Likewise constitutional was a law requiring that a motor vehicle liability policy shall provide that bankruptcy of the insured does not release the insurer from liability to an injured person.[255] There also is no denial of due process for a state to require that casualty companies, in case of total loss, pay the total amount for which the property was insured, less depreciation between the time of issuing the policy and the

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[249] Osborn v. Ozlin, 310 U.S. 53, 68–69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services which the latter does not in fact render.

[250] California Auto. Ass'n v. Maloney, 341 U.S. 105 (1951).

[251] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[252] New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).

[253] National Ins. Co. v. Wanberg, 260 U.S. 71 (1922).

[254] Hartford Accident Co. v. Nelson Co., 291 U.S. 352 (1934).

[255] Merchants Liability Co. v. Smart, 267 U.S. 126 (1925).

time of the loss, rather than the actual cash value of the property at the time of loss.[256]

Moreover, even though it had its attorney-in-fact located in Illinois, signed all its contracts there, and forwarded therefrom all checks in payment of losses, a reciprocal insurance association covering real property located in New York could be compelled to comply with New York regulations which required maintenance of an office in that State and the countersigning of policies by an agent resident therein.[257] Also, to discourage monopolies and to encourage rate competition, a State constitutionally may impose on all fire insurance companies connected with a tariff association fixing rates a liability or penalty to be collected by the insured of 25% in excess of actual loss or damage, stipulations in the insurance contract to the contrary notwithstanding.[258]

A state statute by which a life insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.[259] It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.[260] A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid.[261] When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law.[262] Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and *pro rata* distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenting policyholders have no constitutional right to a particular form of remedy.[263]

***Miscellaneous Businesses and Professions***.—The practice of medicine, using this word in its most general sense, has long

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[256] Orient Ins. Co. v. Daggs, 172 U.S. 577 (1899) (the statute was in effect when the contract at issue was signed).

[257] Hooperston Co. v. Cullen, 318 U.S. 313 (1943).

[258] German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911). *See also* Carroll v. Greenwich Ins. Co., 199 U.S.401 (1905).

[259] Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

[260] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243 (1906).

[261] Whitfield v. Aetna Life Ins. Co., 205 U.S. 489 (1907).

[262] Polk v. Mutual Reserve Fund, 207 U.S. 310 (1907).

[263] Neblett v. Carpenter, 305 U.S. 297 (1938).

been the subject of regulation.[264] A State may exclude osteopathic physicians from hospitals maintained by it or its municipalities,[265] or may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, and prohibiting certain advertising regardless of its truthfulness.[266] The Court has sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.[267]

While statutes requiring pilots to be licensed[268] and setting reasonable competency standards (e.g., that railroad engineers pass color blindness tests) have been sustained,[269] an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years' experience as a freight conductor or brakeman was invalidated as not rationally distinguishing between those competent and those not competent to serve as conductor.[270] An act imposing license fees for operating employment agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law.[271] Also,

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[264] McNaughton v. Johnson, 242 U.S. 344, 349 (1917). *See* Dent v. West Virginia, 129 U.S. 114 (1889); Hawker v. New York, 170 U.S. 189 (1898); Reetz v. Michigan, 188 U.S. 505 (1903); Watson v. Maryland, 218 U.S. 173 (1910); *See also* Barsky v. Board of Regents, 347 U.S. 442 (1954) sustaining a New York law authorizing suspension for six months of the license of a physician who had been convicted of crime in any jurisdiction, in this instance, contempt of Congress under 2 U.S.C. § 192. Three Justices, Black, Douglas, and Frankfurter, dissented.

[265] Collins v. Texas, 223 U.S. 288 (1912); Hayman v. Galveston, 273 U.S. 414 (1927).

[266] Semler v. Dental Examiners, 294 U.S. 608, 611 (1935). *See also* Douglas v. Noble, 261 U.S. 165 (1923); Graves v. Minnesota, 272 U.S. 425, 427 (1926).

[267] North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973). In the course of the decision, the Court overruled Liggett Co. v. Baldridge, 278 U.S. 105 (1928), in which it had voided a law forbidding a corporation to own any drug store, unless all its stockholders were licensed pharmacists, as applied to a foreign corporation, all of whose stockholders were not pharmacists, which sought to extend its business in the State by acquiring and operating therein two additional stores.

[268] Olsen v. Smith, 195 U.S. 332 (1904).

[269] Nashville, C. & St. L. R.R. v. Alabama, 128 U.S. 96 (1888).

[270] Smith v. Texas, 233 U.S. 630 (1914). *See* DeVeau v. Braisted, 363 U.S. 144, 157–60 (1960), sustaining New York law barring from office in longshoremen's union persons convicted of felony and not thereafter pardoned or granted a good conduct certificate from a parole board.

[271] Brazee v. Michigan, 241 U.S. 340 (1916). With four Justices dissenting, the Court in Adams v. Tanner, 244 U.S. 590 (1917), struck down a state law absolutely prohibiting maintenance of private employment agencies. Commenting on the "con-

a state law prohibiting operation of a "debt pooling" or a "debt adjustment" business except as an incident to the legitimate practice of law is a valid exercise of legislative discretion.[272]

The Court has also upheld a variety of other licensing or regulatory legislation applicable to places of amusement,[273] grain elevators,[274] detective agencies,[275] the sale of cigarettes[276] or cosmetics,[277] and the resale of theatre tickets.[278] Restrictions on advertising have also been upheld, including absolute bans on the advertising of cigarettes[279] or the use of a representation of the United States flag on an advertising medium.[280] Similarly constitutional were prohibitions on the solicitation by a layman of the business of collecting and adjusting claims,[281] the keeping of private markets within six squares of a public market,[282] the keeping of billiard halls except in hotels,[283] or the purchase by junk dealers of wire, copper, and other items, without ascertaining the seller's right to sell.[284]

**Protection of State Resources**

***Oil and Gas***.—A state may prohibit conduct that leads to the waste of natural resources without violating due process.[285] Thus,

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stitutional philosophy" thereof in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949), Justice Black stated that Olsen v. Nebraska, 313 U.S. 236 (1941), "clearly undermined *Adams v. Tanner*."

[272] Ferguson v. Skrupa, 372 U.S. 726 (1963).

[273] Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907).

[274] W.W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901).

[275] Lehon v. Atlanta, 242 U.S. 53 (1916).

[276] Gundling v. Chicago, 177 U.S. 183, 185 (1900).

[277] Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937).

[278] Weller v. New York, 268 U.S. 319 (1925).

[279] Packer Corp. v. Utah, 285 U.S. 105 (1932).

[280] Halter v. Nebraska, 205 U.S. 34 (1907).

[281] McCloskey v. Tobin, 252 U.S. 107 (1920).

[282] Natal v. Louisiana, 139 U.S. 621 (1891).

[283] Murphy v. California, 225 U.S. 623 (1912).

[284] Rosenthal v. New York, 226 U.S. 260 (1912). The Court also upheld a state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers from leasing, or otherwise permitting anyone purporting to do eye examinations or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or opthalmologist licensed in the State is not invalid. A State may treat all who deal with the human eye as members of a profession that should refrain from merchandising methods to obtain customers, and that should choose locations that reduce the temptations of commercialism; a state may also conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[285] Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950) (sustaining orders of the Oklahoma Corporation Commission fixing a minimum price for gas and requiring one producer to buy gas from another producer in the same field at a dictated

for instance, where there is a limited market for natural gas acquired attendant to oil production or where the pumping of oil and gas from one location may limit the ability of others to recover oil from a large reserve, a state may require that production of oil be limited or prorated among producers.[286] Generally, whether a system of proration is fair is a question for administrative and not judicial judgment.[287] On the other hand, where the evidence showed that an order prorating allowed production among several wells was actually intended to compel pipeline owners to furnish a market to those who had no pipeline connections, the order was held void as a taking of private property for private benefit.[288]

A state may act to conserve resources even if it works to the economic detriment of the producer. Thus, a State may forbid certain uses of natural gas, such as the production of carbon black, where the gas is burned without fully utilizing the heat therein for other manufacturing or domestic purposes. Such regulations were sustained even where the carbon black was more valuable than the gas from which it was extracted, and notwithstanding the fact that the producer had made significant investment in a plant for the manufacture of carbon black.[289] Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a State to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface unless its lifting power was utilized to produce the greatest proportional quantity of oil.[290]

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price, based on a finding that low field prices for natural gas were resulting in economic and physical waste); Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).

[286] This can be done regardless of whether the benefit is to the owners of oil and gas in a common reservoir or because of the public interests involved. Thompson v. Consolidated Gas Co., 300 U.S. 55, 76–77 (1937) (citing Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900)); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Thus, the Court upheld against due process challenge a statute which defined waste as including, in addition to its ordinary meaning, economic waste, surface waste, and production in excess of transportation or marketing facilities or reasonable market demands, and which limited each producer's share to a prorated portion of the total production that can be taken from the common source without waste. Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932).

[287] Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (evaluating whether proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941); Railroad Comm'n v. Humble Oil & Ref. Co., 311 U.S. 578 (1941).

[288] Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937).

[289] Walls v. Midland Carbon Co., 254 U.S. 300 (1920). *See also* Henderson Co. v. Thompson, 300 U.S. 258 (1937).

[290] Bandini Co. v. Superior Court, 284 U.S. 8 (1931).

***Protection of Property and Agricultural Crops***.—Special precautions may be required to avoid or compensate for harm caused by extraction of natural resources. Thus, a state may require the filing of a bond to secure payment for damages to any persons or property resulting from an oil and gas drilling or production operation.[291] On the other hand, in *Pennsylvania Coal Co. v. Mahon*,[292] a Pennsylvania statute which forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine was viewed as too restrictive on the use of private property and hence a denial of due process and a "taking" without compensation.[293] Years later, however, a quite similar Pennsylvania statute was upheld, the Court finding that the new law no longer involved merely a balancing of private economic interests, but instead promoted such "important public interests" as conservation, protection of water supplies, and preservation of land values for taxation.[294]

A statute requiring the destruction of cedar trees within two miles of apple orchards in order to prevent damage to the orchards caused by cedar rust was upheld as not unreasonable even in the absence of compensation. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout the State being small as compared with that of apple orchards, the State was constitutionally competent to require the destruction of one class of property in order to save another which, in the judgment of its legislature, was of greater value to the public.[295] Similarly, Florida was held to possess constitutional authority to protect the reputation of one of its major industries by penalizing the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.[296]

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[291] Gant v. Oklahoma City, 289 U.S. 98 (1933) (statute requiring bond of $200,000 per well-head, such bond to be executed, not by personal sureties, but by authorized bonding company).

[292] 260 U.S. 393 (1922).

[293] The "taking" jurisprudence that has stemmed from the Pennsylvania Coal Co. v. Mahon is discussed, supra, at "Regulatory Takings," under the Fifth Amendment .

[294] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987). The Court in Pennsylvania Coal had viewed that case as relating to a "a single private house." 260 U.S. at 413.

Also distinguished from Pennsylvania Coal was a challenge to an ordinance prohibiting sand and gravel excavation near the water table and imposing a duty to refill any existing excavation below that level. The ordinance was upheld; the fact that it prohibited a business that had been conducted for over 30 years did not give rise to a taking in the absence of proof that the land could not be used for other legitimate purposes. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

[295] Miller v. Schoene, 276 U.S. 272, 277, 279 (1928).

[296] Sligh v. Kirkwood, 237 U.S. 52 (1915).

***Water, Fish and Game***.—A statute making it unlawful for a riparian owner to divert water into another State was held not to deprive the property owner of due process. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . What it has it may keep and give no one a reason for its will."[297] This holding has since been disapproved, but on interstate commerce rather than due process grounds.[298] States may, however, enact and enforce a variety of conservation measures for the protection of watersheds.[299]

Similarly, a State has sufficient control over fish and wild game found within its boundaries[300] so that it may regulate or prohibit fishing and hunting.[301] For the effective enforcement of such restrictions, a state may also forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor.[302] The Court has also upheld a state law restricting a commercial reduction plant from accepting more fish than it could process without spoilage in order to conserve fish found within its waters, even allowing the application of such restriction to fish imported into the State from adjacent international waters.[303]

The Court's early decisions rested on the legal fiction that the states owned the fish and wild game within their borders, and thus could reserve these possessions for use by their own citizens. The Court soon backed away from the ownership fiction,[304] and in *Hughes v. Oklahoma*[305] it formally overruled prior case law, indi-

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[297] Hudson Water Co. v. McCarter, 209 U.S. 349, 356–57 (1908).

[298] Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982). *See also* City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

[299] *See, e.g.*, Perley v. North Carolina, 249 U.S. 510 (1919) (upholding law requiring the removal of timber refuse from the vicinity of a watershed to prevent the spread of fire and consequent damage to such watershed).

[300] Bayside Fish Co. v. Gentry, 297 U.S. 422, 426 (1936).

[301] Manchester v. Massachusetts, 139 U.S. 240 (1891); Geer v. Connecticut, 161 U.S. 519 (1896).

[302] Miller v. McLaughlin, 281 U.S. 261, 264 (1930).

[303] Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936). *See also* New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908) (upholding law proscribing possession during the closed season of game imported from abroad).

[304] *See, e.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (invalidating Louisiana statute prohibiting transportation outside the state of shrimp taken in state waters, unless the head and shell had first been removed); Toomer v. Witsell, 334 U.S. 385 (1948) (invalidating law discriminating against out-of-state commercial fishermen); Douglas v. Seacoast Products, 431 U.S. 265, 284 (1977) (state could not discriminate in favor of its residents against out-of-state fishermen in federally licensed ships).

[305] 441 U.S. 322 (1979) (formally overruling Geer).

cating that state conservation measures discriminating against out-of-state persons were to be measured under the commerce clause. Although a state's "concerns for conservation and protection of wild animals" were still a "legitimate" basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce.[306]

More recently still, in the context of recreational rather than commercial activity, the Court reached a result more deferential to state authority, holding that access to recreational big game hunting is not within the category of rights protected by the Privileges or Immunities Clause, and that consequently a state could charge out-of-staters significantly more than in-staters for a hunting license.[307] Suffice it to say that similar cases involving a state's efforts to reserve its fish and game for its own inhabitants are likely to be challenged under commerce or privileges and immunities principles, rather than under substantive due process.

**Ownership of Real Property: Rights and Limitations**

***Zoning and Similar Actions***.—It is now well established that states and municipalities have the police power to zone land for designated uses. Zoning authority gained judicial recognition early in the 20th century. Initially, an analogy was drawn to public nuisance law, so that States and their municipal subdivisions could declare that specific businesses, although not nuisances *per se*, were nuisances in fact and in law in particular circumstances and in particular localities.[308] Thus, a State could declare the emission of dense smoke in populous areas a nuisance and restrain it, even though this affected the use of property and subjected the owner to the expense of compliance.[309] Similarly, the Court upheld an ordinance that prohibited brick making in a designated area, even though the specified land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brick making than for any other purpose, had been acquired before it was annexed to the municipality, and had long been used as a brickyard.[310]

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[306] 441 U.S. at 336, 338-39.

[307] Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978).

[308] Reinman v. City of Little Rock, 237 U.S. 171 (1915) (location of a livery stable within a thickly populated city "is well within the range of the power of the state to legislate for the health and general welfare"). *See also* Fischer v. St. Louis, 194 U.S. 361 (1904) (upholding restriction on location of dairy cow stables); Bacon v. Walker, 204 U.S. 311 (1907) (upholding restriction on grazing of sheep near habitations).

[309] Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916). For a case embracing a rather special set of facts, *see* Dobbins v. Los Angeles, 195 U.S. 223 (1904).

[310] Hadacheck v. Sebastian, 239 U.S. 394 (1915).

With increasing urbanization came a broadening of the philosophy of land-use regulation to protect not only health and safety but also the amenities of modern living.[311] Consequently, the Court has recognized the power of government, within the loose confines of the due process clause, to zone in many ways and for many purposes. Governments may regulate the height of buildings,[312] establish building setback requirements,[313] preserve open spaces (through density controls and restrictions on the numbers of houses),[314] and preserve historic structures.[315] The Court will generally uphold a challenged land-use plan unless it determines that either the overall plan is arbitrary and unreasonable with no substantial relation to the public health, safety, or general welfare,[316] or that the plan as applied amounts to a taking of property without just compensation.[317]

Applying these principles, the Court has held that the exclusion of apartment houses, retail stores, and billboards from a "residential district" in a village is a permissible exercise of municipal power.[318] Similarly, a housing ordinance in a community of single-family dwellings, in which any number of related persons (blood, adoption, or marriage) could occupy a house but only two unrelated persons could do so, was sustained in the absence of any showing that it was aimed at the deprivation of a "fundamental interest."[319] Such a fundamental interest, however, was found to be implicated in *Moore v. City of East Cleveland*[320] by a "single family" zoning ordinance which defined a "family" to exclude a grandmother who had been living with her two grandsons of different children. Similarly, black persons cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons, or vice versa.[321]

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[311] *Cf. Developments in the Law-Zoning*, 91 HARV. L. REV. 1427 (1978).

[312] Welch v. Swasey, 214 U.S. 91 (1909).

[313] Gorieb v. Fox, 274 U.S. 603 (1927).

[314] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[315] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[316] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U.S. 269 (1919).

[317] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and discussion of "Regulatory Taking" under the Fifth Amendment, supra

[318] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[319] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[320] 431 U.S. 494 (1977). A plurality of the Court struck down the ordinance as a violation of substantive due process, an infringement of family living arrangements which are a protected liberty interest, id. at 498–506, while Justice Stevens concurred on the ground that the ordinance was arbitrary and unreasonable. Id. at 513. Four Justices dissented. Id. at 521, 531, 541.

[321] Buchanan v. Warley, 245 U.S. 60 (1917).

In one aspect of zoning—the degree to which such decisions may be delegated to private persons—the Court has not been consistent. Thus, for instance, it invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two thirds of the property abutting any street.[322] Or, in another case, it struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.[323] In a decision falling chronologically between these two, however, the Court sustained an ordinance which permitted property owners to waive a municipal restriction prohibiting the construction of billboards.[324]

In its most recent decision, the Court upheld a city charter provision permitting a petition process by which a citywide referendum could be held on zoning changes and variances. The provision required a 55% approval vote in the referendum to sustain the commission's decision, and the Court distinguished between delegating such authority to a small group of affected landowners and the people's retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body.[325]

***Estates, Succession, Abandoned Property***.—The Due Process Clause does not prohibit a State from varying the rights of those receiving benefits under intestate laws. Thus, the Court held that the rights of an estate were not impaired where a New York Decedent Estate Law granted a surviving spouse the right to take as in intestacy, despite the fact that the spouse had waived any right to her husband's estate before the enactment of the law. Because rights of succession to property are of statutory creation, the Court explained, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to

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[322] Eubank v. City of Richmond, 226 U.S. 137 (1912).

[323] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). In a more recent case, the Court held that the zoning power may not be delegated to a church. Larkin v. Grendel's Den, 459 U.S. 116 (1982) (invalidating under the Establishment Clause a state law permitting any church to block issuance of a liquor license for a facility to be operated within 500 feet of the church).

[324] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). The Court thought the case different from Eubank, because in that case the ordinance established no rule but gave the force of law to the decision of a narrow segment of the community, whereas in *Cusack* the ordinance barred the erection of any billboards but permitted the prohibition to be modified by the persons most affected. Id. at 531.

[325] City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Such referenda do, however, raise equal protection problems. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

the surviving spouse regardless of any waiver, however formally executed.[326]

Even after the creation of a testamentary trust, a State retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration. For instance, the Great Depression resulted in the default of numerous mortgages which were held by trusts, which had the affect of putting an unexpected accumulation of real property into those trusts. Under these circumstance, the Court upheld the retroactive application of a statute reallocating distribution within these trusts, even where the administration of the estate had already begun, and the new statute had the effect of taking away a remainderman's right to judicial review of the trustee's computation of income.[327]

The states have significant discretion to regulate abandoned property. For instance, states have several jurisdictional bases to allow for the lawful application of escheat and abandoned property laws to out-of-state corporations. Thus, application of New York's Abandoned Property Law to New York residents' life insurance policies, even when issued by foreign corporations, did not deprive such companies of property without due process, where the insured persons had continued to be New York residents and the beneficiaries were resident at the maturity date of the policies. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein, is sufficiently close to give New York jurisdiction.[328] Or, in *Standard Oil Co. v. New Jersey*,[329] a divided Court held that due process is not violated by a state statute escheating shares of stock in a domestic corporation, including unpaid dividends, even though the last known owners were nonresidents and the stock was issued and the dividends held in another State. The State's power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

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[326] Irving Trust Co. v. Day, 314 U.S. 556, 564 (1942).

[327] Demorest v. City Bank Co., 321 U.S. 36, 47–48 (1944). Under the peculiar facts of the case, however, the remainderman's right had been created by judicial rules promulgated after the death of the decedent, so the case is not precedent for a broad rule of retroactivity.

[328] Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948). Justices Jackson and Douglas dissented on the ground that New York was attempting to escheat unclaimed funds not actually or constructively located in New York, and which were the property of beneficiaries who may never have been citizens or residents of New York.

[329] 341 U.S. 428 (1951).

A state's wide discretion to define abandoned property and dispose of abandoned property can be seen in *Texaco v. Short*.[330] There, an Indiana statute was upheld which terminated interests in coal, oil, gas, or other minerals which had not been used in twenty years and which provided for reversion to the owner of the interest out of which the mining interests had been carved. The "use" of a mineral interest which could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Indeed, merely filing a claim with the local recorder would preserve the interest.[331] The statute provided no notice to owners of interests, however, save for its own publication, nor did it require surface owners to notify owners of mineral interests that the interests were about to expire.[332] By a narrow margin, the Court sustained the statute, holding that the State's interest in encouraging production, securing timely notices of property ownership, and settling property titles provided a basis for enactment, and finding that due process did not require any actual notice to holders of unused mineral interests.[333] The State "may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of interests" and it may similarly "impose on him the lesser burden of keeping informed of the use or nonuse of his own property."[334]

### Health, Safety, and Morals

***Health***.—Even under the narrowest concept of the police power as limited by substantive due process, it was generally conceded that states could exercise the power to protect the public health, safety, and morals.[335] For instance, an ordinance for incineration of garbage and refuse at a designated place as a means of protecting public health is not a taking of private property without just compensation, even though such garbage and refuse may have

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[330] 454 U.S. 516 (1982).

[331] With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.

[332] The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.

[333] Generally, property owners are charged with maintaining knowledge of the legal conditions of property ownership.

[334] 454 U.S. at 538. The four dissenters thought that some specific notice was required for persons holding before enactment. Id. at 540.

[335] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 661 (1887), and discussion supra under "The Development of Substantive Due Process."

some elements of value for certain purposes.[336] Or, compelling property owners to connect with a publicly maintained system of sewers and enforcing that duty by criminal penalties does not violate the due process clause.[337]

There are few constitutional restrictions on the extensive state regulations on the production and distribution of food and drugs.[338] Statutes forbidding or regulating the manufacture of oleomargarine have been upheld,[339] as have statutes ordering the destruction of unsafe food[340] or confiscation of impure milk,[341] notwithstanding that, in the latter cases, such articles had a value for purposes other than food. There also can be no question of the authority of the State, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors[342] or the sale of spectacles by an establishment where a physician or optometrist is not in charge.[343] Nor is it any longer possible to doubt the validity of state regulations pertaining to the administration, sale, prescription, and use of dangerous and habit-forming drugs.[344]

Equally valid as police power regulations are laws forbidding the sale of ice cream not containing a reasonable proportion of butter fat,[345] of condensed milk made from skimmed milk rather than whole milk,[346] or of food preservatives containing boric acid.[347] Similarly, a statute intended to prevent fraud and deception by prohibiting the sale of "filled milk" (milk to which has been added any fat or oil other than a milk fat) is valid, at least where such milk has the taste, consistency, and appearance of whole milk products. The Court reasoned that filled milk is inferior to whole milk in its nutritional content and cannot be served to children as a substitute for whole milk without producing a dietary deficiency.[348]

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[336] California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905).

[337] Hutchinson v. City of Valdosta, 227 U.S. 303 (1913).

[338] "The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established." Sligh v. Kirkwood, 237 U.S. 52, 59–60 (1915).

[339] Powell v. Pennsylvania, 127 U.S. 678 (1888); Magnano v. Hamilton, 292 U.S. 40 (1934).

[340] North American Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

[341] Adams v. City of Milwaukee, 228 U.S. 572 (1913).

[342] Baccus v. Louisiana, 232 U.S. 334 (1914).

[343] Roschen v. Ward, 279 U.S. 337 (1929).

[344] Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921).

[345] Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916).

[346] Hebe Co. v. Shaw, 248 U.S. 297 (1919).

[347] Price v. Illinois, 238 U.S. 446 (1915).

[348] Sage Stores Co. v. Kansas, 323 U.S. 32 (1944). Where health or fraud are not an issue, however, police power may be more limited. Thus, a statute forbidding the sale of bedding made with shoddy materials, even if sterilized and therefore harmless to health, was held to be arbitrary and therefore invalid Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

Even before the passage of the 21st Amendment, which granted states the specific authority to regulate alcoholic beverages, the Supreme Court had found that the states have significant authority in this regard.[349] A State may declare places where liquor is manufactured or kept to be common nuisances,[350] and may even subject an innocent owner to the forfeiture of his property if he allows it to be used for the illegal production or transportation of alcohol.[351]

***Safety***.—Regulations designed to promote public safety are also well within a state's authority to implement. For instance, various measures designed to reduce fire hazards have been upheld. These include municipal ordinances that prohibit the storage of gasoline within 300 feet of any dwelling,[352] require that all gas storage tanks with a capacity of more than ten gallons be buried at least three feet under ground,[353] or prohibit washing and ironing in public laundries and wash houses within defined territorial limits from 10 p.m. to 6 a.m.[354] A city's demolition and removal of wooden buildings erected in violation of regulations was also consistent with the Fourteenth Amendment.[355] Construction of property in full compliance with existing laws, however, does not confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodging houses of non-fireproof construction, can be applied to a lodging house constructed in 1940, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.[356]

States exercise extensive regulation over transportation safety. Although state highways are used primarily for private purposes, they are public property, and the use of a highway for financial gain may be prohibited by the legislature or conditioned as it sees fit.[357] Consequently, a State may reasonably provide that intra-

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[349] "[O]n account of their well-known noxious qualities and the extraordinary evils shown by experience to be consequent upon their use, a State . . . [is competent] to prohibit [absolutely the] manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders. . . ." Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878). *See* Mugler v. Kansas, 123 U.S. 623 (1887); Kidd v. Pearson, 128 U.S. 1 (1888); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); James Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); Barbour v. Georgia, 249 U.S. 454 (1919).

[350] Mugler v. Kansas, 123 U.S. 623, 671 (1887).

[351] Hawes v. Georgia, 258 U.S. 1 (1922); Van Oster v. Kansas, 272 U.S. 465 (1926).

[352] Pierce Oil Corp. v. Hope, 248 U.S. 498 (1919).

[353] Standard Oil Co. v. Marysville, 279 U.S. 582 (1929).

[354] Barbier v. Connolly, 113 U.S. 27 (1885); Soon Hing v. Crowley, 113 U.S. 703 (1885).

[355] Maguire v. Reardon, 225 U.S. 271 (1921).

[356] Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

[357] Stephenson v. Binford, 287 U.S. 251 (1932).

state carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that issuance to those whose service began later shall depend upon public convenience and necessity.[358] A state may require private contract carriers for hire to obtain a certificate of convenience and necessity, and decline to grant one if the service of common carriers is impaired thereby. A state may also fix minimum rates applicable to such private carriers, which are not less than those prescribed for common carriers, as a valid as a means of conserving highways.[359] In the absence of legislation by Congress, a State may, in protection of the public safety, deny an interstate motor carrier the use of an already congested highway.[360]

In exercising its authority over its highways, a State is not limited to the raising of revenue for maintenance and reconstruction or to regulating the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load.[361] No less constitutional is a municipal traffic regulation which forbids the operation in the streets of any advertising vehicle, excepting vehicles displaying business notices or advertisements of the products of the owner and not used mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks.[362] A State may also provide that a driver who fails to pay a judgment for negligent operation shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or dis-

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[358] Stanley v. Public Utilities Comm'n, 295 U.S. 76 (1935).

[359] Stephenson v. Binford, 287 U.S. 251 (1932). But any attempt to convert private carriers into common carriers, Michigan Pub. Utils. Comm'n v. Duke, 266 U.S. 570 (1925), or to subject them to the burdens and regulations of common carriers, without expressly declaring them to be common carriers, is violative of due process. Frost Trucking v. Railroad Comm'n, 271 U.S. 583 (1926); Smith v. Cahoon, 283 U.S. 553 (1931).

[360] Bradley v. Public Utils. Comm'n, 289 U.S. 92 (1933).

[361] Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable. Sproles v. Binford, 286 U.S. 374 (1932).

[362] Inasmuch as it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion. Railway Express Agency v. New York, 336 U.S. 106 (1949).

charged.[363] Compulsory automobile insurance is so plainly valid as to present no federal constitutional question.[364]

***Morality***.—Legislatures have wide discretion in regulating "immoral" activities. Thus, legislation suppressing prostitution[365] or gambling[366] will be upheld by the Court as within the police power of a State. Accordingly, a state statute may provide that judgment against a party to recover illegal gambling winnings may be enforced by a lien on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.[367] Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car.[368] For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, regardless of any particular equities.[369]

**Vested and Remedial Rights**

As the Due Process Clause protects against arbitrary deprivation of "property," privileges or benefits that constitute property are entitled to protection.[370] Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause.[371] Thus, where repeal of a provision that made directors liable for moneys embezzled by corporate officers was applied retroactively, it deprived certain creditors of their property without due process of law.[372] A person, however, has no

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[363] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962). *But see* Perez v. Campbell, 402 U.S. 637 (1971). Procedural due process must, of course be observed. Bell v. Burson, 402 U.S. 535 (1971). A nonresident owner who loans his automobile in another state, by the law of which he is immune from liability for the borrower's negligence and who was not in the state at the time of the accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner's permission. Young v. Masci, 289 U.S. 253 (1933).

[364] Ex parte Poresky, 290 U.S. 30 (1933). *See also* Packard v. Banton, 264 U.S. 140 (1924); Sprout v. South Bend, 277 U.S. 163 (1928); Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

[365] L'Hote v. New Orleans, 177 U.S. 587 (1900).

[366] Ah Sin v. Wittman, 198 U.S. 500 (1905).

[367] Marvin v. Trout, 199 U.S. 212 (1905).

[368] Bennis v. Michigan, 516 U.S. 442 (1996).

[369] Stone v. Mississippi, 101 U.S. 814 (1880); Douglas v. Kentucky, 168 U.S. 488 (1897).

[370] *See, e.g.*, Snowden v. Hughes, 321 U.S. 1 (1944) (right to become a candidate for state office is a privilege only, hence an unlawful denial of such right is not a denial of a right of "property"). Cases under the equal protection clause now mandate a different result. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (seeming to conflate due process and equal protection standards in political rights cases).

[371] Angle v. Chicago, St. Paul, M. & D. Ry., 151 U.S. 1 (1894).

[372] Coombes v. Getz, 285 U.S. 434, 442, 448 (1932).

constitutionally protected property interest in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by an effective procedure.[373]

Similarly, a statute creating an additional remedy for enforcing liability is not, as applied to stockholders then holding stock, violative of due process.[374] Nor is a law that lifts a statute of limitations and makes possible a suit, theretofore barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."[375]

**State Control over Local Units of Government**

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected.[376] Nor does a statute requiring cities to indemnify owners of property damaged by mobs or during riots result in an unconstitutional deprivation of the property, even when the city could not have prevented the violence.[377] Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act which so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability no unconstitutional deprivation is experienced.[378]

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot

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[373] Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).

[374] Shriver v. Woodbine Bank, 285 U.S. 467 (1932).

[375] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315–16 (1945).

[376] Soliah v. Heskin, 222 U.S. 522 (1912); City of Trenton v. New Jersey, 262 U.S. 182 (1923). The equal protection clause has been employed, however, to limit a State's discretion with regard to certain matters. *See* "Fundamental Interests: The Political Process," infra.

[377] City of Chicago v. Sturges, 222 U.S. 313 (1911).

[378] Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883).

successfully invoke the due process clause,[379] nor may taxpayers allege any unconstitutional deprivation as a result of changes in their tax burden attendant upon the consolidation of contiguous municipalities.[380] Nor is a statute requiring counties to reimburse cities of the first class but not cities of other classes for rebates allowed for prompt payment of taxes in conflict with the due process clause.[381]

**Taxing Power**

***Generally***.—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the States.[382] When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers,[383] and the Court will refrain from condemning a tax solely on the ground that it is excessive.[384] Nor can the constitutionality of taxation be made to depend upon the taxpayer's enjoyment of any special benefits from use of the funds raised by taxation.[385]

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes.[386] However, modern notions of public purpose have expanded to the point where the limitation has little practical import.[387] Whether a use is public or private, while it is

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[379] Michigan ex rel. Kies v. Lowrey, 199 U.S. 233 (1905).

[380] Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[381] Stewart v. Kansas City, 239 U.S. 14 (1915).

[382] Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the States the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).

[383] Fox v. Standard Oil Co., 294 U.S. 87, 99 (1935).

[384] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Kelly v. City of Pittsburgh, 104 U.S. 78 (1881); Chapman v. Zobelein, 237 U.S. 135 (1915); Alaska Fish Salting & By-Products Co. v. Smith, 255 U.S. 44 (1921); Magnano Co. v. Hamilton, 292 U.S. 40 (1934); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[385] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). A taxpayer therefore cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay. Dane v. Jackson, 256 U.S. 589 (1921).

[386] Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655 (1875) (voiding tax employed by city to make a substantial grant to a bridge manufacturing company to induce it to locate its factory in the city). *See also* City of Parkersburg v. Brown, 106 U.S. 487 (1882) (private purpose bonds not authorized by state constitution).

[387] Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flourmill system, homebuilding projects,

ultimately a judicial question, "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court." [388]

The authority of states to tax income is "universally recognized." [389] Years ago the Court explained that "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits." [390] Also, a tax on income is not constitutionally suspect because retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld, [391] and there are also situations in which courts have upheld retroactive application to the preceding year or two. [392]

A state also has broad tax authority over wills and inheritance. A State may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent, [393] although such tax must be consistent with

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Carmichael v. Southern Coal & Coke Co., 300 U.S. 644 (1937), a society for preventing cruelty to animals (dog license tax), Nicchia v. New York, 254 U.S. 228 (1920), a railroad tunnel, Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923), books for school children attending private as well as public schools, Cochran v. Board of Education, 281 U.S. 370 (1930), and relief of unemployment, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937).

[388] In applying the Fifth Amendment Due Process Clause the Court has said that discretion as to what is a public purpose "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. Carmichael, 301 U.S. at 518. *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

[389] New York ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937).

[390] 300 U.S. at 313. *See also* Shaffer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).

[391] *See, e.g.*, Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323 (1874); United States v. Hudson, 299 U.S. 498 (1937); United States v. Darusmont, 449 U.S. 292 (1981).

[392] Welch v. Henry, 305 U.S. 134 (1938) (upholding imposition in 1935 of tax liability for 1933 tax year; due to the scheduling of legislative sessions, this was the legislature's first opportunity to adjust revenues after obtaining information of the nature and amount of the income generated by the original tax). Since "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract," the Court explained, "its retroactive imposition does not necessarily infringe due process." Id. at 146–47.

[393] Stebbins v. Riley, 268 U.S. 137, 140, 141 (1925).

other due process considerations.[394] Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the State in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[395] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.[396]

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the due process clause merely because the city has entered the power business in competition with such companies.[397] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[398]

States have significant discretion in how they value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process.[399] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[400]

A State also has wide discretion in how to apportion real property tax burdens. Thus, a State may defray the entire expense of creating, developing, and improving a political subdivision either

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[394] When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional. Coolidge v. Long, 282 U.S. 582 (1931). The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process." Welch v. Henry, 305 U.S. 134, 147 (1938). But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid. Stebbins v. Riley, 268 U.S. 137 (1925).

[395] Cahen v. Brewster, 203 U.S. 543 (1906).

[396] Keeney v. New York, 222 U.S. 525 (1912).

[397] Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).

[398] New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).

[399] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[400] Paddell v. City of New York, 211 U.S. 446 (1908).

from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays.[401] Or, where a state statute authorizes municipal authorities to define the district to be benefitted by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefitted by the improvement was not included.[402]

On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad is violative of due process,[403] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[404] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[405] However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefitted directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law.[406] Finally, a State may levy an assessment for special benefits resulting from an improvement already made[407] and may validate an assessment previously held void for want of authority.[408]

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[401] Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

[402] Butters v. City of Oakland, 263 U.S. 162 (1923). It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 266 U.S. 187 (1924). *See also* Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefitted by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).

[403] Road Dist. v. Missouri Pac. R.R., 274 U.S. 188 (1927).

[404] Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).

[405] Louisville & Nashville R.R. v. Barber Asphalt Co., 197 U.S. 430 (1905).

[406] Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1916).

[407] Wagner v. Baltimore, 239 U.S. 207 (1915).

[408] Charlotte Harbor Ry. v. Welles, 260 U.S. 8 (1922).

**Jurisdiction to Tax**

***Generally***.—The operation of the Due Process Clause as a jurisdictional limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of two basic questions. First, is there a sufficient relationship between the state exercising taxing power and the object of the exercise of that power? Second, is the degree of contact sufficient to justify the state's imposition of a particular obligation? Illustrative of the factual settings in which such issues arise are 1) determining the scope of the business activity of a multi-jurisdictional entity that is subject to a state's taxing power; 2) application of wealth transfer taxes to gifts or bequests of nonresidents; 3) allocation of the income of multi-jurisdictional entities for tax purposes; 4) the scope of state authority to tax income of nonresidents; and 5) collection of state use taxes.

The Court's opinions in these cases have often discussed due process and dormant Commerce Clause issues as if they were indistinguishable.[409] A more recent decision in *Quill Corp. v. North Dakota*,[410] however, utilized a two-tier analysis that found sufficient contact to satisfy due process but not dormant Commerce Clause requirements. In *Quill*,[411] the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. Taxation of an interstate business does not offend due process, the Court held, if that business "purposefully avails itself of the benefits of an economic market in the [taxing] State . . . even if it has no physical presence in the State."[412] Thus, *Quill* may be read as implying that the more stringent Commerce Clause standard subsumes due process jurisdictional issues, and that consequently these due process

[409] For discussion of the relationship between the taxation of interstate commerce and the dormant commerce clause, *see* Taxation, supra.

[410] 504 U.S. 298 (1992).

[411] 504 U.S. 298 (1992).

[412] The Court had previously held that the requirement in terms of a benefit is minimal. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622–23 (1982), (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521–23 (1937)). It is satisfied by a "minimal connection" between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436–37 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272–73 (1978). *See especially* Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 562 (1975); National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977).

issues need no longer be separately considered.[413] This interpretation has yet to be confirmed, however, and a detailed review of due process precedents may prove useful.

***Real Property***.—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a State could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court."[414] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

***Tangible Personalty***.—A State may tax tangible property located within its borders (either directly through an *ad valorem* tax or indirectly through death taxes) irrespective of the residence of the owner.[415] By the same token, if tangible personal property makes only occasional incursions into other States, its permanent situs remains in the State of origin, and, subject to certain exceptions, is taxable only by the latter.[416] The ancient maxim, *mobilia sequuntur personam*, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." The tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner."[417]

Thus, when rolling stock is permanently located and used in a business outside the boundaries of a domiciliary State, the latter has no jurisdiction to tax it.[418] Further, vessels that merely touch

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[413] A physical presence within the state is necessary, however, under the Commerce Clause analysis applicable to taxation of mail order sales. *See* Quill Corp. v. North Dakota, 504 U.S. at 309-19 (refusing to overrule the Commerce Clause ruling in National Bellas Hess v. Department of Revenue, 386 U.S. 753, 756 (1967)). *See also* Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) (neither the Commerce Clause nor the Due Process Clause is violated by application of a business tax, measured on a value added basis, to a company that manufactures goods in another state, but that operates a sales office and conducts sales within state).

[414] Union Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). *See also* Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[415] Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910); Frick v. Pennsylvania, 268 U.S. 473 (1925); Blodgett v. Silberman, 277 U.S. 1 (1928).

[416] New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584 (1906).

[417] Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209–10 (1936); Union Transit Co. v. Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[418] Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in Central R.R. v. Pennsylvania, 370 U.S. 607, 619–21 (1962), had his "doubts about the

briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at all.[419] Thus, where airplanes are continuously in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.[420]

Conversely, a nondomiciliary State, although it may not tax property belonging to a foreign corporation which has never come within its borders, may levy a tax on movables which are regularly and habitually used and employed therein. Thus, while the fact that cars are loaded and reloaded at a refinery in a State outside the owner's domicile does not fix the situs of the entire fleet in that State, the State may nevertheless tax the number of cars which on the average are found to be present within its borders.[421] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds

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use of the Due Process Clause to . . . [invalidate State taxes]. The modern use of due process to invalidate State taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines . . . And in the first case [Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a State tax for lack of jurisdiction to tax after the passage of that Amendment, neither the Amendment nor its Due Process Clause . . . was ever mentioned." He also maintained that Justice Holmes shared this view in Union Transit Co. v. Kentucky, 199 U.S. at 211.

[419] Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one State, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).

[420] Noting that an entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary State, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary State to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other State was deemed able to accord the same protection and benefits as the taxing State in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other States, the Court declared that the "taxability of any part of this fleet by any other State, than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

[421] Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933). Moreover, in assessing that part of a railroad within its limits, a State need not treat it as an independent line valued as if it was operated separately from the balance of the railroad. The State may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several States. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

to the value of the road and the rights exercised in the State.[422] Or, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is constitutional unless it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or is relatively higher than taxes on other kinds of property.[423]

***Intangible Personalty***.—To determine whether a State, or States, may tax intangible personal property, the Court has applied the fiction *mobilia sequuntur personam* (movable property follows the person) and has also recognized that such property may acquire, for tax purposes, a permanent business or commercial situs. The Court, however, has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile. Constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them. If the latter, the question would be which two—the State of the commercial situs and of the issuing corporation's domicile, or the State of the owner's domicile and that of the commercial situs.[424]

Thus far, the Court has sustained the following personal property taxes on intangibles: (1) a debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the State of the debtor's residence;[425] (2) a mortgage owned and kept outside the State by a nonresident but on land within the State;[426] (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;[427] (4) deposits of a resident in a bank in another State, where he carries on a business and from which these deposits are derived,

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[422] Wallace v. Hines, 253 U.S. 66 (1920). For example, the ratio of track mileage within the taxing State to total track mileage cannot be employed in evaluating that portion of total railway property found in the State when the cost of the lines in the taxing State was much less than in other States and the most valuable terminals of the railroad were located in other States. *See also* Fargo v. Hart, 193 U.S. 490 (1904); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

[423] Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only revenues derived from local operations, the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).

[424] Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 MO. L. REV. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some Modern Aspects*, 18 TEX. L. REV. 196, 314–15 (1940).

[425] Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).

[426] Savings Society v. Multnomah County, 169 U.S. 421 (1898).

[427] Bristol v. Washington County, 177 U.S. 133, 141 (1900).

but belonging absolutely to him and not used in the business ;[428] (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;[429] (6) membership by a resident in a stock exchange located in another State;[430] (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing State;[431] (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing State;[432] (9) shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder;[433] (10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the State;[434] (11) the transfer within the taxing State by one nonresident to another of stock certificates issued by a foreign corporation;[435] and (12) promissory

[428] These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the State where the business is carried on Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed

[429] Rogers v. Hennepin County, 240 U.S. 184 (1916).

[430] Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921). "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."

[431] Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents."

[432] First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.

[433] Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).

[434] The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).

[435] New York *ex rel.* Hatch v. Reardon, 204 U.S. 152 (1907).

notes executed by a domestic corporation, although payable to banks in other States.[436]

The following personal property taxes on intangibles have been invalidated: (1) debts evidenced by notes in safekeeping within the taxing State, but made and payable and secured by property in a second State and owned by a resident of a third State;[437] (2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the State and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[438]

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another State and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.[439] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another State in respect of intangible property located in the latter State, at least where it does not appear that the trustee is exposed to the danger of other *ad valorem* taxes in another State.[440] The first case, *Brooke v. Norfolk*,[441] is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Different too is *Safe Deposit & T. Co. v. Virginia*,[442] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

A State in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the State and the accounts receivable arise from manufacturing activities in another State. Similarly, a nondomiciliary State in which a foreign corporation did business can tax the "corporate excess" arising from property em-

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[436] Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.

[437] Buck v. Beach, 206 U.S. 392 (1907).

[438] Senior v. Braden, 295 U.S. 422 (1935).

[439] Brooke v. City of Norfolk, 277 U.S. 27 (1928).

[440] Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).

[441] 277 U.S. 27 (1928).

[442] 280 U.S. 83 (1929).

ployed and business done in the taxing State.[443] On the other hand, when the foreign corporation transacts only interstate commerce within a State, any excise tax on such excess is void, irrespective of the amount of the tax.[444]

Also a domiciliary State which imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary State only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered . . . ," the presumption persists that intangible property is taxable by the State of origin.[445]

A property tax on the capital stock of a domestic company, however, which includes in the appraisal thereof the value of coal mined in the taxing State but located in another State awaiting sale deprives the corporation of its property without due process of law.[446] Also void for the same reason is a state tax on the franchise of a domestic ferry company which includes in the valuation thereof the worth of a franchise granted to the said company by another State.[447]

***Transfer (Inheritance, Estate, Gift) Taxes***.—As a state has authority to regulate transfer of property by wills or inheritance, it may base its succession taxes upon either the transmission or receipt of property by will or by descent.[448] But whatever may be the justification of their power to levy such taxes, since 1905 the States have consistently found themselves restricted by the rule in *Union*

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[443] Adams Express Co. v. Ohio, 165 U.S. 194 (1897).

[444] Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).

[445] Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 318, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice Stone in Curry v. McCanless, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles.

[446] Delaware, L. & W.P.R.R. v. Pennsylvania, 198 U.S. 341 (1905).

[447] Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[448] Stebbins v. Riley, 268 U.S. 137, 140–41 (1925).

*Transit Co. v. Kentucky*,[449] which precludes imposition of transfer taxes upon tangible which are permanently located or have an actual *situs* outside the State.

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one State of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the *situs* (but nondomiciliary) State, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,[450] the domiciliary State of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. Cognizance was taken of the fact that the State in which these intangibles had their situs had also taxed the trust.[451]

On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary State was held insufficient to support a tax by that State on the succession to shares of stock in that corporation owned by a nonresident decedent.[452] Also against the trend was *Blodgett v. Silberman*,[453] wherein the Court defeated collection of a transfer tax by the domiciliary State by treating coins and bank notes deposited by a decedent in a safe deposit box in another State as tangible property.[454]

In the course of about two years following the Depression, the Court handed down a group of four decisions which placed the stamp of disapproval upon multiple transfer taxes and—by infer-

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[449] 199 U.S. 194 (1905) (property taxes).. The rule was subsequently reiterated in 1925 in Frick v. Pennsylvania, 268 U.S. 473 (1925). *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Co. v. Schnader, 293 U.S. 112 (1934). In State Tax Comm'n v. Aldrich, 316 U.S. 174, 185 (1942), however, Justice Jackson, in dissent, asserted that a reconsideration of this principle had become timely.

[450] 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in Graves v. Schmidlapp, 315 U.S. 657 (1942).

[451] Levy of an inheritance tax by a nondomiciliary State was also sustained on similar grounds in Wheeler v. New York, 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.

[452] Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926).

[453] 277 U.S. 1 (1928).

[454] The Court conceded, however, that the domiciliary State could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

ence—other multiple taxation of intangibles.[455] The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile."[456] Thus, the Court proceeded to deny the right of nondomiciliary States to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the due processclause.

The Court has expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles. In 1939, in *Curry v. McCanless*,[457] the Court announced a departure from the "doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one State. . . ." Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or . . . [his intangibles] within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, . . . [However], the State of domicile is not deprived, by the taxpayer's activities, elsewhere, of its constitutional jurisdiction to tax."

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. "In effecting her purposes," the testatrix was viewed as having "brought some of the legal interests which she created within the control of one State by

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[455] First Nat'l Bank v. Maine, 284 U.S. 312 (1932); Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Farmer's Loan Co. v. Minnesota, 280 U.S. 204 (1930).

[456] First National Bank v. Maine, 284 U.S. 312, 330–31 (1932).

[457] 307 U.S. 357, 363, 366–68, 372 (1939).

selecting a trustee there, and others within the control of the other State, by making her domicile there." She had found it necessary to invoke "the aid of the law of both States and her legatees" were subject to the same necessity.[458]

On the authority of *Curry v. McCanless*, the Court, in *Pearson v. McGraw*[459] sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the State, but on the fact that the owner was a resident of Oregon. In *Graves v. Elliott*,[460] the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership, . . . and its exercise in the case of intangibles is . . . [an] appropriate subject of taxation at the place of the domicile of the owner of the power. Relinquishment at death, in consequence of the nonexercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."[461]

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[458] These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions which he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many States as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary State would invariably qualify as a State competent to tax as would a nondomiciliary State, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

[459] 308 U.S. 313 (1939).

[460] 307 U.S. 383 (1939).

[461] 307 U.S. at 386. Consistent application of the principle enunciated in Curry v. McCanless is also discernible in two later cases in which the Court sustained the right of a domiciliary State to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoyed." In Graves v. Schmidlapp, 315 U.S. 657, 660, 661 (1942), an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted from McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819) to the effect that the power to tax "'is an incident of sovereignty, and is coextensive with that to which it is an incident.'" Again, in Central Hanover Bank Co. v. Kelly, 319 U.S. 94 (1943), the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust despite the

The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more States find that the decedent died domiciled within its borders. In such cases, contesting States may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas v. Florida*,[462] the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other States. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several States, so that the latter were confronted with a prospective inability to collect.

***Corporate Privilege Taxes***.—A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the State, since the tax is levied not on property but on the privilege of doing business in corporate form.[463] However, a State cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void,[464] even though there is a maximum

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fact that it was executed in New York, the securities were located in New York, and the disposition of the corpus was to two nonresident sons.

[462] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two States as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct State of domicile. In California v. Texas, 437 U.S. 601 (1978), a case on all points with Texas v. Florida, the Court denied leave to file an original action to adjudicate a dispute between the two States about the actual domicile of Howard Hughes, a number of Justices suggesting that Worcester County no longer was good law. Subsequently, the Court reaffirmed Worcester County, Cory v. White, 457 U.S. 85 (1982), and then permitted an original action to proceed, California v. Texas, 457 U.S. 164 (1982), several Justices taking the position that neither Worcester County nor Texas v. Florida was any longer viable.

[463] Kansas City Ry. v. Kansas, 240 U.S. 227 (1916); Kansas City, M. & B.R.R. v. Stiles, 242 U.S. 111 (1916). Similarly, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the State. Schwab v. Richardson, 263 U.S. 88 (1923).

[464] Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910); Pullman Co. v. Kansas, 216 U.S. 56 (1910); Looney v. Crane Co., 245 U.S. 178 (1917); International Paper Co. v. Massachusetts, 246 U.S. 135 (1918).

fee,[465] unless the tax is apportioned based on property interests in the taxing state.[466] On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.[467]

A municipal license tax imposed on a foreign corporation for goods sold within and without the State, but manufactured in the city, is not a tax on business transactions or property outside the city and therefore does not violate the due process clause.[468] But a State lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for fabricating equipment outside the taxing State, even if the equipment is later installed in the taxing State. Unless the activities which are the subject of the tax are carried on within its territorial limits, a State is not competent to impose such a privilege tax.[469]

***Individual Income Taxes***.—A State may tax annually the entire net income of resident individuals from whatever source received,[470] as jurisdiction is founded upon the rights and privileges incident to domicile. A State may also tax the portion of a nonresident's net income which is derived from property owned, and from any business, trade, or profession carried on, by him within its borders,[471] based upon the State's dominion over the property or activity from which it is derived and the obligation to contribute to the support of a government which secures the collection of such income. Accordingly, a State may tax residents on income from rents of land located outside the State; from interest on bonds physically without the State and secured by mortgage upon lands similarly situated;[472] and from a trust created and administered in another State, and not directly taxable to the trustee.[473] Further,

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[465] Cudahy Co. v. Hinkle, 278 U.S. 460 (1929).

[466] An example of such an apportioned tax is a franchise tax based on such proportion of outstanding capital stock as is represented by property owned and used in business transacted in the taxing State. St. Louis S. W. Ry. v. Arkansas, 235 U.S. 350 (1914).

[467] Atlantic Refining Co. v. Virginia, 302 U.S. 22 (1937).

[468] American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). Nor does a state license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). A tax on chain stores, at a rate per store determined by the number of stores both within and without the State is not unconstitutional as a tax in part upon things beyond the jurisdiction of the State.

[469] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

[470] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[471] Shaffer v. Carter, 252 U.S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[472] New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[473] Maguire v. Trefy, 253 U.S. 12 (1920).

the fact that another State has lawfully taxed identical income in the hands of trustees operating therein does not necessarily destroy a domiciliary State's right to tax the receipt of income by a resident beneficiary.[474]

***Corporate Income Taxes: Foreign Corporations***.—A tax based on the income of a foreign corporation may be determined by allocating to the State a proportion of the total,[475] unless the income attributed to the State is out of all appropriate proportion to the business there transacted.[476] Thus, a franchise tax on a foreign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.[477] Inasmuch as the privilege granted by a State to a foreign corporation of carrying on business supports a tax by that State, it followed that a Wisconsin privilege dividend tax, could be applied to a Delaware corporation despite it having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.[478]

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[474] Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938). Likewise, even though a nonresident does no business within a State, the latter may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders. New York ex. rel. Whitney v. Graves, 299 U.S. 366 (1937).

[475] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton Ltd. v. Tax Comm'n, 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the States to use apportionment formulae to allocate to each State for taxing purposes a fraction of the income earned by an integrated business conducted in several States as well as abroad. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980). Exxon refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a State's formulary apportionment taxes extraterritorial income improperly. *Bair*, 437 U.S. at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

[476] Evidence may be submitted which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which are in no sense attributable to transactions within its jurisdiction. Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

[477] Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).

[478] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many States does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as divi-

***Insurance Company Taxes***.—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the State does not deprive the company of property without due process,[479] but such a tax is invalid if the company has withdrawn all its agents from the State and has ceased to do business, merely continuing to receive the renewal premiums at its home office.[480] Also violative of due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, which obtained the coverage of property within the State from an unlicenced out-of-state insurer which consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[481] However, tax may be imposed upon the privilege of entering and engaging in business in a State, even if the tax is a percentage of the "annual premiums to be paid throughout the life of the policies issued." Under this kind of tax, a State may continue to collect even after the company's withdrawal from the State.[482]

A State may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third State to insure its customers against loss of cars purchased through it, so far as the cars go into possession of a purchaser within the taxing State.[483] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other States who are not authorized to do business in the taxing State, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage.[484] Likewise a Connecticut life insurance corporation, licensed to do business in California, that negotiated reinsurance contracts in Connecticut, received payment of premiums thereon in Connecticut, and was there liable for payment of losses claimed thereunder, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of

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dends, he contended is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad." *See also* Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940).

[479] Equitable Life Soc'y v. Pennsylvania, 238 U.S. 143 (1915).

[480] Provident Savings Ass'n v. Kentucky, 239 U.S. 103 (1915).

[481] State Bd. of Ins. v. Todd Shipyards, 370 U.S. 451 (1962).

[482] Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940) (emphasis added).

[483] Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).

[484] St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).

residents therein. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that State.[485]

**Procedure in Taxation**

***Generally***.—Exactly what due process is required in the assessment and collection of general taxes has never been decided by the Supreme Court. While it was held that "notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" for imposition of special taxes, it has also ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary.[486] Due process of law as applied to taxation does not mean judicial process;[487] neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.[488] Due Process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the State for such purpose.[489]

***Notice and Hearing in Relation to Taxes***.—"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax,

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[485] Connecticut General Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.

[486] Turpin v. Lemon, 187 U.S. 51, 58 (1902); Glidden v. Harrington, 189 U.S. 255 (1903).

[487] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[488] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

[489] Hodge v. Muscatine County, 196 U.S. 276 (1905).

fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."[490]

***Notice and Hearing in Relation to Assessments***.—"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[491]

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed.[492] Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be rea-

[490] Hagar v. Reclamation Dist., 111 U.S. 701, 709–10 (1884).
[491] 111 U.S. at 710.
[492] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

sonably asked.[493] Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the State for remittance becomes final.[494]

However, when assessments based on the enjoyment of a special benefit are made by a political subdivision, a taxing board or court, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination.[495] The hearing need not amount to a judicial inquiry,[496] although a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[497] Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[498] On the other hand, if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the improvement district and assessed, but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final.[499] The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment, and once his land has been duly in-

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[493] State Railroad Tax Cases, 92 U.S. 575, 610 (1876).

[494] Nickey v. Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913). A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property. Pittsburgh C. C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).

[495] St. Louis Land Co. v. Kansas City, 241 U.S. 419, 430 (1916); Paulsen v. Portland, 149 U.S. 30, 41 (1893); Bauman v. Ross, 167 U.S. 548, 590 (1897).

[496] Tonawanda v. Lyon, 181 U.S. 389, 391 (1901).

[497] Londoner v. Denver, 210 U.S. 373 (1908).

[498] Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hooper, 269 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Board of Supervisors, 257 U.S. 118 (1921).

[499] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 168, 175 (1896); Browning v. Hooper, 269 U.S. 396, 405 (1926).

cluded within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment, that is, the amount of the tax which he has to pay.[500]

More specifically, where the mode of assessment resolves itself into a meremathematical calculation, there is no necessity for a hearing.[501] Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.[502] In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.[503]

***Collection of Taxes***.—States may undertake a variety of methods to collect taxes. For instance, collection of an inheritance tax may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the State.[504] A State may compel retailers to collect such gasoline taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[505] In collecting personal income taxes, most States require employers to deduct and withhold the tax from the wages of employees.[506]

States may also use various procedures to collect taxes from prior tax years. To reach property which has escaped taxation, a State may tax estates of decedents for a period prior to death and

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[500] Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah v. Heskin, 222 U.S. 522 (1912). Nor can he rightfully complain because the statute renders conclusive, after a hearing, the determination as to apportionment by the same body which levied the assessment. Hibben v. Smith, 191 U.S. 310, 321 (1903).

[501] Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40%. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).

[502] City of Detroit v. Parker, 181 U.S. 399 (1901).

[503] Paulsen v. Portland, 149 U.S. 30, 38 (1893).

[504] National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).

[505] Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).

[506] The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

grant proportionate deductions for all prior taxes which the personal representative can prove to have been paid.[507] Of, it is was found not to be a violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier's operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[508]

As a State may provide in advance that taxes will bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent will bear interest from the time the delinquency commenced. Further, a State may adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[509] After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[510] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[511]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[512] No less constitutional, as a means of facilitating collection, is an *in rem* proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree.[513] On the other hand, while the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[514] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.[515] Apart from such restraints, how-

[507] Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).
[508] International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956).
[509] League v. Texas, 184 U.S. 156 (1902).
[510] Palmer v. McMahon, 133 U.S. 660, 669 (1890).
[511] Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).
[512] King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).
[513] Leigh v. Green, 193 U.S. 79 (1904).
[514] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).
[515] Dewey v. Des Moines, 173 U.S. 193 (1899).

ever, a State is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.[516]

***Sufficiency and Manner of Giving Notice***.—Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing,[517] or by delivery to a statutorily designated agent.[518] As regards land, "where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . ." In fact, compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an *in rem* case , even if there are technical defects in such notice.[519]

Whether statutorily required notice is sufficient may vary based on particular circumstances. Thus, where a taxpayer was not legally competent, no guardian had not been appointed and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office.[520] On the other hand, due process was not denied to appellants who were unable to avert foreclosure on certain trust lands (based on liens for unpaid water charges) because their own bookkeeper failed to inform them of the receipt of mailed notices.[521]

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[516] League v. Texas, 184 U.S. 156, 158 (1902). *See also* Straus v. Foxworth, 231 U.S. 162 (1913).

[517] Londoner v. Denver, 210 U.S. 373 (1908). *See also* Kentucky Railroad Tax Cases, 115 U.S. 321, 331 (1885); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537 (1895); Merchants Bank v. Pennsylvania, 167 U.S. 461, 466 (1897); Glidden v. Harrington, 189 U.S. 255 (1903).

[518] A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).

[519] Leigh v. Green, 193 U.S. 79, 92–93 (1904). Thus, an assessment for taxes and a notice of sale when such taxes are delinquent will be sustained as long as there is a description of the land and the owner knows that the property so described is his, even if that description is not technically correct. Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). Where tax proceedings are *in rem*, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property. Id. See also Longyear v. Toolan, 209 U.S. 414 (1908).

[520] Covey v. Town of Somers, 351 U.S. 141 (1956).

[521] Nelson v. New York City, 352 U.S. 103 (1956). This conclusion was unaffected by the disparity between the value of the land taken and the amount owed

***Sufficiency of Remedy***.—When no other remedy is available, due process is denied by a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax.[522] Requirements of due process are similarly violated by a statute which limits a taxpayer's right to challenge an assessment to cases of fraud or corruption,[523] and by a state tribunal which prevents a recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law limiting suits to recover taxes alleged to have been assessed illegally to taxes paid at the time and in the manner provided by said law.[524] In the case of a tax held unconstitutional as a discrimination against interstate commerce and not invalidated in its entirety, the state has several alternatives for equalizing incidence of the tax: it may pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors; it may assess and collect back taxes from those competitors; or it may combine the two approaches.[525]

***Laches***.—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.[526] Likewise a car company, which failed to report its gross receipts as required by statute, has no further right to contest the state comptroller's estimate of those receipts and his adding thereto the 10 percent penalty permitted by law.[527]

**Eminent Domain**

The due process clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or

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the city. Having issued appropriate notices, the city cannot be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor is it obligated to inquire why appellants regularly paid real estate taxes on their property.

[522] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

[523] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

[524] Carpenter v. Shaw, 280 U.S. 363 (1930). *See also* Ward v. Love County, 253 U.S. 17 (1920). In this as in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply *predeprivation*, but a state that denies predeprivation remedy by requiring that tax payments be made before objections are heard must provide a *postdeprivation* remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990). *See also* Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) (per curiam) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

[525] Carpenter v. Shaw, 280 U.S. 363 (1930).

[526] Farncomb v. Denver, 252 U.S. 7 (1920).

[527] Pullman Co. v. Knott, 235 U.S. 23 (1914).

a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose. Applicable principles are discussed under the Fifth Amendment.[528]

**Fundamental Rights (Noneconomic Substantive Due Process)**

A counterpart to the now-discredited economic substantive due process, noneconomic substantive due process is still vital today. The concept has, over time, come to include a number of disparate lines of cases, and various labels have been applied to the rights protected, including "fundamental rights," "privacy rights," "liberty interests" and "incorporated rights." The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,[529] serves as the basis for some of the most significant constitutional holdings of our time. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the "incorporation" of fundamental rights.[530] Other noneconomic due process holdings, however, such as the cases establishing the right of a woman to have an abortion,[531] remain controversial.

***Development of the Right of Privacy***.—More so than other areas of law, noneconomic substantive due process seems to have started with few fixed precepts. Were the rights being protected property rights (and thus really protected by economic due process) or were they individual liberties? What standard of review needed to be applied? What were the parameters of such rights once identified? For instance, did a right of "privacy" relate to protecting physical spaces such as one's home, or was it related to the issue of autonomy to make private, intimate decisions? Once a right was identified, often using abstract labels, how far could such an abstraction be extended? Did protecting the "privacy" of the decisions whether to have a family also include the right to make decisions regarding sexual intimacy? While many of these issues have, over time, been resolved, others remain.

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[528] *See* analysis under "National Eminent Domain Power," Fifth Amendment, supra.

[529] *See, e.g.,* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Cambridge: 1977).

[530] *See* supra Bill of Rights, "Fourteenth Amendment".

[531] *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

One of the earliest formulations of noneconomic substantive due process was the right to privacy. This right was first proposed by Samuel Warren and Louis Brandeis in an 1890 Harvard Law Review article[532] as a unifying theme to various common law protections of the "right to be left alone," including the developing laws of nuisance, libel, search and seizure, and copyright. According to the authors, ". . . the right to life has come to mean the right to enjoy life,—the right to be let alone . . . . This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."

The concepts put forth in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a dissenting opinion by Justice Brandeis regarding the Fourth Amendment.[533] Then, in the 1920's, at the heyday of economic substantive due process, the Court ruled in two cases which, although nominally involving the protection of property, foreshadowed the rise of the protection of noneconomic interests. In *Meyer v. Nebraska*,[534] the Court struck down a state law forbidding schools from teaching any modern foreign language to any child who had not successfully finished the eighth grade. Then, two years later, in *Pierce v. Society of Sisters*,[535] the Court declared it unconstitutional to require public school education of children aged eight to sixteen. The statute in *Meyer* was found to interfere with the property interest of the plaintiff, a German teacher, in pursuing his occupation, while the private school plaintiffs in *Pierce* were threatened with destruction of their businesses and the

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[532] Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

[533] *See* Olmstead v. United States, 277 U.S. 438 (1928) (J. Brandeis, dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis said: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They sought to protect Americans in their beliefs, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 473.

[534] 262 U.S. 390 (1923). Justices Holmes and Sutherland entered a dissent, applicable to Meyer, in Bartels v. Iowa, 262 U.S. 404, 412 (1923).

[535] 268 U.S. 510 (1925).

values of their properties.[536] Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents and children in the assertion of other noneconomic forms of "liberty."

"Without doubt," Justice McReynolds said in *Meyer*, 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."[537] The right of the parents to have their children instructed in a foreign language was "within the liberty of the [Fourteenth] Amendment."[538] *Meyer* was then relied on in *Pierce* to assert that the statute there "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . 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."[539]

Although the Supreme Court continued to define noneconomic liberty broadly in *dicta,*[540] this new concept was to have little impact for decades.[541] Finally, in 1967, the Court held in *Loving v. Virginia*[542] that a statute prohibiting interracial marriage denied substantive due process. Marriage was termed "one of the 'basic civil rights of man'" and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and the classification of marriage rights on a racial basis was

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[536] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928). The Court has subsequently made clear that these cases dealt with "a complete prohibition of the right to engage in a calling," holding that "a brief interruption" did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (1999) (search warrant served on attorney prevented attorney from assisting client appearing before a grand jury).

[537] 262 U.S. at 399.

[538] 262 U.S. at 400.

[539] 268 U.S. at 534-35.

[540] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are among "the basic civil rights of man"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (care and nurture of children by the family are within "the private realm of family life which the state cannot enter").

[541] *E.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (allowing compulsory vaccination); Buck v. Bell, 274 U.S. 200 (1927) (allowing sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); Minnesota v. Probate Court *ex rel.* Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).

[542] 388 U.S. 1, 12 (1967).

>'unsupportable." Further development of this line of cases was slowed by the expanded application of the Bill of Rights to the states, which afforded the Court an alternative ground to void state policies.[543]

Despite the Court's increasing willingness to overturn state legislation, the basis and standard of review that the Court used to review infringements on "fundamental freedoms" were not always clear. In *Poe v. Ullman*,[544] for instance, the Court dismissed as non-justiciable a suit challenging a Connecticut statute banning the use of contraceptives, even by married couples. In dissent, however, Justice Harlan advocated the application of a due process standard of reasonableness—the same lenient standard he would have applied to test economic legislation.[545] Applying a lengthy analysis, Justice Harlan concluded that the statute in question infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court in *Griswold v. Connecticut*,[546] a majority of the Justices rejected reliance on substantive due process[547] and instead decided it on another basis—that the statute was an invasion of privacy, which was a non-textual "penumbral" right protected by a matrix of constitutional provisions.[548] Not only was

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[543] Indeed, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note also that in Epperson v. Arkansas, 393 U.S. 97, 105 (1968), and Tinker v. Des Moines School District, 393 U.S. 503, 506–07 (1969), Justice Fortas for the Court approvingly noted the due process basis of Meyer and Pierce while deciding both cases on First Amendment grounds.

[544] 367 U.S. 497, 522, 539–45 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id. at 509.

[545] According to Justice Harlan, due process is limited neither to procedural guarantees nor to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather "a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." The liberty protected by the clause "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." 367 U.S. at 542, 543.

[546] 381 U.S. 479 (1965).

[547] "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." Griswold v. Connecticut, 381 U.S. at 482 (opinion of Court by Justice Douglas).

[548] The analysis, while reminiscent of the "right to privacy" first suggested by Warren and Brandeis, still approached the matter in reliance on substantive due process cases. It should be noted that the separate concurrences of Justices Harlan and White were specifically based on substantive due process, 381 U.S. at 499, 502, which indicates that the majority's position was intended to be something different. Justice Goldberg, on the other hand, in concurrence, would have based the decision

this right to be protected again governmental intrusion, but there was apparently little or no consideration to be given to what governmental interests might justify such an intrusion upon the marital bedroom.

The apparent lack of deference to state interests in *Griswold* was borne out in the early abortion cases, discussed in detail below, which required the showing of a "compelling state interest" to interfere with a woman's right to terminate a pregnancy.[549] Yet, in other contexts, the Court appears to have continued to use a "reasonableness" standard.[550] More recently, the Court has complicated the issue further (again in the abortion context) by the addition of yet another standard, "undue burden."[551]

A further problem confronting the Court is how such abstract rights, once established, are to be delineated. For instance, the constitutional protections afforded to marriage, family and procreation in *Griswold* have been extended by the Court to apply to married and unmarried couples alike.[552] Yet, in *Bowers v. Hardwick*,[553] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited the types of intimate activities engaged in by married as well as unmarried couples. The Court interpreted the statute only as applied to the plaintiffs, who were homosexuals, explaining that there was no historical right to engage in homosexual sodomy. The dissent, however, would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the issue left unanswered by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy.

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on the Ninth Amendment. 381 U.S. at 486-97. *See* analysis under the Ninth Amendment, "Rights Retained By the People," supra.

[549] *See* Roe v. Wade, 410 U.S. 113 (1973).

[550] When the Court began to extend "privacy" rights to unmarried person through the equal protection clause, it seemed to rely upon a view of rationality and reasonableness not too different from Justice Harlan's dissent in Poe v. Ullman. Eisenstadt v. Baird, 405 U.S. 438 (1972), is the principal case. *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

[551] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[552] *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972). "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the 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." 405 U.S. at 453.

[553] 478 U.S. 186 (1986).

Similar disagreement over the appropriate level of generality for definition of a liberty interest was evident in *Michael H. v. Gerald D.*, involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man.[554] While recognizing the protection traditionally afforded a father, Justice Scalia, joined only by Chief Justice Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (*i.e.* the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection, arguing that courts should limit consideration to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[555] Dissenting Justice Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should "ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of 'liberty.'"[556]

***Abortion***.—In *Roe v. Wade*,[557] the Court established a right of personal privacy protected by the due process clause that includes the right of a woman to determine whether or not to bear a child. In doing so, the Court dramatically increased judicial oversight of legislation under the privacy line of cases, striking down aspects of abortion-related laws in practically all the States, the District of Columbia, and the territories. To reach this result, the Court first undertook a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on abortion were of relatively recent vintage and thus lacked the historical foundation which might have preserved them from constitutional review.[558] Then, the Court established that the word "person" as used in the due process clause and in other provisions of the Constitution did not include the unborn, and therefore the unborn

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[554] 491 U.S. 110 (1989). Five Justices agreed that a liberty interest was implicated, but the Court ruled that California's procedures for establishing paternity did not unconstitutionally impinge on that interest.

[555] 491 U.S. at 128 n.6.

[556] 491 U.S. at 142.

[557] 410 U.S. 113, 164 (1973). A companion case was Doe v. Bolton, 410 U.S. 179 (1973). The opinion by Justice Blackman was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id. at 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, 410 U.S. at 173, while Justice White left the issue open. 410 U.S. at 223.

[558] 410 U.S. at 129–47.

lacked federal constitutional protection.[559] Finally, the Court summarily announced that the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" includes "a right of personal privacy, or a guarantee of certain areas or zones of privacy"[560] and that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[561]

It was also significant that the Court held this right of privacy to be "fundamental" and, drawing upon the strict standard of review found in equal protection litigation, held that the due process clause required that any limits on this right be justified only by a "compelling state interest" and be narrowly drawn to express only the legitimate state interests at stake.[562] Assessing the possible interests of the States, the Court rejected justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions as unsupported in the record and ill-served by the laws in question. Further, the state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue of when life begins. Two valid state interests were, however, recognized. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"[563]

Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother's womb, the Court found that the State has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[564] In the intermediate trimester, the danger to the woman increases and the State may therefore regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health," but the fetus is

[559] 410 U.S.at 156–59.
[560] 410 U.S. at 152–53.
[561] 410 U.S. at 152–53.
[562] 410 U.S. at 152, 155-56. The "compelling state interest" test in equal protection cases is reviewed under "The New Standards: Active Review," *infra*.
[563] 410 U.S. at 147-52, 159-63.
[564] 410 U.S. at 163.

still not able to survive outside the womb, and consequently the actual decision to have an abortion cannot be otherwise impeded.[565] "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[566]

Thus, the Court concluded that "(a) for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician; (b) for the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health; (c) for the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Further, in a companion case, the Court struck down three procedural provisions relating to a law which did allow some abortions.[567] These regulations required that an abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the State's interest in maternal health because they were not reasonably related to that interest.[568] But a clause making the performance of an abortion a crime except when it is based upon the doctor's "best clinical judgment that an abortion is necessary" was upheld against vagueness attack and was further held to benefit women seeking

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[565] 410 U.S. at 163.

[566] 410 U.S. at 163-64. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160 (footnotes omitted).

[567] Doe v. Bolton, 410 U.S. 179 (1973).

[568] 410 U.S. at 192-200. In addition, a residency provision was struck down as violating the privileges and immunities clause of Article IV, § 2. Id. at 200. *See* analysis under "State Citizenship: Privileges and Immunities," supra.

abortions inasmuch as the doctor could utilize his best clinical judgment in light of all the attendant circumstances.[569]

After the decision in *Roe,* various states attempted to limit access to this newly found right, such as by requiring spousal or parental consent to obtain an abortion.[570] The Court, however, held that (1) requiring spousal consent was an attempt by the State to delegate a veto power over the decision of the woman and her doctor that the State itself could not exercise,[571] (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy,[572] and

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[569] 410 U.S. at 191-92. "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id. at 192. Presumably this discussion applies to the Court's ruling in Roe holding that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S. at 163-64, a holding which is unelaborated in the opinion. *See also* United States v. Vuitch, 402 U.S. 62 (1971).

[570] Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent to minor's abortion); Colautti v. Franklin, 439 U.S. 379 (1979) (imposition on doctor's determination of viability of fetus and obligation to take life-saving steps); Singleton v. Wulff, 428 U.S. 106 (1976) (standing of doctors to litigate right of patients to Medicaid-financed abortions); Bigelow v. Virginia, 421 U.S. 809 (1975) (ban on newspaper ads for abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (state ban on performance of abortion by "any person" may constitutionally be applied to prosecute nonphysicians performing abortions).

[571] Planned Parenthood v. Danforth, 428 U.S. 52, 67–72 (1976). The Court recognized the husband's interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id. at 92.

[572] 428 U.S. at 72-75. Minors have rights protected by the Constitution, but the States have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman's right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id. at 101. In Bellotti v. Baird, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor found to be capable of making, and having made, an informed and reasonable decision to have an abortion, was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a mature minor's decision, while four others would hold that if parental consent is required the State must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases. In H. L. v. Matheson, 450 U.S. 398 (1981), the Court upheld, as applied to an unemancipated minor living at home and dependent on her parents, a statute requiring a physician, "if possible," to notify the parents or guardians of a minor seeking an abortion. The decisions leave open a variety of questions, addressed by some concurring and dissenting Justices, dealing with when it would not be in the minor's best interest to avoid notifying her parents and with the alternatives to parental

(3) that a criminal provision requiring the attending physician to exercise all care and diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with *Roe*.[573] The Court did sustain provisions that required the woman's written consent to an abortion with assurances that it is informed and freely given, and the Court also upheld mandatory reporting and record keeping for public health purposes with adequate assurances of confidentiality. Another provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional since in the absence of another comparably safe technique it did not qualify as a reasonable protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.[574]

In other rulings applying *Roe*, the Court struck down some requirements and upheld others. A requirement that all abortions performed after the first trimester be performed in a hospital was invalidated as imposing "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure."[575] The Court held, however, that a state may require that abortions be performed in hospitals *or* licensed outpatient clinics, as long as licensing standards do not "depart from accepted medical practice."[576] Various "informed consent" requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman's decision.[577] The Court

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notification and consent. In two 1983 cases the Court applied the Bellotti v. Baird standard for determining whether judicial substitutes for parental consent requirements permit a pregnant minor to demonstrate that she is sufficiently mature to make her own decision on abortion. *Compare* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (no opportunity for case-by-case determinations); *with* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (adequate individualized consideration).

[573] Planned Parenthood v. Danforth, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379 (1979).

[574] Planned Parenthood v. Danforth, 428 U.S. 52, 75–79 (1976).

[575] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 438 (1983); *Accord*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983). The Court in Akron relied on evidence that "dilation and evacuation" (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had "increased dramatically" the safety of second trimester abortions in the 10 years since Roe v. Wade. 462 U.S. at 435–36.

[576] Simopoulos v. Virginia, 462 U.S. 506, 516 (1983).

[577] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In *City of Akron*, the Court explained that while the state has a legitimate interest in ensuring that the woman's consent is informed, it may not de-

also invalidated a 24-hour waiting period following a woman's written, informed consent.[578]

On the other hand, the Court has upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, since the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.[579] Also, the Court upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus.[580] Further, the Court refused to extend *Roe* to require States to pay for abortions for the indigent, holding that neither due process nor equal protection requires government to use public funds for this purpose.[581]

The equal protection discussion in the public funding case bears closer examination because of its significance for later cases. The equal protection question arose because public funds were being made available for medical care to indigents, including costs attendant to child birth, but not for expenses associated with abortions. Admittedly, discrimination based on a non-suspect class such as indigents does not generally compel strict scrutiny. However, the question arose as to whether such a distinction impinged upon the right to abortion, and thus should be subjected to heightened scrutiny. The Court rejected this argument and used a rational basis test, noting that the condition that was a barrier to getting an abortion—indigency—was not created or exacerbated by the government.

In reaching this finding the Court held that, while a state-created obstacle need not be absolute to be impermissible, it must at a minimum "unduly burden" the right to terminate a pregnancy. And, the Court held, to allocate public funds so as to further a state interest in normal childbirth does not create an absolute ob-

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mand of the physician "a recitation of an inflexible list of information" unrelated to the particular patient's health, and, for that matter, may not demand that the physician rather than some other qualified person render the counseling. City of Akron, 462 U.S. 416, 448–49 (1983).

[578] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 450–51 (1983). *But see* Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a 48-hour waiting period following notification of parents by a minor).

[579] Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 486–90 (1983).

[580] 462 U.S. at 482-86, 505.

[581] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). *See also* Beal v. Doe, 432 U.S. 438 (1977) (states are not required by federal law to fund abortions); Harris v. McRae, 448 U.S. at 306–11 (same). The state restriction in *Maher*, 432 U.S. at 466, applied to nontheraputic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, Harris, 448 U.S. at 323, although it provided Justice Stevens with the basis for reaching different results. Id. at 349 (dissenting).

stacle to obtaining and does not unduly burden the right.[582] What is interesting about this holding is that the "undue burden" standard was to take on new significance when the Court began raising questions about the scope and even the legitimacy of *Roe*.

Although the Court expressly reaffirmed *Roe v. Wade* in 1983,[583] its 1989 decision in *Webster v. Reproductive Health Services*[584] signaled the beginning of a retrenchment. *Webster* upheld two aspects of a Missouri statute regulating abortions: a prohibition on the use of public facilities and employees to perform abortions not necessary to save the life of the mother; and a requirement that a physician, before performing an abortion on a fetus she has reason to believe has reached a gestational age of 20 weeks, make an actual viability determination.[585] This retrenchment was also apparent in two 1990 cases in which the Court upheld both one-parent and two-parent notification requirements.[586]

*Webster*, however, exposed a split in the Court's approach to *Roe v. Wade*. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly crit-

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[582] "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." Maher, 432 U.S. at 469–74 (the quoted sentence is at 474); Harris, 448 U.S. at 321–26. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in Harris. Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion. Poelker v. Doe, 432 U.S. 519 (1977).

[583] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419–20 (1983). In refusing to overrule Roe v. Wade, the Court merely cited the principle of *stare decisis*. Justice Powell's opinion of the Court was joined by Chief Justice Burger, and by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, joined by Justices White and Rehnquist, dissented, voicing disagreement with the trimester approach and suggesting instead that throughout pregnancy the test should be the same: whether state regulation constitutes "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy." 462 U.S. at 452, 461. In the 1986 case of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Justice White, joined by Justice Rehnquist, advocated overruling of Roe v. Wade, Chief Justice Burger thought Roe v. Wade had been extended to the point where it should be reexamined, and Justice O'Connor repeated misgivings expressed in her Akron dissent.

[584] 492 U.S. 490 (1989).

[585] The Court declined to rule on several other aspects of Missouri's law, including a preamble stating that life begins at conception, and a prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion.

[586] Ohio's requirement that one parent be notified of a minor's intent to obtain an abortion, or that the minor use a judicial bypass procedure to obtain the approval of a juvenile court, was approved. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990). And, while the Court ruled that Minnesota's requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative. Hodgson v. Minnesota, 497 U.S. 417 (1990).

ical of *Roe*, but found no occasion to overrule it. Instead, the plurality's approach sought to water down *Roe* by applying a less stringent standard of review. For instance, the plurality found the viability testing requirement valid because it "permissibly furthers the State's interest in protecting potential human life." [587] Justice O'Connor, however, concurred in the result based on her view that the requirement did not impose "an undue burden" on a woman's right to an abortion, while Justice Scalia's concurrence urged that *Roe* be overruled outright. Thus, when a Court majority later invalidated a Minnesota procedure requiring notification of both parents without judicial bypass, it did so because it did "not reasonably further any legitimate state interest." [588]

*Roe* was not confronted more directly in *Webster* because the viability testing requirement, as characterized by the plurality, merely asserted a state interest in protecting potential human life after viability, and hence did not challenge *Roe*'s 'trimester framework. [589] Nonetheless, a majority of Justices appeared ready to reject a strict trimester approach. The plurality asserted a compelling state interest in protecting human life throughout pregnancy, rejecting the notion that the state interest "should come into existence only at the point of viability;" [590] Justice O'Connor repeated her view that the trimester approach is "problematic;" [591] and, as mentioned, Justice Scalia would have done away with *Roe* altogether.

Three years later, however, the Court invoked principles of *stare decisis* to reaffirm *Roe*'s "essential holding," although it had by now abandoned the trimester approach and adopted Justice O'Connor's "undue burden" test and *Roe*'s "essential holding." [592]

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[587] 492 U.S. at 519-20. Dissenting Justice Blackmun, joined by Justices Brennan and Marshall, argued that this "permissibly furthers" standard "completely disregards the irreducible minimum of *Roe* . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy," and instead balances "a lead weight" (the State's interest in fetal life) against a "feather" (a woman's liberty interest). Id. at 555, 556 n.11.

[588] Hodgson v. Minnesota, 497 U.S. 417, 450 (1990).

[589] 492 U.S. at 521. Concurring Justice O'Connor agreed that "no decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible." Id. at 528.

[590] 492 U.S. at 519.

[591] 492 U.S. at 529. Previously, dissenting in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), Justice O'Connor had suggested that the Roe trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."

[592] It was a new alignment of Justices that restated and preserved *Roe*. Joining Justice O'Connor in a jointly authored opinion adopting and applying Justice

According to the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[593] the right to abortion has three parts. "First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

This restatement of *Roe*'s essentials, recognizing a legitimate state interest in protecting fetal life throughout pregnancy, necessarily eliminated the rigid trimester analysis permitting almost no regulation in the first trimester. Viability, however, still marked "the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions,"[594] but less burdensome regulations could be applied before viability. "What is at stake," the three-Justice plurality asserted, "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." Thus, unless an undue burden is imposed, states may adopt measures "designed to persuade [a woman] to choose childbirth over abortion."[595]

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O'Connor's "undue burden" analysis were Justices Kennedy and Souter. Justices Blackmun and Stevens joined parts of the plurality opinion, but dissented from other parts. Justice Stevens would not have abandoned trimester analysis, and would have invalidated the 24-hour waiting period and aspects of the informed consent requirement. Justice Blackmun, author of the Court's opinion in *Roe*, asserted that "the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*," id. at 923, and would have invalidated all of the challenged provisions. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, would have overruled Roe and upheld all challenged aspects of the Pennsylvania law.

[593] 505 U.S. 833, 846 (1992).

[594] 505 U.S. 833, 860 (1992).

[595] 505 U.S. at 877-78. Application of these principles in *Casey* led the Court to uphold overrule some precedent, but to invalidate arguably the most restrictive provision. The four provisions challenged which were upheld included a narrowed definition of "medical emergency" (which controlled exemptions from the Act's limitations), record keeping and reporting requirements, an informed consent and 24-hour waiting period requirement; and a parental consent requirement, with possibility for judicial bypass, applicable to minors. The provisions which was invalidated as an

*Casey* did, however, overturn earlier decisions striking down informed consent and 24-hour waiting periods.[596] Given the state's legitimate interests in protecting the life of the unborn and the health of the potential mother, and applying "undue burden" analysis, the three-Justice plurality found these requirements permissible.[597] The Court also upheld application of an additional requirement that women under age 18 obtain the consent of one parent or avail themselves of a judicial bypass alternative.

On the other hand, the Court[598] distinguished Pennsylvania's spousal notification provision as constituting an undue burden on a woman's right to choose an abortion. "A State may not give to a man the kind of dominion over his wife that parents exercise over their children" (and that men exercised over their wives at common law).[599] Although there was an exception for a woman who believed that notifying her husband would subject her to bodily injury, this exception was not broad enough to cover other forms of abusive retaliation, e.g., psychological intimidation, bodily harm to children, or financial deprivation. To require a wife to notify her husband in spite of her fear of such abuse would unduly burden the wife's liberty interest as an individual to decide whether to bear a child.

The passage of various state laws restricting so-called "partial birth abortions" gave observers an opportunity to see if the "undue burden" standard was in fact likely to lead to a major retrenchment in abortion regulation. In *Stenberg v. Carhart*,[600] the Court reviewed a Nebraska statute which forbade "partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery." The Court noted that the prohibition ap-

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undue burden on a woman's right to an abortion was a spousal notification requirement.

[596] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating "informed consent" and 24-hour waiting period); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating informed consent requirement).

[597] Requiring informed consent for medical procedures was found to be both commonplace and reasonable, and, in the absence of any evidence of burden, the state could require that information relevant to informed consent be provided by a physician rather than an assistant. The 24-hour waiting period was approved both in theory (it being reasonable to assume "that important decisions will be more informed and deliberate if they follow some period of reflection") and in practice (in spite of "troubling" findings of increased burdens on poorer women who must travel significant distances to obtain abortions, and on all women who must twice rather than once brave harassment by anti-abortion protesters). 505 U.S. at 885-87.

[598] The plurality Justices were joined in this part of their opinion by Justices Blackmun and Stevens.

[599] 505 U.S. at 898.

[600] Stenberg v. Carhart 530 U.S. 914 (2000) 530
U.S. 914 (2000).

peared to apply to abortions performed throughout a pregnancy, and that the lone exception was for an abortion necessary to preserve the life of the mother.[601] Thus the statute brought into question both the distinction maintained in *Casey* between pre-viability and post-viability abortions, and the oft-repeated language from *Roe*, which provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or the health of a pregnant woman.[602] The Court, however, reaffirmed these central tenets of its abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad and the exception for threats to the life of the mother was too narrow.

***Privacy after Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?***.—The use of strict scrutiny to review intrusions on personal liberties in *Roe v. Wade* seemed to portend the Court's striking down many other governmental restraints upon personal activities. Those developments have not occurred, however, as the Court has been cautious in extending the right to privacy. Part of the reason that the Court may have been slow to extend the rationale of *Roe v. Wade* to other contexts was that "privacy" or the right "to be let alone" appears to encompass a number of different concepts arising from different parts of the Constitution, and the same combination of privacy rights and competing governmental interests are not necessarily implicated in other types of "private" conduct.

For instance, the term "privacy" itself seems to encompass at least two different but related issues. First, it relates to disclosure of information to the outside world, *i.e.,* the right of individuals to determine how much and what information about themselves is to be revealed to others.[603] Second, it relates inward toward notions of personal autonomy, *i.e.,* the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[604] These dual concepts, here referred to as "informational privacy" and "personal autonomy", can easily arise in the same case, as government regulation of personal behavior can limit per-

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[601] The Nebraska law provided that such procedures could be performed where "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. § 28–328(1).

[602] Roe v. Wade, 410 U.S. 113, 164 (1973).

[603] For instance, Justice Douglas's asked rhetorically in Griswold: "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 486.

[604] Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

sonal autonomy, while investigating and prosecuting such behavior can expose it to public scrutiny. Unfortunately, some of the Court's cases identified violations of a right of privacy without necessarily making this distinction clear. While the main thrust of the Court's fundamental-rights analysis appears to emphasize the personal autonomy aspect of privacy, now often phrased as "liberty" interests, a clear analytical framework for parsing of these two concepts in different contexts has not yet been established.

Another reason that there is difficulty in defining "privacy" is that the right appears to arise from multiple sources. For instance, the Court first identified issues regarding informational privacy as specifically tied to various of the provisions of Bill of Rights, including the First and Fourth Amendments. In *Griswold v. Connecticut,* [605] however, Justice Douglas found an independent right of privacy in the "penumbras"of these and other constitutional provisions. Although the parameters and limits of the right to privacy were not well delineated by that decision, which struck down a statute banning married couples from using contraceptives, the right appeared to be based on the notion that the government should not be allowed to gather information about private, personal activities. [606] However, years later, when the closely related abortion cases were decided, the right to privacy being discussed was now characterized as a "liberty interest" protected under the due process clause of the Fourteenth Amendment, [607] and the basis for the right identified was more consistent with a concern for personal autonomy.

After *Griswold*, the Court had several opportunities to address and expand on the concept of Fourteenth Amendment informational privacy, but instead it returned to Fourth and Fifth Amendment principles to address official regulation of personal informa-

[605] 381 U.S. 479 (1965).

[606] The predominant concern flowing through the several opinions in Griswold v. Connecticut is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the pressures such investigative techniques would impose on the confines of the Fourth Amendment's search and seizure clause, but also included techniques that would have been within the range of permissible investigation.

[607] Roe v. Wade, 410 U.S. 113, 153 (1973). *See* id. at 167–71 (Justice Stewart concurring). Justice Douglas continued to deny that substantive due process is the basis of the decisions. Doe v. Bolton, 410 U.S. 179, 209, 212 n.4 (1973) (concurring).

tion.[608] For example, in *United States v. Miller*,[609] the Court in evaluating the right of privacy of depositors to restrict Government access to cancelled checks maintained by the bank relied on whether there was an expectation of privacy under the Fourth Amendment.[610] Also, the Court has held that First Amendment itself affords some limitation upon governmental acquisition of information, although only where the exposure of such information would violate freedom of association or the like.[611]

Similarly, in *Fisher v. United States*,[612] the Court held that the Fifth Amendment's self-incrimination clause did not prevent the IRS from obtaining income tax records prepared by accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. The Court noted that it "has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[613] Further, "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment."[614]

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[608] *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). *See also* Laird v. Tatum, 408 U.S. 1 (1972); United States v. United States District Court, 407 U.S. 297 (1972); United States v. Dionisio, 410 U.S. 1 (1973); Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[609] 425 U.S. 435 (1976). *See also* Fisher v. United States, 425 U.S. 391, 401 (1976); Paul v. Davis, 424 U.S. 693, 712–13 (1976); United States v. Bisceglia, 420 U.S. 141 (1975).

[610] The Bank Secrecy Act required the banks to retain cancelled checks. The Court held that the checks were business records of the bank in which the depositors had no expectation of privacy and therefore there was no Fourth Amendment standing to challenge government legal process directed to the bank, and this status was unchanged by the fact that the banks kept the records under government mandate in the first place.

[611] *See* Buckley v. Valeo, 424 U.S. 1, 60–82 (1976); Whalen v. Roe, 429 U.S. 589, 601 n.27, 604 n.32 (1977); United States v. Miller, 425 U.S. 435, 444 n.6 (1976). The Court continues to reserve the question of the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary." Fisher v. United States, 425 U.S. 391, 401 n.7 (1976).

[612] 425 U.S. 391 (1976).

[613] 425 U.S. at 399.

[614] 425 U.S. at 401.

So what remains of informational privacy? Interestingly, a cryptic opinion in *Whalen v. Roe*[615] may indicate the Court's continuing willingness to recognize privacy interests as independent constitutional rights. At issue was a state's pervasive regulation of prescription drugs with abuse potential, and a centralized computer record-keeping system through which prescriptions, including patient identification, could be stored. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected, but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently grievous threat to either interest to establish a constitutional violation."[616] Lower court cases have raised substantial questions as to whether this case established a "fundamental right" to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.[617]

In the interim, the Court briefly considered yet another aspect of privacy - the idea that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home. In *Stanley v. Georgia*,[618] the Court held that the government may not make private possession of obscene materials for private use a crime. Normally, investigation and apprehension of an individual for possessing pornography in the privacy of the home would raise obvious First Amendment free speech and the Fourth Amendment search and seizure issues. In this case, however, the material was obscenity, unprotected by the First Amendment, and the police had a valid search warrant, obviating Fourth Amendment con-

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[615] 429 U.S. 589 (1977).

[616] 429 U.S. at 598-604. The Court cautioned that it had decided nothing about the privacy implications of the accumulation and disclosure of vast amounts of information in data banks. Safeguarding such information from disclosure "arguably has its roots in the Constitution," at least "in some circumstances," the Court seemed to indicate. Id. at 605. *Compare* id. at 606 (Justice Brennan concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after Nixon v. Administrator of General Services, 433 U.S. 425, 455–65 (1977) (stating that an invasion of privacy claim "cannot be considered in abstract [and] . . . must be weighed against the public interest"). *But see* id. at 504, 525–36 (Chief Justice Burger dissenting), and 545 n.1 (Justice Rehnquist dissenting).

[617] *See, e.g.,* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (". . . we believe that the balancing test, more common to due process claims, is appropriate here.").

[618] 394 U.S. 557 (1969).

cerns.[619] Nonetheless, the Court based its decision upon a person's protected right to receive what information and ideas he wishes, which derives from the "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,"[620] and from the failure of the state to either justify protecting an individual from himself or to show empirical proof of such activity harming society.[621]

The potential significance of *Stanley* was enormous, as any number of illegal personal activities, such as drug use or illegal sex acts, could arguably be practiced in the privacy of one's home with little apparent effect on others. The *Stanley* decision, however, was quickly restricted to the particular facts of the case, namely possession of pornography in the home.[622] In *Paris Adult Theatre v. Slaton*,[623] which upheld the government's power to prevent the showing of obscene material in an adult theater, the Court recognized that governmental interests in regulating private conduct could include the promotion of individual character and public morality, and improvement of the quality of life and "tone" of society. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."[624]

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[619] In fact, the Court passed over a subsidiary Fourth Amendment issue that was available for decision in favor of a broader resolution. 394 U.S. at 569-72. (Stewart, J., concurring).

[620] 394 U.S. at 564-65

[621] The rights noted by the Court were held superior to the interests Georgia asserted to override them. That is, first, the State was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the State's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

[622] United States v. Reidel, 402 U.S. 351, 354–56 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 375–76 (1971); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973).

[623] 413 U.S. 49 (1973).

[624] 413 U.S. at 64. Similar themes can be found in Roe v. Wade, 410 U.S. 113, 148 (1972), decided the year before. Because the Court had determined that the

Furthermore, continued the *Paris Adult Theatre* Court "[o]ur Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'" [625]

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with *Stanley*. The limited impact of *Stanley* was reemphasized in *Bowers v. Hardwick*. The Court in *Bowers*, finding that there is no protected right to engage in homosexual sodomy in the privacy of the home, held that *Stanley* did not implicitly create protection for "voluntary sexual conduct [in the home] between consenting adults." [626] Instead, the Court found *Stanley* "firmly grounded in the First Amendment," [627] and noted that extending the reasoning of that case to homosexual conduct would result in protecting all voluntary sexual conduct between

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right to obtain an abortion constituted a protected "liberty," the State was required to justify its proscription by a compelling interest. Departing from a *laissez faire*, "free will" approach to individual autonomy, the Court recognized protecting the health of the mother as a valid interest. The Court also mentioned but did not rule upon a state interest in protecting morality. The Court was referring not to the morality of abortion, but instead to the promotion of sexual morality through making abortion unavailable. Roe v. Wade, 410 U.S. 113, 148 (1972).

[625] Paris Adult Theatre v. Slaton, 413 U.S. 49, 57–63, 63–64, 68–69 (1973); *and see* id. at 68 n.15. While denying a privacy right to view obscenity in a theater, the Court did recognize that in order to protect otherwise recognized autonomy rights, the privacy right might need to be expanded to a variety of different locations: "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." Paris Adult Theatre v. Slaton, 413 U.S. 49, 66 n.13 (1973). Thus, arguably, the constitutional protection of places (as opposed to activities) arises not because of any inherent privacy of the location, but because the protected activities normally take place in those locales.

[626] 478 U.S. at 195–96. Dissenting Justice Blackmun challenged the Court's characterization of Stanley, suggesting that it had rested as much on the Fourth as on the First Amendment, and that "the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution's protection of privacy." Id. at 207–08.

[627] 478 U.S. 186, 195 (1986).

consenting adults, including adultery, incest, and other sexual crimes. This, said the Court, was a step it was not willing to take.

So, what of an expansion of the right to privacy under the rubric of personal autonomy? The Court speaking in *Roe* in 1973 made it clear that, despite the importance of its decision, the protection of personal autonomy was limited to a relatively narrow range of behavior. "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453–54; id. at 460, 463–65 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, supra."[628]

The limits of this doctrine were amply demonstrated in 1986 by, again, *Bowers v. Hardwick*,[629] where the Court by 5–4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[630] and also rejected the more comprehensive claim that the cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[631] Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases.[632] In addition, the Court concluded that rationales relied upon in the earlier

[628] Roe v. Wade, 410 U.S. 113, 152 (1973).

[629] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

[630] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190-91.

[631] 478 U.S. at 191. The Court asserted that Carey v. Population Services Int'l, 431 U.S. 678, 694 n.17 (1977), which had reserved decision on the issue, had established that the privacy right "did not reach so far."

[632] 478 U.S. at 191.

privacy cases do not extend "a fundamental right to homosexuals to engage in acts of consensual sodomy."[633] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practices.[634] The privacy of the home does not immunize all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[635]

Interestingly, Justice Blackmun's dissent in *Hardwick* was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[636] Justice Blackmun would have instead addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy.[637] This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, motherhood, procreation, and child rearing."[638]

Even as limited by *Roe*, the concept of privacy still retains sufficient breadth to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services International*,[639] recognition of the "constitutional protection of individual autonomy in matters of childbearing" led the Court to invali-

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[633] In the Court's view, homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191-92.

[634] 478 U.S. at 191-92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[635] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195-96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

[636] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See* id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219.

[637] 478 U.S. at 204-06.

[638] 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[639] 431 U.S. 678 (1977).

date a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[640] The Court significantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests.

As exemplified by this case, the extent to which governmental regulation of the sexual activities of minors is subject to constitutional scrutiny is of great and continuing importance.[641] Analysis of these questions is hampered, however, because the Court has not told us what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships to result in differing constitutional treatment. The Court's observation in the abortion cases "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[642] little elucidates the answers inasmuch as in the same Term the Court significantly restricted its equal protection

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[640] 431 U.S. at 684-91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the State. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691–99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[641] The Court reserved this question in Carey, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[642] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in Carey, 431 U.S. at 684–85.

doctrine of "fundamental" interests—"compelling" interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is whether it is "explicitly or implicitly guaranteed by the Constitution."[643]

Whether there still exists an expansive right of "privacy," as opposed to the limited "liberty" interest of more recent cases, is still unclear. There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is now settled to be a "liberty" protected under the due process clauses, however, the analytical validity of denominating the particular right or interest as an element of privacy seems open to question.

***Family Relationships***.—Unlike the shifting definitions of the "privacy" line of case, the Court's treatment of the "liberty" of familial relationships has a relatively principled doctrinal basis. Starting with *Meyer* and *Pierce,*[644] the Court has held that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[645] For instance, the right to marry is a fundamental right protected by the due process clause,[646] and only "reasonable regulations" of such relationship may be imposed.[647] Thus, the Court has held that a state may not deny the right to marry to someone who has failed to meet a child support obligation, as the State already has numerous other means for exacting compliance with support obligations.[648] In fact, any regulation which af-

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[643] San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be discerned easily. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[644] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1928).

[645] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality). Unlike the liberty interest in property, which derives from early statutory law, these liberties spring instead from natural law traditions, as they are "intrinsic human rights". Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977). These rights, however, do not extend to all close relationships. Bowers v. Hardwick, 478 U.S. 186 (1986) (same sex relationships).

[646] Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

[647] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[648] Zablocki v. Redhail, 434 U.S. 374 (1978). The majority of the Court deemed the statute to fail under equal protection, whereas Justices Stewart and Powell found the due process clause to be violated. Id. at 391, 396. *Compare* Califano v. Jobst, 434 U.S. 47 (1977).

fects the ability to form, maintain, dissolve, or resolve conflicts within a family is subject to rigorous judicial scrutiny.

There is also a constitutional right to live together as a family,[649] and this right is not limited to the nuclear family. Thus, a neighborhood which is zoned for single family occupancy, and which defines "family" so as to prevent a grandmother from caring for two grandchildren of different children, was found to violate the due process clause.[650] And the concept of "family" may extend beyond the biological relationship to the situation of foster families, although the Court has acknowledged that such a claim raises complex and novel questions, and that the liberty interests may be limited.[651] On the other hand, the Court has held, the presumption of legitimacy accorded to a child born to a married woman living with her husband is valid even to defeat the right of the child's biological father to establish paternity and visitation rights.[652]

The Court has merely touched upon but not dealt definitively with the complex and novel questions raised by possible conflicts between parental rights and children's rights.[653] The Court has, however, imposed limits on the ability of a court to require that

[649] "If a State were to attempt to force the breakup of a natural family, over the objections 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, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'" Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Justice Stewart concurring), *cited with approval in* Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

[650] Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id. at 513.

[651] Smith v. Organization of Foster Families, 431 U.S. 816 (1977). As the Court noted, the rights of a natural family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of State-ordered arrangement. As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the natural parents. Although Smith does not define the nature of the interest of foster parents, it would appear to be quite limited and attenuated. Id. at 842–47. In a conflict between natural and foster families, a court is likely to defer to a typical state process which makes such decisions based on the best interests of the child. *See* Quilloin v. Walcott, 434 U.S. 246 (1978).

[652] Michael H. v. Gerald D., 491 U.S. 110 (1989). There was no opinion of the Court. A majority of Justices (Brennan, Marshall, Blackmun, Stevens, White) was willing to recognize that the biological father has a liberty interest in a relationship with his child, but Justice Stevens voted with the plurality (Scalia, Rehnquist, O'Connor, Kennedy) because he believed that the statute at issue adequately protected that interest.

[653] The clearest conflict to date was presented by state law giving a veto to parents over their minor children's right to have an abortion. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Planned Parenthood v. Casey, 503 U.S. 833 (1992). *See also* Parham v. J. R., 442 U.S. 584 (1979) (parental role in commitment of child for treatment of mental illness).

children be made available for visitation with grandparents and other third parties. In *Troxel v. Granville*,[654] the Court evaluated a Washington State law which allowed "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child. Under this law, a child's grandparents were awarded more visitation with a child than was desired by the sole surviving parent. A plurality of the Court, noting the "fundamental rights of parents to make decisions concerning the care, custody and control of their children,"[655] reversed this decision, noting the lack of deference to the parent's wishes and the contravention of the traditional presumption that a fit parent will act in the best interests of a child.

***Liberty Interests of the Retarded, Mentally Ill or Abnormal: Civil Commitment and Treatment***.—The recognition of liberty rights for retarded or handicapped individuals who are involuntarily committed or who voluntarily seek commitment to public institutions is potentially a major development in substantive due process. The States, pursuant to their *parens patriae* power, have a substantial interest in institutionalizing persons in need of care, both for their own protection and for the protection of others.[656] Each individual, on the other hand, has a due process protected interest in freedom from confinement and personal restraint, and a liberty interest in reducing the degree of confinement exists even when individuals are properly committed.[657] Little controversy has attended the gradual accretion of case law in the lower courts, now confirmed by the Supreme Court, that the due process clause guarantees freedom from unsafe conditions of confinement and undue physical restraint.[658] A number of influential lower court decisions have also found a significant right to treatment[659] or "habili-

[654] 530 U.S. 57 (2000).

[655] 530 U.S. at 66.

[656] These principles have no application to persons not held in custody by the state. DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even when the social service agency had been notified of possible abuse, and possibility had been substantiated through visits by social worker).

[657] Youngberg v. Romeo, 457 U.S. 307, 314–16 (1982). *See* Jackson v. Indiana, 406 U.S. 715 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Vitek v. Jones, 445 U.S. 480 (1980) Vitek v. Jones, 445 U.S. 480, 491–94 (1980).

[658] Youngberg v. Romeo, 457 U.S. 307, 314–316 (1982). Thus, personal security constitutes a "historic liberty interest" protected substantively by the due process clause. Ingraham v. Wright, 430 U.S. 651, 673 (1977) (liberty interest in being free from undeserved corporal punishment in school); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Justice Powell concurring) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental actions").

[659] In Jackson v. Indiana, 406 U.S. 715, 738 (1972), the Court had said that "due process requires that the nature and duration of commitment bear some reasonable

tation,"[660] although the Supreme Court's approach in this area has been tentative.

For instance, in *Youngberg v. Romeo*, the Court recognized a liberty right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[661] While the lower court had agreed with plaintiff's theory of entitlement to "such treatment as will afford a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit,"[662] the Supreme Court felt that the plaintiff had reduced his theory to a claim for "training related to safety and freedom from restraint."[663] But the Court's concern for federalism, its reluctance to approve judicial activism in supervising institutions, and its recognition of the budgetary constraints associated with state provision of services caused it to hold that lower federal courts need to defer to professional decision making to determine what level of care was adequate. Professional decisions are presumptively valid and liability can be imposed "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the deci-

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relation to the purpose for which the individual is committed." Reasoning that if commitment is for treatment and betterment of individuals, it must be accompanied by adequate treatment, several lower courts recognized a due process right. *E.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D.Ala), *enforced*, 334 F. Supp. 1341 (1971), supplemented, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D.Ala. 1972), *aff'd in part, reserved in part, and remanded, sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 432 U.S. 563 (1975).

[660] "The word 'habilitation' is commonly used to refer to programs for the mentally retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (quoting amicus brief for American Psychiatric Association).

[661] Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[662] 457 U.S. at 318 n.23.

[663] 457 U.S. at 317-18. Concurring, Justices Blackmun, Brennan, and O'Connor, argued that due process guaranteed patients at least that training necessary to prevent them from losing the skills they entered the institution with. Id. at 325. Chief Justice Burger rejected any protected interest in training. Id. at 329. The Court had also avoided a decision on a right to treatment in O'Connor v. Donaldson, 422 U.S. 563, 573 (1975), vacating and remanding a decision recognizing the right and thus depriving the decision of precedential value. Chief Justice Burger expressly rejected the right there also. Id. at 578. But just four days later the Court denied certiorari to another panel decision from the same circuit relying on its Donaldson decision to establish such a right, leaving the principle alive in that circuit. Burnham v. Department of Public Health, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057 (1975). *See also* Allen v. Illinois, 478 U.S. 364, 373 (1986) (dictum that person civilly committed as "sexually dangerous person" might be entitled to protection under the self-incrimination clause if he could show that his confinement "is essentially identical to that imposed upon felons with no need for psychiatric care").

sion on such a judgment."[664] Presumably, however, the difference between liability for damages and injunctive relief will still afford federal courts considerable latitude in enjoining institutions to better their services in the future, even if they cannot award damages for past failures.[665]

The Court's resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate persons predisposed to engage in specific criminal behaviors. In *Kansas v. Hendricks*,[666] the Court upheld a Kansas law which allowed civil commitment without a showing of "mental illness," so that a defendant diagnosed as a pedophile could be committed based on his having a "mental abnormality" which made him "likely to engage in acts of sexual violence." Although the Court minimized the use of this expanded nomenclature,[667] the concept of "mental abnormality" appears both more encompassing and less defined than the concept of "mental illness." It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other recidivists such as drug offenders. A subsequent opinion does seem to narrow the *Hendricks* holding so as to require an additional finding that the defendant would have difficulty controlling his or her behavior.[668]

Still other issues await exploration. The whole area of the rights of committed individuals will likely be explored under a substantive and procedural due process analysis.[669] Additionally, federal legislation is becoming extensive,[670] and state legislative and

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[664] 457 U.S. at 323.

[665] *E.g.*, Ohlinger v. Watson, 652 F. 2d 775, 779 (9th Cir. 1980); Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977). Of course, lack of funding will create problems with respect to injunctive relief as well. *Cf.* New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980). It should be noted that the Supreme Court has limited the injunctive powers of the federal courts in similar situations.

[666] 521 U.S. 346 (1997).

[667] 521 U.S. at 359. *But see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that a state can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).

[668] Kansas v. Crane, 532 U.S. 930 (2001).

[669] *See Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). In Mills v. Rogers, 457 U.S. 291 (1982), the Court had before it the issue of the due process right of committed mental patients at state hospitals to refuse administration of antipsychotic drugs. An intervening decision of the State's highest court had measurably strengthened the patients' rights under both state and federal law and the Court remanded for reconsideration in light of the state court decision. *See also* Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981).

[670] Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94–103, 89 Stat. 486, as amended, 42 U.S.C. §§ 6000 et seq., as to which *see* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Mental Health Systems Act, 94 Stat. 1565, 42 U.S.C. § 9401 et seq.

judicial development of law is highly important because the Supreme Court looks to this law as one source of the interests which the due process clause protects.[671]

***"Right to Die"***.—Although the popular term "right to die" has been used as a label to describe the debate over end-of-life decisions, the underlying issues include a variety of legal concepts, some distinct and some overlapping. For instance, "right to die" could include issues of suicide, passive euthanasia (allowing a person to die by refusal or withdrawal of medical intervention), assisted suicide (providing a person the means of committing suicide), active euthanasia (killing another), and palliative care (providing comfort care which accelerates the death process). Recently, a new category has been suggested—physician-assisted suicide—which appears to be an uncertain blend of assisted suicide or active euthanasia undertaken by a licensed physician.

There has been little litigation of constitutional issues surrounding suicide generally, although Supreme Court *dicta* seems to favor the notion that the state has a constitutionally defensible interest in preserving the lives of healthy citizens.[672] On the other hand, the right of a seriously ill person to terminate life-sustaining medical treatment has been addressed, but not squarely faced. In *Cruzan v. Director, Missouri Department of Health*,[673] the Court, rather than directly addressing the issue, "assume[d]" that a competent person has a constitutionally protected right to refuse life-saving hydration and nutrition.[674] More importantly, however, a majority of the Justices separately declared that such a liberty interest exists.[675] Yet, it is not clear how actively the Court would seek to protect this right from state regulation.

In *Cruzan,* which involved a patient in a persistent vegetative state, the Court upheld a state requirement that there must be "clear and convincing evidence" of a patient's previously manifested wishes before nutrition and hydration could be withdrawn. Despite the existence of a presumed due process right, the Court held that a state is not required to follow the judgment of the family, the guardian, or "anyone but the patient herself" in making this decision.[676] Thus, in the absence of clear and convincing evidence that

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[671] *See, e.g.*, Mills v. Rogers, 457 U.S. 291, 299–300 (1982).

[672] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990) ("We do not think that a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death").

[673] 497 U.S. 261 (1990).

[674] 497 U.S. at 279.

[675] *See* 497 U.S. at 287 (O'Connor, concurring); id. at 304–05 (Brennan, joined by Marshall and Blackmun, dissenting); id. at 331 (Stevens, dissenting).

[676] 497 U.S. at 286.

the patient had expressed an interest not to be sustained in a persistent vegetative state, or that she had expressed a desire to have a surrogate make such a decision for her, the state may refuse to allow withdrawal of nutrition and hydration.[677]

Despite the Court's acceptance of such state requirements, the implications of the case are significant. First, the Court appears, without extensive analysis, to have adopted the position that refusing nutrition and hydration is the same as refusing other forms of medical treatment. Also, the Court seems ready to extend such right not only to terminally ill patients, but also to severely incapacitated patients whose condition has stabilized.[678] However, the Court made clear in a subsequent case, *Washington v. Glucksberg,*[679] that it intends to draw a line between withdrawal of medical treatment and more active forms of intervention.

In *Glucksberg*, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician's aid in committing suicide. Reviewing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with "utmost care" before breaking new ground in the area of liberty interests.[680] The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of *Cruzan* and other liberty interest cases,[681] noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears

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[677] "A State is entitled to guard against potential abuses" that can occur if family members do not protect a patient's best interests, and "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and [instead] simply assert an unqualified interest in the preservation of human life to be weighed against the . . . interests of the individual." 497 U.S. at 281-82.

[678] There was testimony that the patient in Cruzan could be kept "alive" for about 30 years if nutrition and hydration were continued.

[679] 521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a state which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.

[680] 521 U.S. at 720.

[681] *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).

to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.[682]

## PROCEDURAL DUE PROCESS: CIVIL

### Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.[683] Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.[684] One of the basic criteria used to establish if due process is satisfied is whether such procedure was historically required in like circumstance.

***Relevance of Historical Use***.—The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country.[685] In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."[686] Fortunately, the States

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[682] A passing reference by Justice O'Connor in a concurring opinion in Glucksberg and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or "palliative" care. Glucksberg and Vacco, 521 U.S. at 736-37 (Justice O'Connor, concurring).

[683] Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

[684] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884). "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." Id. at 708; *Accord*, Hurtado v. California, 110 U.S. 516, 537 (1884).

[685] Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899). "A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." Hurtado v. California, 110 U.S. at 529.

[686] Twining, 211 U.S. at 101.

are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.[687]

***Non-Judicial Proceedings***.—A court proceeding is not a requisite of due process.[688] Administrative and executive proceedings are not judicial, yet they may satisfy the due process clause.[689] Moreover, the due process clause does not require *de novo* judicial review of the factual conclusions of state regulatory agencies,[690] and may not require judicial review at all.[691] Nor does the Fourteenth Amendment prohibit a State from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.[692] Further, it is up to a State to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.[693]

***The Requirements of Due Process***.—Although due process tolerates variances in procedure "appropriate to the nature of the case,"[694] it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[695] Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of

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[687] Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1899); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[688] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[689] For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, yet their validity is not thereby impaired. McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[690] Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941) (oil field proration order). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (courts should not second-guess regulatory commissions in evaluating expert testimony).

[691] *See, e.g.*, Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veteran's benefits).

[692] State statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio ex rel. Bryant v. Akron Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the due process clause and present no federal question.

[693] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

[694] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

[695] Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

protected interests.[696] The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[697] The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[698] Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it.[699] Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.[700]

(2) Hearing. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest."[701] This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . ."[702] Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[703]

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[696] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 120 S. Ct. 1579 (2000) (amendment of judgement to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

[697] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). *See also* Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

[698] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

[699] Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1974); Greene v. Lindsey, 456 U.S. 444 (1982).

[700] City of West Covina v. Perkins, 525 U.S. 234 (1999).

[701] Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "Parties whose rights are to be affected are entitled to be heard." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[702] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–71 (1951) (Justice Frankfurter concurring).

[703] Armstrong v. Manzo, 380 U.S. 545, 552 (1965)

(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases,[704] an impartial decision maker is an essential right in civil proceedings as well.[705] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[706] Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.[707]

There is, however, a "presumption of honesty and integrity in those serving as adjudicators,"[708] so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[709] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers

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[704] Tumey v. Ohio, 273 U.S. 510 (1927)); *In re* Murchison, 349 U.S. 133 (1955).

[705] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[706] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982).

[707] Gibson v. Berryhill, 411 U.S. 564 (1973). Or, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction). Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[708] Schweiker v. McClure, 456 U.S. 188, 195 (1982); Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941).

[709] Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, an even lesser standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id. at 249.

who had engaged in a strike against the school system in violation of state law was not such so as to disqualify them.[710]

(4) Confrontation and Cross-Examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[711] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."[712]

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in *dictum* that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[713] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.[714] There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.[715]

(6) Decision on the Record. While this issue arises principally in the administrative law area,[716] it is applicable generally. "[T]he

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[710] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976). *Compare* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (1974) (Justice Powell), *with* id. at 196–99 (Justice White), and 216 (Justice Marshall).

[711] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

[712] Greene v. McElroy, 360 U.S. 474, 496–97 (1959). *But see* Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).

[713] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[714] RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 571 (1968–1970).

[715] FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

[716] The exclusiveness of the record is fundamental in administrative law. *See* §7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). However, one must show not only that the agency used *ex parte* evidence but that he was prejudiced thereby. Market Street Ry. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding *ex parte* evidence).

decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."[717]

(7) Counsel. In *Goldberg v. Kelly*, the Court held that an agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.[718] In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established the presumption that an indigent does not have the right to an appointed counsel unless his "physical liberty" is threatened.[719] However, where other liberty or property interests are threatened, a litigant may overcome this presumption, so that the right of an indigent to appointed counsel is to be determined on a case-by-case basis using a balancing standard.[720]

For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one." The Court, however, also noted the State's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.[721] In other due process cases involving parental rights, the Court has held that due

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[717] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[718] 397 U.S. 254, 270–71 (1970).

[719] Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Court purported to draw this rule from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no *per se* right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of Mathews v. Eldridge, 424 U.S. 319 (1976), upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right. Thus, at least in this context, the value of the first *Eldridge* factor is diminished. The Court noted, however, that the Mathews v. Eldridge standards were drafted in the context of the generality of cases and were not intended for case-by-case application. *Cf.* 424 U.S. at 344 (1976)

[720] 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. Id. at 32

[721] 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.

process requires special state attention to parental rights.[722] Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

**The Procedure Which Is Due Process**

***The Interests Protected: "Life, Liberty and Property".***—The language of the Fourteenth Amendment requires the provision of due process when an interest in one's "life, liberty or property" is threatened.[723] Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.[724] In the 1960s, however, the Court began a rapid expansion of the "liberty" and "property" aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The "life" interest, on the other hand, while often important in criminal cases, has found little application in the civil context.

***The Property Interest***.—The expansion of the concept of "property rights" beyond its common law roots reflected a recognition by the Court that certain interests which fell short of traditional property rights were nonetheless important parts of people's economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession

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[722] *See e.g.*, Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the State required to be instituted); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

[723] Morrissey v. Brewer, 408 U.S. 471, 481 (1982). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment's due process clause have been interchangeable. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[724] For instance, at common law, one's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One's liberty, generally expressed as one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.

could occur.[725] Or, the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination that the garnisher was likely to prevail.[726] Or, the continued possession of a drivers license, which may be essential to one's livelihood, is protected; thus, a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability.[727]

A more fundamental shift in the concept of property occurred with recognition of society's growing economic reliance on government benefits, employment and contracts,[728] and with the decline of the "right-privilege" principle. This principle, discussed previously in the First Amendment context,[729] was pithily summarized by Justice Holmes years ago in dismissing a suit by a policeman protesting being fired from his job: "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[730] Under this theory, a finding that a litigant had no "vested property interest" in government employment[731] or that some form of public assistance was "only" a privilege,[732] meant that no procedural due process was required before depriving a person of that interest.[733] The reasoning was that if a government was under no obligation to provide something, it could choose to provide it subject to whatever conditions or protected by whatever procedures it might find appropriate.

The conceptual underpinnings of this position, however, were always in conflict with a line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. This line of thought, referred to as the "unconstitutional conditions" doctrine, held that "even though a

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[725] Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).

[726] Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

[727] Bell v. Burson, 402 U.S. 535 (1971). *Compare* Dixon v. Love, 431 U.S. 105 (1977) *with* Mackey v. Montrym, 443 U.S. 1 (1979). *But see* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (no liberty interest in worker's compensation claim where reasonableness and necessity of particular treatment had not yet been resolved).

[728] *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW685 (2nd. ed) (1988).

[729] Tribe, *supra*, at 1084–90.

[730] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 2d 517, 522 (1892).

[731] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 314 U.S. 918 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952).

[732] Flemming v. Nestor, 363 U.S. 603 (1960).

[733] Barsky v. Board of Regents, 347 U.S. 442 (1954).

person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[734] Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, at which point the right-privilege distinction became largely disregarded.[735]

Concurrently with the virtual demise of the "right-privilege" distinction, there arose the "entitlement" doctrine, under which the Court erected a barrier of procedural—but not substantive—protections[736] against erroneous governmental deprivation of something it had within its discretion bestowed. Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights and "natural rights." Now, under a new "positivist" approach, a protected property or liberty interest might be found based on any positive governmental statute or governmental practice that gave rise to a legitimate expectation. Indeed, for a time it appeared that this positivist conception of protected rights was going to displace the traditional sources.

As noted previously, the advent of this new doctrine can be seen in *Goldberg v. Kelly*.[737] In *Goldberg*, the Court held that, inasmuch as termination of welfare assistance may deprive an eligible recipient of the means of livelihood, the government must provide a pre-termination evidentiary hearing in which an initial determination of the validity of the dispensing agency's grounds for termination could be made. In order to reach this conclusion, the Court found that such benefits "are a matter of statutory entitlement for persons qualified to receive them."[738] Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, it was found that the recipient had a property

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[734] Perry v. Sinderman, 408 U.S. 593, 597 (1972). *See* Speiser v. Randall, 357 U.S. 513 (1958).

[735] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Much of the old fight had to do with imposition of conditions on admitting corporations into a State. *Cf.* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656–68 (1981) (reviewing the cases). The right-privilege distinction is not, however, totally moribund. *See* Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (sustaining as qualification for public financing of campaign agreement to abide by expenditure limitations otherwise unconstitutional); Wyman v. James, 400 U.S. 309 (1971).

[736] Meaning that Congress or a state legislature could still simply take away part or all of the benefit. Richardson v. Belcher, 404 U.S. 78 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[737] 397 U.S. 254 (1970).

[738] 397 U.S. at 261–62. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits).

interest entitling him to proper procedure before termination or revocation.

At first, the Court's emphasis on the importance of the statutory rights to the claimant led some lower courts to apply the due process clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This approach, the Court held, was inappropriate. "[W]e must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[739] To have a property interest in the constitutional sense, the Court held, it was not enough that one has an abstract need or desire for a benefit or a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[740]

Consequently, in *Board of Regents v. Roth*, the Court held that the refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the public university's contract, regulations, or policies that "created any legitimate claim" to reemployment.[741] On the other hand, in *Perry v. Sindermann*,[742] a professor employed for several years at a public college was found to have a protected interest, although his employment contract had no tenure provision nor was there a statutory assurance of it.[743] The "existing rules or

[739] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972).

[740] 408 U.S. at 577. Although property interests often arise by statute, the Court has also recognized interests established by state case law. Thus, where state court holdings required that private utilities terminate service only for cause (such as nonpayment of charges), then a utility is required to follow procedures to resolve disputes about payment or the accuracy of charges prior to terminating service. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[741] 436 U.S. at 576–78. The Court also held that no liberty interest was implicated, because in declining to rehire Roth the State had not made any charges against him or taken any actions that would damage his reputation or stigmatize him. 436 at 572–75. For an instance of protection accorded a claimant on the basis of such an action, see Codd v. Vegler. *See also* Bishop v. Wood, 426 U.S. 341, 347–50 (1976); Vitek v. Jones, 445 U.S. 480, 491- 94 (1980); Board of Curators v. Horowitz, 435 U.S. 78, 82–84 (1978).

[742] 408 U.S. 593 (1972). *See* Leis v. Flynt, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[743] 408 U.S. at 601–03 (1972). In contrast, a statutory assurance was found in Arnett v. Kennedy, 416 U.S. 134 (1974), where the civil service laws and regulations allowed suspension or termination "only for such cause as would promote the efficiency of the service." 416 U.S. at 140. On the other hand, a policeman who was

understandings" were deemed to have the characteristics of tenure, and thus provided a legitimate expectation independent of any contract provision.[744]

The Court has also found "legitimate entitlements" in a variety of other situations beyond employment. In *Goss v. Lopez*,[745] an Ohio statute provided for both free education to all residents between five and 21 years of age and compulsory school attendance; thus, the State was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[746] The Court is highly deferential, however, to school dismissal decisions based on academic grounds.[747]

An incipient counter-revolution to the expansion of due process appears to have been at least temporarily rebuffed, at least as regards entitlements. In *Arnett v. Kennedy*,[748] three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction, albeit in a new formulation. The case involved a federal law which provided that employees could not be discharged except for cause, and the

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a "permanent employee" under an ordinance which appeared to afford him a continuing position subject to conditions subsequent was held not to be protected by the due process clause because the federal district court interpreted the ordinance as providing only employment at the will and pleasure of the city, an interpretation that the Supreme Court chose not to disturb. Bishop v. Wood, 426 U.S. 341 (1976). "On its face," the Court noted, "the ordinance on which [claimant relied] may fairly be read as conferring" both "a property interest in employment . . . [and] an enforceable expectation of continued public employment." 426 U.S. at 344–45 (1976). The district court's decision had been affirmed by an equally divided appeals court and the Supreme Court deferred to the presumed greater expertise of the lower court judges in reading the ordinance. 426 U.S. at 345 (1976).

[744] 408 U.S. at 601

[745] 419 U.S. 565 (1975). *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (measure of damages for violation of procedural due process in school suspension context). *And see* Board of Curators v. Horowitz, 435 U.S. 78 (1978) (whether liberty or property interest implicated in academic dismissals and discipline, as contrasted to disciplinary actions).

[746] Goss v. Lopez, 419 U.S. at 574.. *See also* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care.)

[747] Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, this limited constitutional right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 474 U.S. at 225.

[748] 416 U.S. 134 (1974).

Justices acknowledged that due process rights could be created through statutory grants of entitlements. The Justices, however, went on to observe that the same law specifically withheld the procedural protections now being sought by the employees. Because "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,"[749] the employee would have to "take the bitter with the sweet."[750] Thus, Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process which might be otherwise required.

But the other six Justices, while disagreeing among themselves in other respects, rejected this attempt to so formulate the issue. "This view misconceives the origin of the right to procedural due process," Justice Powell wrote. "That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[751] Yet, in *Bishop v. Wood*,[752] the Court accepted a district court's finding that a policeman held his position "at will" despite language setting forth conditions for discharge. Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice *Arnett* position, so much so that the dissenters accused the majority of having repudiated the majority position of the six Justices in *Arnett*. And, in *Goss v. Lopez*,[753] Justice Powell, writing in dissent but using language quite similar to the Rehnquist *Arnett* language, seemed to indicate that the right to public education could be qualified by a statute authorizing a school principle to impose a ten day suspension.[754]

More recently, however, the Court has squarely held that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may

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[749] 416 U.S. at 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

[750] 416 U.S. at 154.

[751] 416 U.S. 167 (Justices Powell and Blackmun concurring). *See* 416 U.S. at 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting).

[752] 426 U.S. 341 (1976). A five-to-four decision, the opinion was written by Justice Stevens, replacing Justice Douglas, and was joined by Justice Powell, who had disagreed with the theory in Arnett. *See* id. at 350, 353 n.4, 355 (dissenting opinions). The language is ambiguous and appears at different points to adopt both positions. *But see* id. at 345, 347.

[753] 419 U.S. 565, 573–74 (1975). *See* id. at 584, 586–87 (Justice Powell dissenting).

[754] 419 U.S. at 584, 586–87 (Justice Powell dissenting).

have specified its own procedures that it may deem adequate for determining the preconditions to adverse action." Indeed, any other conclusion would allow the State to destroy virtually any state-created property interest at will.[755] The most striking application of this analysis, to date, is found in *Logan v. Zimmerman Brush Co.*.[756] In Logan, a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint. The Court noted that various older cases had clearly established that causes of action were property, and, in any event, Logan's claim was an entitlement grounded in state law and thus could only be removed "for cause." This property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.[757]

***The Liberty Interest***.—With respect to liberty interests, the Court has followed a similarly meandering path. Although the traditional concept of liberty was freedom from physical restraint, the Court has expanded the concept to include various other protected interests, some statutorily created and some not.[758] Thus, in *Ingraham v. Wright*,[759] the Court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. "The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[760]

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[755] Vitek v. Jones, 445 U.S. 480, 491 (1980). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

[756] 455 U.S. 422 (1982).

[757] 455 U.S. at 428–33 A different majority of the Court also found an equal protection denial. 455 U.S. 438, 433.

[758] These procedural liberty interests should not, however, be confused with substantive liberty interests, which, if not outweighed by a sufficient governmental interest, may not be intruded upon regardless of the process followed. *See* "Fundamental Rights (Noneconomic Substantive Due Process)", supra.

[759] 430 U.S. 651 (1977)

[760] 430 U.S. at 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. *See* Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). See also Smith v. Organization of Foster Families, 431 U.S. 816

The Court also appeared to have expanded the notion of "liberty" to include the right to be free of official stigmatization, and found that such threatened stigmatization could in and of itself require due process.[761] Thus, in *Wisconsin v. Constantineau*,[762] the Court invalidated a statutory scheme in which persons could be labeled "excessive drinkers," without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served. The Court, without discussing the source of the entitlement, noted that the governmental action impugned the individual's reputation, honor, and integrity.

But, in *Paul v. Davis*,[763] the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one's reputation also resulted in loss of a statutory entitlement. In *Davis*, the police had included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants without an opportunity for notice or hearing. But the Court held that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions."[764] Thus, unless the government's official defamation has a specific negative effect on an entitlement, such as the denial to "excessive drinkers" of the right to obtain alcohol that occurred in *Constantineau*, there is no protected liberty interest that would require due process.

A number of liberty interest cases which involve statutorily created entitlements involve prisoner rights, and thus are dealt with more extensively in the section on criminal due process. How-

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(1977); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, 455 U.S. 745 (1982).

[761] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972); Goss v. Lopez, 419 U.S. 565 (1975)

[762] 400 U.S. 433 (1971).

[763] 424 U.S. 693 (1976).

[764] Here the Court, 424 U.S. at 701–10, distinguished Constantineau as being a "reputation-plus" case. That is, it involved not only the stigmatizing of one posted but it also "deprived the individual of a right previously held under state law - the right to purchase or obtain liquor in common with the rest of the citizenry." 424 U.S. at 708. How the state law positively did this the Court did not explain. But, of course, the reputation-plus concept is now well-settled. *See* discussion *supra*. *And see* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a subsequent case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9–12 (1978).

ever, they are worth noting here. In *Meachum v. Fano*,[765] the Court held that a state prisoner was not entitled to a fact-finding hearing when he is transferred to a different prison in which the conditions were substantially less favorable to him, because (1) the due process clause liberty interest by itself is satisfied by the initial valid conviction which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any state of facts, and no hearing was required.

But in *Vitek v. Jones*,[766] a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in that facility." Because the transfer was conditioned upon a "cause," the establishment of the facts necessary to show the cause had to be done through fair procedures. Interestingly, however, the *Vitek* Court also held that the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the due process clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation,[767] a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.

But with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures.[768] Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain "substantive predicates" limiting the exercise of discretion, and there must be explicit "mandatory language" requiring

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[765] 427 U.S. 215 (1976). *See also* Montanye v. Haymes, 427 U.S. 236 (1976).

[766] 445 U.S. 480 (1980).

[767] Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[768] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Jago v. Van Curen, 454 U.S. 14 (1981). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positivist granted privileges of prisoners).

a particular outcome if substantive predicates are found.[769] In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the State creates an "atypical and significant" deprivation.[770]

***Proceedings in Which Procedural Due Process Need Not Be Observed***.—While due notice and a reasonable opportunity to be heard are two fundamental protections found in almost all systems of law established by civilized countries,[771] there are certain proceedings in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. For instance, persons adversely affected by a law cannot challenge its validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[772]

Similarly, when an administrative agency engages in a legislative function, as, for example, when it drafts regulations of general application affecting an unknown number of persons, it need not afford a hearing prior to promulgation.[773] On the other hand, if a regulation, sometimes denominated an "order," is of limited application, that is, it affects an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must precede such action becomes a matter of greater urgency and

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[769] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain "substantive predicates" but lack mandatory language).

[770] Sandin v. Conner, 515 U.S. 472, 484 (1995) (solitary confinement not atypical "in relation to the ordinary incidents of prison life").

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

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

[773] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

must be determined by evaluation of the various factors discussed below.[774]

One such factor is whether agency action is subject to later judicial scrutiny.[775] In one of the initial decisions construing the due process clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.[776]

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.[777]

It is a violation of the due process clause for a State to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[778] With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment.

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[774] 410 U.S. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908).

[775] "It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).

[776] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[777] Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).

[778] Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Baker v. Baker, Eccles & Co., 242 U.S. 294, 403 (1917); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900).

The person may be remitted to other actions initiated by him[779] or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[780] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.[781]

***When Process Is Due***.—The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests.[782] The currently prevailing standard is that formulated in *Mathews v. Eldridge*,[783] which concerned termination of Social Security benefits. "Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

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[779] Lindsey v. Normet, 405 U.S. 56, 65–69 (1972). However, if one would suffer too severe an injury between the doing and the undoing, he may avoid the alternative means. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[780] American Surety Co. v. Baldwin, 287 U.S. 156 (1932). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 432–33 (1982)

[781] Saunders v. Shaw, 244 U.S. 317 (1917).

[782] "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894–95 (1961).

[783] 424 U.S. 319, 335 (1976).

The termination of welfare benefits in *Goldberg v. Kelly*,[784] which could have resulted in a "devastating" loss of food and shelter, had required a pre-deprivation hearing. The termination of Social Security benefits at issue in *Mathews* would require less protection, however, because those benefits are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in *Goldberg*. Finally, the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.[785]

Application of the *Mathews* standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. Earlier cases, which had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, leaned toward requiring pre-deprivation hearings. Newer cases, however, look to the interests of creditors as well. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[786]

Thus, *Sniadach v. Family Finance Corp.*,[787] which mandated pre-deprivation hearings before wages may be garnished, has apparently been limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.[788] *Fuentes v. Shevin*,[789] which struck

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[784] 397 U.S. 254, 264 (1970).

[785] Mathews v. Eldridge, 424 U.S. 319, 339–49 (1976).

[786] Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1975). *See also* id. at 623 (Justice Powell concurring), 629 (Justices Stewart, Douglas, and Marshall dissenting). Justice White, who wrote Mitchell and included the balancing language in his dissent in Fuentes v. Shevin, 407 U.S. 67, 99–100 (1972), did not repeat it in North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975), but it presumably underlies the reconciliation of Fuentes and Mitchell in the latter case and the application of Di-Chem.

[787] 395 U.S. 337 (1969)

[788] North Georgia Finishing v. Di-Chem, 419 U.S. 601, 611 n.2 (1975) (Justice Powell concurring). The majority opinion draws no such express distinction, *see* id. at 605–06, rather emphasizing that Sniadach - Fuentes do require observance of *some* due process procedural guarantees. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (opinion of Court by Justice White emphasizing the wages aspect of the earlier case).

[789] 407 U.S. (1972).

down a replevin statute which authorized the seizure of property (here household goods purchased on an installment contract) simply upon the filing of an *ex parte* application and the posting of bond, has been limited,[790] so that an appropriately structured *ex parte* judicial determination before seizure is sufficient to satisfy due process.[791] Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[792]

Similarly, applying the *Mathews v. Eldridge* standard in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of admin-

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[790] Fuentes was an extension of the Sniadach principle to all "significant property interests" and thus mandated pre-deprivation hearings. Fuentes was a decision of uncertain viability from the beginning, inasmuch as it was four-to-three; argument had been heard prior to the date Justices Powell and Rehnquist joined the Court, hence neither participated in the decision. *See* Di-Chem 419 U.S. at 616–19 (Justice Blackmun dissenting); Mitchell, 416 U.S. at 635–36 (1974) (Justice Stewart dissenting).

[791] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). More recently, the Court has applied a variant of the Mathews v. Eldridge formula in holding that Connecticut's prejudgment attachment statute, which "fail[ed] to provide a preattachment hearing without at least requiring a showing of some exigent circumstance," operated to deny equal protection. Connecticut v. Doehr, 501 U.S. 1, 18 (1991). "[T]he relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." 501 U.S. at 11.

[792] Mitchell v. W.T. Grant Co., 416 U.S. at 615–18 (1974) and at 623 (Justice Powell concurring). *And see* Arnett v. Kennedy, 416 U.S. 134, 188 (1974) (Justice White concurring in part and dissenting in part). Efforts to litigate challenges to seizures in actions involving two private parties may be thwarted by findings of "no state action," but there often is sufficient participation by state officials in transferring possession of property to constitute state action and implicate due process. *Compare* Flagg Brothers v. Brooks, 436 U.S. 149 (1978) (no state action in warehouseman's sale of goods for nonpayment of storage, as authorized by state law), *with* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (state officials' joint participation with private party in effecting prejudgment attachment of property); *and* Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (probate court was sufficiently involved with actions activating time bar in "nonclaim" statute).

istrative burdens, and the risk of an erroneous termination combine to require the provision of some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful.[793] Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient.[794] In other cases, hearings with even minimum procedures may be dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small.[795] In a case dealing with negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.[796]

In *Brock v. Roadway Express, Inc.*,[797] a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a "whistle-blower" employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal. The principal difference with the *Mathews v. Eldridge* test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer "in controlling the makeup of its workforce" and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary

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[793] Arnett v. Kennedy, 416 U.S. 134, 170–71 (1974) (Justice Powell concurring), and 416 U.S. at 195–96 (Justice White concurring in part and dissenting in part); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In Barry v. Barchi, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. *See also* FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with 90-day delay before decision resulting from post-suspension hearing).

[794] Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

[795] *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of drivers' license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).

[796] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[797] 481 U.S. 252 (1987). Justice Marshall's plurality opinion was joined by Justices Blackmun, Powell, and O'Connor; Chief Justice Rehnquist and Justice Scalia joined Justice White's opinion taking a somewhat narrower view of due process requirements but supporting the plurality's general approach. Justices Brennan and Stevens would have required confrontation and cross-examination.

hearing requirements in the context of regulatory adjudication will depend on future developments.[798]

In another respect, the balancing standard of *Mathews* has resulted in a State having wider flexibility in determining what process is required. For instance, in an alteration of previously existing law, no hearing is required if a State affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract.[799] Thus, the Court, in passing on the infliction of corporal punishment in the public schools, held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which the punishment was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would not be punished without cause or excessively.[800] The Court did not, however, inquire about the availability of judicial remedies for such violations in the State in which the case arose.[801]

The Court has required greater protection from property deprivations resulting from operation of established state procedures than from those resulting from random and unauthorized acts of state employees,[802] and presumably this distinction still holds. Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is "the state system itself that destroys a complainant's property interest."[803] While the Court did briefly entertain the theory that a negligent action (i.e. non-willful) by a state official was sufficient to invoke due process, and that a post-

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[798] For analysis of the case's implications, *see* Rakoff, *Brock v. Roadway Express, Inc., and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157.

[799] *See, e.g.* Lujan v. G & G Fire Sprinklers, Inc, 523 U.S. 189 (2001) (breach of contract suit against state contractor who withheld payment to subcontractor based on state agency determination of noncompliance with Labor Code sufficient for due process purposes).

[800] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977).

[801] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977). In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19–22 (1987) involving cutoff of utility service for non-payment of bills, the Court rejected the argument that common-law remedies were sufficient to obviate the pre-termination hearing requirement.

[802] Logan v. Zimmerman Brush Co., 455 U.S. at 435–36 (1982). The Court emphasized that a post-deprivation hearing regarding harm inflicted by a state procedure would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." 455 U.S. 422, 436–37.

[803] 455 U.S. at 436

deprivation hearing regarding such loss was required,[804] the Court subsequently overruled this holding, stating that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."[805]

In "rare and extraordinary situations," where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a later full hearing.[806] Examples are seizure of contaminated foods or drugs or other such commodities to protect the consumer,[807] collection of governmental revenues,[808] and the seizure of enemy property in wartime.[809] Thus, citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear.[810] On the one hand, the Court was ambivalent about a right-privilege distinction;[811] on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the conces-

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[804] More expressly adopting the tort remedy theory, the Court in Parratt v. Taylor, 451 U.S. 527 (1981), held that the loss of a prisoner's mail-ordered goods through the negligence of prison officials constituted a deprivation of property, but that the State's post-deprivation tort-claims procedure afforded adequate due process. When a state officer or employee acts negligently, the Court recognized, there is no way that the State can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedures and there is no contention that the procedures themselves are inadequate, the due process clause is satisfied by the provision of a judicial remedy which the claimant must initiate. 451 U.S. at 541, 543–44. It should be noted that Parratt was a property loss case, and thus may be distinguished from liberty cases, where a tort remedy, by itself, may not be adequate process. *See* Ingraham v. Wright, 430 U.S. at 680–82.

[805] Daniels v. Williams, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials). Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution. Prisoners may resort to state tort law in such circumstances, but neither the Constitution nor §1983 provides a federal remedy.

[806] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). *See* Parratt v. Taylor, 451 U.S. 527, 538–40 (1981). Of course, one may waive his due process rights, though as with other constitutional rights, the waiver must be knowing and voluntary. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). *See also* Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972).

[807] North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). *See also* Fahey v. Mallonee, 332 U.S. 245 (1948). *Cf.* Mackey v. Montrym, 443 U.S. 1, 17–18 (1979).

[808] Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[809] Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921).

[810] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[811] 367 U.S. at 894, 895, 896 (1961).

sionaire's other premises—with the Government's interest in conducting a high-security program.[812]

**Jurisdiction**

***Generally***.—Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process clause limits the abilities of states to exercise this power.[813] In the famous case of *Pennoyer v. Neff*,[814] the Court enunciated two principles of jurisdiction respecting the States in a federal system[815] —first, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and second, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[816] Over a long period of time, however, the mobility of American society and

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[812] 367 U.S. at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and 416 U.S. at 181–183 (Justice White concurring in part and dissenting in part).

[813] Scott v. McNeal, 154 U.S. 34, 64 (1894).

[814] 95 U.S. 714 (1878)

[815] Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252–62. the constitutional basis for them was deemed to be in the due process clause of the Fourteenth Amendment. Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The due process clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled utilization of this constitutional foundation. Pennoyer denied full faith and credit to the judgment because the state lacked jurisdiction.

[816] 95 U.S. at 722. The basis for the territorial concept of jurisdiction promulgated in Pennoyer and modified over the years is two-fold: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" or place of business. International Shoe Co. v. Washington 326 U.S. 310, 316, 317 (1945); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and, more important, a concern for the preservation of federalism. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Framers, the Court has asserted, while intending to tie the States together into a Nation, "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Thus, the federalism principle is preeminent. "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

the increasing complexity of commerce led to attenuation of the second principle of *Pennoyer*, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a State.[817] This "minimum contacts" test, consequently, permits the courts of a State to obtain power over out-of-state defendants.

***In Personam Proceedings Against Individuals***.—How jurisdiction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered *in personam*, and jurisdiction must be established over the defendant's person in order to render an effective decree.[818] Generally, presence within the State is sufficient to create personal jurisdiction over an individual, if process is served.[819] In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the State.[820] However, if the defendant, although technically domiciled therein, has left the State with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, inasmuch as it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.[821]

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in

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[817] International Shoe Co. v. Washington, 326 U.S. 310 (1945)). As the Court explained in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), "[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). The first principle, that a State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called "transient" rule of jurisdiction—McDonald v. Mabee, 243 U.S. 90, 91 (1917), remains valid, although in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the Court's *dicta* appeared to assume it is not.

[818] National Exchange Bank v. Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 471 (1905).

[819] McDonald v. Mabee, 243 U.S. 90, 91 (1917). *Cf.* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). The rule has been strongly criticized but persists. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956). But in Burnham v. Superior Court, 495 U.S. 604 (1990), the Court held that service of process on a nonresident physically present within the state satisfies due process regardless of the duration or purpose of the nonresident's visit.

[820] Milliken v. Meyer, 311 U.S. 457 (1940).

[821] McDonald v. Mabee, 243 U.S. 90 (1917).

which he neither appeared nor was served or effectively made a party.[822] The early cases held that the process of a court of one State could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment.[823] This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,[824] and even a special appearance to deny jurisdiction might be treated as consensual submission to the court.[825] The concept of "constructive consent" was then seized upon as a basis for obtaining jurisdiction. For instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued.[826]

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the State's power to regulate acts done in the state that were dan-

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[822] Rees v. Watertown, 86 U.S. (19 Wall.) 107 (1874); Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1915); Griffin v. Griffin, 327 U.S. 220 (1946).

[823] Sugg v. Thornton, 132 U.S. 524 (1889); Riverside Mills v. Menefee, 237 U.S. 189, 193 (1915); Hess v. Pawloski, 274 U.S. 352, 355 (1927). *See also* Harkness v. Hyde, 98 U.S. 476 (1879); Wilson v. Seligman, 144 U.S. 41 (1892).

[824] Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230 (1900); Western Loan & Savings Co. v. Butte & Boston Min. Co., 210 U.S. 368 (1908); Houston v. Ormes, 252 U.S. 469 (1920). *See also* Adam v. Saenger, 303 U.S. 59 (1938) (plaintiff suing defendants deemed to have consented to jurisdiction with respect to counterclaims asserted against him).

[825] State legislation which provides that a defendant who comes into court to challenge the validity of service upon him in a personal action surrenders himself to the jurisdiction of the court, but which allows him to dispute where process was served, is constitutional and does not deprive him of property without due process of law. In such a situation, the defendant may ignore the proceedings as wholly ineffective, and attack the validity of the judgment if and when an attempt is made to take his property thereunder. If he desires, however, to contest the validity of the court proceedings and he loses, it is within the power of a State to require that he submit to the jurisdiction of the court to determine the merits. York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285 (1891); Western Indemnity Co. v. Rupp, 235 U.S. 261 (1914)

[826] Hess v. Pawloski, 274 U.S. 352 (1927): Wuchter v. Pizzutti, 276 U.S. 13 (1928); Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953).

gerous to life or property.[827] Inasmuch as the State did not really have the ability to prevent nonresidents from doing business in their state,[828] this extension was necessary in order to permit States to assume jurisdiction over individuals "doing business" within the State. Thus, the Court soon recognized that "doing business" within a State was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the State on an agent appointed to carry out the business.[829]

The culmination of this trend, established in the case of *International Shoe Co. v. Washington*,[830] was the requirement that there be "minimum contacts" with the State in question in order to establish jurisdiction. The outer limit of this test is illustrated by *Kulko v. Superior Court*,[831] in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the State was to send his daughter to live with her mother in California.[832] The argument was made that the father had "caused an effect" in the State by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York. The Court explained that, "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."[833] Although the Court noted that the "effects" test had been accepted as a test of contacts when wrongful activity outside a State causes injury within the State or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California.[834] As with many such cases, the decision was narrowly limited to its facts and does little

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[827] Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

[828] 274 U.S. at 355. *See* Flexner v. Farson, 248 U.S. 289, 293 (1919).

[829] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[830] 326 U.S. 310, 316 (1945).

[831] 436 U.S. 84 (1978).

[832] Kulko had visited the State twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. 436 U.S. at 92–93.

[833] 436 U.S. at 92.

[834] 436 U.S. at 96–98.

to clarify the standards applicable to state jurisdiction over nonresidents.

***Suing Out-of-State (Foreign) Corporations***.—A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the State chartering it.[835] Thus, the basis for state court jurisdiction over an out-of-state ("foreign") corporation has been even more uncertain than that with respect to individuals. Before the case of *International Shoe Co. v. Washington*,[836] it was asserted that inasmuch as a corporation could not carry on business in a State without the State's permission, the State could condition its permission upon the corporation's consent to submit to the jurisdiction of the State's courts, either by appointment of someone to receive process or in the absence of such designation, by accepting service upon corporate agents authorized to operate within the State.[837] Further, by doing business in a State, the corporation was deemed to be present there and thus subject to service of process and suit.[838] This theoretical corporate presence conflicted with the idea of corporations having no existence outside their State of incorporation, but it was nonetheless accepted that a corporation "doing business" in a State to a sufficient degree was "present" for service of process upon its agents in the State who carried out that business.[839]

Such presence did not, however, expose a corporation to all manner of suits. Under the reasoning of these early cases, even continuous activity of some sort by a foreign corporation within a State would not suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any State in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made.[840] And if the

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[835] *Cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

[836] 326 U.S. 310 (1945).

[837] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); St. Clair v. Cox, 196 U.S. 350 (1882); Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909); Simon v. Southern Ry., 236 U.S. 115 (1915); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917).

[838] Presence was first independently used to sustain jurisdiction in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), although the possibility was suggested as early as St. Clair v. Cox, 106 U.S. 350 (1882). *See also* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (Justice Brandeis for Court).

[839] *E.g.*, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); St. Louis S. W. Ry. v. Alexander, 227 U.S. 218 (1913).

[840] *E.g.*, Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Simon v. Southern Railway, 236 U.S. 115, 129–130 (1915); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Davis v. Farmers Co-operative Co., 262 U.S. 312 (1923); Helicopteros Nacionales de Colombia v.

corporation stopped doing business in the forum State before suit against it was commenced, it might well escape jurisdiction altogether.[841] The issue of the degree of activity required, in particular the degree of solicitation necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.[842] In the absence of enough activity to constitute doing business, the mere presence within its territorial limits of an agent, officer, or stockholder, upon whom service might readily be had, was not effective to enable a State to acquire jurisdiction over the foreign corporation.[843]

The rationales and premises of these cases were swept away in *International Shoe Co. v. Washington*,[844] although the results in many of them would stand on the basis of the case's "minimum contacts" analysis. International Shoe, an out-of-state corporation, had not been issued a license to do business in Washington State, but it systematically and continuously employed a sales force of Washington residents to solicit therein, and thus was held amenable to suit in Washington for unpaid unemployment compensation contributions for such salesmen. A notice of assessment was served personally upon one of the local sales solicitors, and a copy of the assessment was sent by registered mail to the corporation's principal office in Missouri, and this was deemed sufficient to apprize the corporation of the proceeding.

To reach this conclusion the Court not only overturned prior holdings to the effect that mere solicitation of business does not constitute a sufficient contact to subject a foreign corporation to a State's jurisdiction,[845] but also rejected the "presence" test as begging the question to be decided. "The terms 'present' or 'presence,'"

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Hall, 466 U.S. 408 (1984). Continuous operations were sometimes sufficiently substantial and of a nature to warrant assertions of jurisdiction. St. Louis S. W. Ry. v. Alexander, 227 U.S. 218 (1913).

[841] Robert Mitchell Furn. Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921): Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373, 379 (1920). On a consent theory, jurisdiction would continue. Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 364 (1933).

[842] Solicitation of business alone was inadequate to constitute "doing business," Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907), but when connected with other activities would suffice to confer jurisdiction. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). *See* the survey of cases by Judge Hand in Hutchinson v. Chase and Gilbert, 45 F.2d 139, 141–42 (2d Cir. 1930).

[843] *E.g.*, Goldey v. Morning News, 156 U.S. 518 (1895); Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); Riverside Mills v. Menefee, 237 U.S. 189, 195 (1915). *But see* Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[844] 326 U.S. 310 (1945).

[845] This departure was recognized by Justice Rutledge subsequently in Nippert v. City of Richmond, 327 U.S. 416, 422 (1946). Inasmuch as International Shoe, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the Court could have utilized International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), to find it was "present" in the State.

according to Chief Justice Stone, "are used merely to symbolize those activities of the corporation's agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . . , to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. . . . An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."[846] As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court concluded that "so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[847]

Extending this logic, a majority of the Court ruled that an out-of-state association selling mail order insurance had developed sufficient contacts and ties with Virginia residents so that the State could institute enforcement proceedings under its Blue Sky Law by forwarding notice to the company by registered mail, notwithstanding that the Association solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever.[848] The due process clause was declared not to "forbid a State to protect its citizens from such injustice" of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.[849]

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[846] International Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

[847] 326 U.S. at 319

[848] Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950). The decision was 5-to-4 with one of the majority Justices also contributing a concurring opinion. Id. at 651 (Justice Douglas). The possible significance of the concurrence is that it appears to disagree with the implication of the majority opinion, id. at 647–48, that a State's legislative jurisdiction and its judicial jurisdiction are coextensive. d. at 652–53 (distinguishing between the use of the State's judicial power to enforce its legislative powers and the judicial jurisdiction when a private party is suing). *See* id. at 659 (dissent).

[849] 339 U.S. at 647-49. The holding in Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum State and that the circumstances under which its contracts with forum State citizens, executed and to be performed in its State of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum State, was distinguished rather than formally overruled. 339 U.S. at 647. In any event, *Benn*, although

Likewise, the Court reviewed a California statute which subjected foreign mail order insurance companies engaged in contracts with California residents to suit in California courts, and which had authorized the petitioner to serve a Texas insurer by registered mail only.[850] The contract between the company and the insured specified that Austin, Texas, was the place of "making" and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the State and no evidence had been presented that it had solicited anyone other than the insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. "The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[851]

In making this decision, the Court noted that "[l]ooking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[852] However, in *Hanson v. Denckla*, decided during the same Term, the Court found *in personam* jurisdiction lacking for the first time since *International*

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unmentioned in the opinion, could not survive McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[850] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[851] 355 U.S. at 223 The Court also noticed the proposition that the insured could not bear the cost of litigation away from home as well as the insurer. *See also* Perkins v. Benguet Consolidating Mining Co., 342 U.S. 437 (1952), a case too atypical on its facts to permit much generalization but which does appear to verify the implication of International Shoe that *in personam* jurisdiction may attach to a corporation even where the cause of action does not arise out of the business done by defendant in the forum State, as well as to state, in *dictum*, that the mere presence of a corporate official within the State on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and service were made on him within the State. 342 U.S. at 444–45. The Court held that the State could, but was not required to, assert jurisdiction over a corporation owning gold and silver mines in the Philippines but temporarily (because of the Japanese occupation) carrying on a part of its general business in the forum State, including directors' meetings, business correspondence, banking, and the like, although it owned no mining properties in the State.

[852] McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957). An exception exists with respect to *in personam* jurisdiction in domestic relations cases, at least in some instances. *E.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (holding that sufficient contacts afforded Nevada in personam jurisdiction over a New York resident wife for purposes of dissolving the marriage but Nevada did not have jurisdiction to terminate the wife's claims for support).

*Shoe Co. v. Washington*, pronouncing firm due process limitations. In *Hanson*,[853] the issue was whether a Florida court considering a contested will obtained jurisdiction over corporate trustees of disputed property through use of ordinary mail and publication. The will had been entered into and probated in Florida, the claimants were resident in Florida and had been personally served, but the trustees, who were indispensable parties, were resident in Delaware. Noting the trend in enlarging the ability of the States to obtain in personam jurisdiction over absent defendants, the Court denied the exercise of nationwide in personam jurisdiction by States, saying "it would be a mistake to assume that th[e] trend [to expand the reach of state courts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[854]

The Court recognized in *Hanson* that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the due process clause. The Court noted that due process restrictions do more than guarantee immunity from inconvenient or distant litigation, in that "[these restrictions] are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him." The only contacts the corporate defendants had in Florida consisted of a relationship with the individual defendants. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."[855]

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[853] 357 U.S. 235 (1958). The decision was 5-to-4. *See* 357 U.S. at 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).

[854] 357 U.S. at 251 In dissent, Justice Black observed that "of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here." 357 U.S. at 260.

[855] 357 U.S. at 251, 253–54. Justice Black argued that the relationship of the nonresident defendants, of the subject of the litigation to the forum State, upon an analogy of choice of law and *forum non conveniens*, made Florida the natural and constitutional basis for asserting jurisdiction. 357 U.S. at 251, 258–59 The Court has numerous times asserted that contacts sufficient for the purpose of designating

In *World-Wide Volkswagen Corp. v. Woodson*,[856] the Court applied its "minimum contacts" test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum State. Plaintiffs had sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile. The car had been purchased the previous year in New York, while the plaintiffs were New York residents, and the accident had occurred while they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defendants. The Court found that the defendants (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the State's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the State, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. The unilateral action of the purchasers in driving the car to Oklahoma was insufficient to create the kinds of requisite contacts.

While it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability was held to be relevant only insofar as "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[857] Further, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of in personam jurisdiction over them.[858] Thus, a defendant must, as the Court said in *Denckla*, " purposefully [avail] itself of the privilege of conducting activities within the forum State,"[859] if not by carrying on business there within the constitutional sense, at least by delivering "its products into the

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a particular State's law as appropriate may be insufficient for the purpose of asserting jurisdiction. *See* Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294–95 (1980). On the due process limits on choice of law decisions, *see* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

[856] 444 U.S. 286 (1980).

[857] 444 U.S. at 297

[858] 444 U.S. at 299.

[859] Hanson v. Denckla, 357 U.S. 235, 253 (1985), *quoted in* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

stream of commerce with the expectation that they will be purchased by consumers in the forum State." [860]

The Court has had to decide how to apply *International Shoe* principles in several more situations. Thus, circulation of a magazine in a state is an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have "minimum contacts" with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation. [861] Or, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state. [862] Further, while there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state. [863]

***Actions In Rem: Proceeding Against Property***.—In an *in rem* action, which is brought directly against a property interest, a State can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was

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[860] 444 U.S. at 298. Of the three dissenters, Justice Brennan argued that the "minimum contacts" test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum State and plaintiffs against the actual burden imposed on defendant, 444 U.S. at 299, while Justices Marshall and Blackmun applied the test and found jurisdiction because of the foreseeability of defendants that a defective product of theirs might cause injury in a distant State and because the defendants had entered into an interstate economic network. 444 U.S. at 313. The balancing of interests test was applied in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987), holding unreasonable exercise of jurisdiction by a California court over an indemnity action by a Taiwan tire manufacturer against a Japanese manufacturer of tire valves, the underlying damage action by a California motorist having been settled.

[861] Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (holding as well that the forum state may apply "single publication rule" making defendant liable for nationwide damages).

[862] Calder v. Jones, 465 U.S. 783 (1984) (jurisdiction over reporter and editor responsible for defamatory article which they knew would be circulated in subject's home state).

[863] Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *But cf.* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (purchases and training within state, both unrelated to cause of action, are insufficient to justify general *in personam* jurisdiction).

never established.[864] Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question.[865] Proceedings brought to register title to land,[866] to condemn[867] or confiscate[868] real or personal property, or to administer a decedent's estate[869] are typical in rem actions. Due process is satisfied by seizure of the property (the "*res*") and notice to all who have or may have interests therein.[870] Under prior case law, a court could acquire *in rem* jurisdiction over nonresidents by mere constructive service of process,[871] under the theory that property was always in possession of its owners and that seizure would afford them notice, inasmuch as they would keep themselves apprized of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, that notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.[872]

Although the Court has now held "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in *International Shoe Co. v. Washington*,"[873] it does not appear that this will appreciably change the result for *in rem* jurisdiction over property. "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the

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[864] Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a state court could proceed to judgment respecting the ownership of such property, even though it lacked a constitutional competence to reach claimants of title who resided beyond its borders. Arndt v. Griggs, 134 U.S. 316, 321 (1890); Grannis v. Ordean, 234 U.S. 385 (1914); Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917).

[865] Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850).

[866] American Land Co. v. Zeiss, 219 U.S. 47 (1911); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814 (Chief Justice Holmes), appeal dismissed, 179 U.S. 405 (1900).

[867] Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889).

[868] The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874).

[869] Clarke v. Clarke, 178 U.S. 186 (1900); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[870] Pennoyer v. Neff, 95 U.S. 714 (1878). Predeprivation notice and hearing may be required if the property is not the sort that, given advance warning, could be removed to another jurisdiction, destroyed, or concealed. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (notice to owner required before seizure of house by government).

[871] Arndt v. Griggs, 134 U.S. 316 (1890); Ballard v. Hunter, 204 U.S. 241 (1907); Security Savings Bank v. California, 263 U.S. 282 (1923).

[872] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Robinson v. Hanrahan, 409 U.S. 38 (1972).

[873] 433 U.S. 186 (1977).

source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State."[874] Thus, for "true" *in rem* actions, the old results are likely to still prevail.

***Quasi in Rem: Attachment Proceedings***.—If a defendant is neither present within a State nor domiciled therein, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant's property within the state. The practice of allowing a State to attach a non-resident's real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of *in rem* proceeding sometimes called "*quasi in rem,*" and under *Pennoyer v. Neff*[875] an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice by publication.[876] The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.[877]

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum State, such as

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[874] 433 U.S. at 207–08 (footnote citations omitted). The Court also suggested that the State would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Id.

[875] 95 U.S. 714 (1878). *Cf.* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Corn Exch. Bank v. Commissioner, 280 U.S. 218, 222 (1930); Endicott Co. v. Encyclopedia Press, 266 U.S. 285, 288 (1924).

[876] The theory was that property is always in possession of an owner, and that seizure of the property will inform him. This theory of notice was disavowed sooner than the theory of jurisdiction. See "Actions in Rem: Proceedings Against Property," supra.

[877] Other, quasi in rem actions, which are directed against persons, but ultimately have property as the subject matter, such as probate, Goodrich v. Ferris, 214 U.S. 71, 80 (1909), and garnishment of foreign attachment proceedings, Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905), might also be prosecuted to conclusion without requiring the presence of all parties in interest. The jurisdictional requirements for rendering a valid divorce decree are considered under the full faith and credit clause, Art. I, §1.

where the property was related to the matter sued over.[878] In others, the question was more disputed, as in the famous New York Court of Appeals case of *Seider v. Roth*,[879] in which the property subject to attachment was the contractual obligation of the defendant's insurance company to defend and pay the judgment. But in *Harris v. Balk*,[880] the facts of the case and the establishment of jurisdiction through *quasi in rem* proceedings raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. The Marylander ascertained, apparently adventitiously, that Harris, a North Carolina resident who owed Balk an amount of money, was passing through Maryland, and the Marylander attached this debt. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris argued that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.[881]

Subsequently, *Harris v. Balk* was overruled in *Shaffer v. Heitner*,[882] in which the Court rejected the Delaware state court's jurisdiction, holding that the "minimum contacts" test of *International Shoe* applied to all *in rem* and *quasi in rem* actions. The case involved a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property here consisting of shares of corporate stock and options to stock in the defendant corporation. The stock was considered to be in Delaware because that was the state of incorporation, but none of the certificates representing the seized stocks were physically present in Delaware. The reason for applying the same test as is applied in *in personam* cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase 'judicial jurisdiction' over a thing,' is a customary elliptical way of referring

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[878] Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P. 2d 960 (1957), *appeal dismissed*, 357 U.S. 569 (1958) (debt seized in California was owed to a New Yorker, but it had arisen out of transactions in California involving the New Yorker and the California plaintiff).

[879] 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966).

[880] 198 U.S. 215 (1905).

[881] *Compare* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) (action purportedly against property within State, proceeds of an insurance policy, was really an *in personam* action against claimant and, claimant not having been served, the judgment is void). *But see* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

[882] 433 U.S. 186 (1977).

to jurisdiction over the interests of persons in a thing.'" [883] Thus, "[t]he recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'" [884]

A further tightening of jurisdictional standards occurred in *Rush v. Savchuk*. [885] The plaintiff was injured in a one-car accident in Indiana while a passenger in a car driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum. [886] *Rush* thus resulted in the demise of the controversial *Seider v. Roth* doctrine, which lower courts had struggled to save after *Shaffer v. Heitner*. [887]

***Actions in Rem: Estates, Trusts, Corporations***.—Generally, probate will occur where the decedent was domiciled, and as a probate judgment is considered *in rem*, a determination as to assets in that State will be determinative as to all interested persons. [888] Insofar as the probate affects property, land or personalty beyond the State's boundaries, however, the judgment is *in personam* and

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[883] 433 U.S. at 207 (internal quotation from RESTATEMENT (SECOND) OF CONFLICT OF LAWS 56, Introductory Note (1971)).

[884] 433 U.S. at 207. The characterization of actions *in rem* as being not actions against a *res* but against persons with interests merely reflects Justice Holmes' insight in Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76–77, 55 N.E., 812, 814, *appeal dismissed*, 179 U.S. 405 (1900).

[885] 444 U.S. 320 (1980).

[886] 444 U.S. at 328–30. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id. at 333 (Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee." Id. at 330–31. Presumably, the comment is not meant to undermine the validity of such direct-action statutes, which was upheld in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), a choice-of-law case rather than a jurisdiction case.

[887] *See* O'Conner v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

[888] Goodrich v. Ferris, 214 U.S. 71, 80 (1909); McCaughey v. Lyall, 224 U.S. 558 (1912).

can bind only parties thereto or their privies.[889] Thus, the full faith and credit clause would not prevent a out-of-state court in the state where the property is located from reconsidering the first court's finding of domicile, which could affect the ultimate disposition of the property.[890]

The difficulty of characterizing the existence of the *res* in a particular jurisdiction is illustrated by the *in rem* aspects of *Hanson v. Denckla*.[891] As discussed earlier,[892] the decedent created a trust with a Delaware corporation as trustee,[893] and the Florida courts had attempted to assert both *in personam* and *in rem* jurisdiction over the Delaware corporation. Asserting the old theory that a court's *in rem* jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"[894] *i.e.,* whether the court has jurisdiction over the thing, the Court thought it clear that the trust assets that were the subject of the suit were located in Delaware and thus the Florida courts had no *in rem* jurisdiction. The Court did not expressly consider whether the *International Shoe* test should apply to such *in rem* jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida's interests arising from its authority to probate and construe the domiciliary's will, under which the foreign assets might pass, were a sufficient basis of *in rem* jurisdiction and decided they were not.[895] The effect of *International Shoe* in this area is still to be discerned.

The reasoning of the *Pennoyer*[896] rule, that seizure of property and publication was sufficient to give notice to nonresidents or absent defendants, has also been applied in proceedings for the forfeiture of abandoned property. If all known claimants were personally served and all claimants who were unknown or nonresident

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[889] Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[890] 315 U.S. at 353.

[891] 357 U.S. 235 (1957).

[892] The *in personam* aspect of this decision is considered *supra*.

[893] She reserved the power to appoint the remainder, after her reserved life estate, either by testamentary disposition or by *inter vivos* instrument. After she moved to Florida, she executed a new will and a new power of appointment under the trust, which did not satisfy the requirements for testamentary disposition under Florida law. Upon her death, dispute arose as to whether the property passed pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will.

[894] 357 U.S. at 246.

[895] 357 U.S. at 247–50. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that State, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. 357 U.S. at 256, 262.

[896] *See* discussion of *Pennoyer*, supra.

were given constructive notice by publication, judgments in these proceedings were held binding on all.[897] But in *Mullane v. Central Hanover Bank & Trust Co.*,[898] the Court, while declining to characterize the proceeding as *in rem* or *in personam*, held that a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could not obtain a judicial settlement of accounts if the only notice was publication in a local paper. While such notice by publication was sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held it was feasible to make serious efforts to notify residents and nonresidents whose whereabouts were known, such as by mailing notice to the addresses on record with the bank.[899]

***Notice: Service of Process***.—It is not enough that a State be potentially capable of exercising control over persons and property. Before a State can legitimately exercise such power, its jurisdiction must be perfected by an appropriate service of process which is effective to notify all parties of proceedings which may affect their rights.[900] Personal service guarantees actual notice of the pendency of a legal action, and has traditionally been deemed necessary in actions styled *in personam*.[901] But less rigorous notice procedures have been accepted, in light of history and of the practical obstacles to providing personal service in every instance, although these procedures do not carry with them the same certainty of actual notice as does personal service.[902] But, whether the action be *in rem* or *in personam*, there is a constitutional minimum; if it be shown that

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[897] Hamilton v. Brown, 161 U.S. 256 (1896); Security Savings Bank v. California, 263 U.S. 282 (1923). *See also* Voeller v. Neilston Co., 311 U.S. 531 (1941).

[898] 339 U.S. 306 (1950).

[899] A related question is which state has the authority to escheat a coporate debt. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961); Texas v. New Jersey, 379 U.S. 674 (1965). Where a state seeks to escheat intangible corporate property such as uncollected debt, the Court found that the multiplicity of States with a possible interest made a "contacts" test unworkable. Citing ease of administration rather than logic or jurisdiction, the Court held that the authority to take the uncollected claims against a corporation by escheat would be based on whether the last known address on the company's books for the each creditor was in a particular State.

[900] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "There . . . must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." Omni Capital Int'l v. Rudolph Wolff & Co., 484 U.S. 97 (1987).

[901] McDonald v. Mabee, 243 U.S. 90, 92 (1971).

[902] Greene v. Lindsey, 456 U.S. 444, 449 (1982) *See* Dusenbery v. United States, 534 U.S. 161 (2001) (upholding a notice of forfeiture which was delivered by certified mail to the mail-room of a prison where the individual to be served was incarcerated).

the mode of notice used was not reasonably calculated to provide the necessary information, its age and history will not sustain it.[903]

The use of mail to convey notice, for instance, has become quite established,[904] especially for assertion of *in personam* jurisdiction extraterritorially upon individuals and corporations having "minimum contacts" with a forum State, where various "long-arm" statutes authorize notice by mail.[905] Or, in a class action, due process is satisfied by mail notification of out-of-state class members, giving such members the opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.[906] Other service devices and substitutions, have been pursued and show some promise of further loosening of the concept of territoriality even while complying with minimum due process standards of notice.[907]

**Power of the States to Regulate Procedure**

***Generally***.—As long as a party has been given sufficient notice and an opportunity to defend his interest, the due process clause of the Fourteenth Amendment does not generally mandate the particular forms of procedure to be used in state courts.[908] The

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[903] In Greene v. Lindsey, 456 U.S. 444 (1982), the Court held that in light of substantial evidence that notices posted on the doors of apartments in a housing project in an eviction proceeding were often torn down by children and others before tenants ever saw them, service by posting did not comport with due process. Without requiring it, the Court observed that the mails provided an efficient and inexpensive means of communication upon which prudent men could rely and that notice by mail would provide a reasonable assurance of notice. Id. at 455. *See also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (personal service or notice by mail is required for mortgagee of real property subject to tax sale); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (notice by mail or other appropriate means to reasonably ascertainable creditors of probated estate).

[904] *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n ex rel. State Corp. Comm'n, 339 U.S. 643 (1950).

[905] *See, e.g.*, G.D. Searle & Co. v. Cohn, 455 U.S. 404, 409–12 (1982) (discussing New Jersey's "long-arm" rule, under which a plaintiff must make every effort to serve process upon someone within the State and then only if "after diligent inquiry and effort personal service cannot be made" within the State, then "service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."). *Cf.* Velmohos v. Maren Engineering Corp., 83 N.J. 282, 416 A.2d 372 (1980), *vacated and remanded*, 455 U.S. 985 (1982).

[906] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[907] *E.g.*, Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) (authorizing direct action against insurance carrier rather than against the insured).

[908] Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A State "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912). The

States may regulate the manner in which rights may be enforced and wrongs remedied,[909] and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.[910] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues which ordinarily do not implicate the Fourteenth Amendment. The function of the Fourteenth Amendment is negative rather than affirmative[911] and in no way obligates the States to adopt specific measures of reform.[912]

***Commencement of Actions***.—A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.[913] But, foreclosure of all access to the courts, through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. Thus, where a State has monopolized the avenues of settle-

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power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Constitution. Angel v. Bullington, 330 U.S. 183 (1947).

[909] Insurance Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Iowa Central Ry. v. Iowa, 160 U.S. 389, 393 (1896): Honeyman v. Hanan, 302 U.S. 375 (1937). *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

[910] Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).

[911] Some recent decisions, however, have imposed some restrictions on state procedures that require substantial reorientation of process. While this is more generally true in the context of criminal cases, in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, some requirements have also been imposed in civil cases. Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Santosky v. Kramer, 455 U.S. 745 (1982). Review has, however, been restrained with regard to details. *See, e.g.*, Lindsey v. Normet, 405 U.S. at 64–69.

[912] Ownbey v. Morgan, 256 U.S. 94, 112 (1921). Thus the Fourteenth Amendment does not constrain the States to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to amend pleadings. Note that the Supreme Court did once grant review to determine whether due process required the States to provide some form of post-conviction remedy to assert federal constitutional violations, a review which was mooted when the State enacted such a process. Case v. Nebraska, 381 U.S. 336 (1965). When a State, however, through its legal system exerts a monopoly over the pacific settlement of private disputes, as with the dissolution of marriage, due process may well impose affirmative obligations on that State. Boddie v. Connecticut, 401 U.S. 371, 374–77 (1971).

[913] Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). Nor was the retroactive application of this statutory requirement to actions pending at the time of its adoption violative of due process as long as no new liability for expenses incurred before enactment was imposed thereby and the only effect thereof was to stay such proceedings until the security was furnished.

ment of disputes between persons by prescribing judicial resolution, and where the dispute involves a fundamental interest, such as marriage and its dissolution, the State may not deny access to those persons unable to pay its fees.[914]

In older cases, not questioned by the more recent ones, it was held that a State, as the price of opening its tribunals to a nonresident plaintiff, may exact the condition that the nonresident stand ready to answer all cross actions filed and accept any *in personam* judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record.[915] For similar reasons, a requirement of the performance of a chemical analysis as a condition precedent to a suit to recover for damages resulting to crops from allegedly deficient fertilizers, while allowing other evidence, is not deemed to be arbitrary or unreasonable.[916]

Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.[917]

***Defenses***.—Just as a State may condition the right to institute litigation, so may it establish terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment is rendered and after he has paid that judgment.[918] A State may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.[919] A State may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents. No person has a vested right in such defenses.[920] Similarly, a nonresident de-

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[914] Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* Little v. Streater, 452 U.S. 1 (1981) (state-mandated paternity suit); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (parental status termination proceeding); Santosky v. Kramer, 455 U.S. 745 (1982) (permanent termination of parental custody).

[915] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 (1931); Adam v. Saenger, 303 U.S. 59 (1938).

[916] Jones v. Union Guano Co., 264 U.S. 171 (1924).

[917] Sawyer v. Piper, 189 U.S. 154 (1903).

[918] Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915)

[919] Lindsey v. Normet, 405 U.S. 56, 64–69 (1972). *See also* Bianchi v. Morales, 262 U.S. 170 (1923) (upholding mortgage law providing for summary foreclosure of a mortgage without allowing any defense except payment)..

[920] Bowersock v. Smith, 243 U.S. 29, 34 (1917); Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54, 55 (1919); Herron v. Southern Pacific Co., 283 U.S. 91 (1931). *See*

fendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend.[921]

***Costs, Damages, and Penalties***.—What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due process of law.[922] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[923] Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.[924]

Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.[925] Also, as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons, a State may permit harassed litigants to recover penalties in the form of attorney's fees or damages.[926]

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a State may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer

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*also* Martinez v. California, 444 U.S. 277, 280–83 (1980) (State interest in fashioning its own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).

[921] Ownbey v. Morgan, 256 U.S. 94 (1921).

[922] Ballard v. Hunter, 204 U.S. 241, 259 (1907).

[923] Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914).

[924] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' Fifth Amendment due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish). *See also* United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) (upholding regulations under the Black Lung Benefits Act prohibiting contractual fee arrangements).

[925] Lowe v. Kansas, 163 U.S. 81 (1896). Consider, however, the possible bearing of Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (statute allowing jury to impose costs on acquitted defendant, but containing no standards to guide discretion, violates due process).

[926] Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U.S. 35, 43–44 (1922); Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 139 (1921); Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine is called, whether a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime.[927] On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the first judgment was not a penalty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the State's judicial process.[928]

To deter careless destruction of human life, a State by law may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees,[929] and may also allow punitive damages for fraud perpetrated by employees.[930] Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.[931] The Court has indicated, however, that the amount of punitive damages are limited to those reasonably necessary to vindicate a state's interest in deterring unlawful conduct.[932] These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.[933]

***Statutes of Limitation***.—A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a State

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[927] Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).

[928] National Union v. Arnold, 348 U.S. 37 (1954) (the judgment debtor had refused to post a supersedeas bond or to comply with reasonable orders designed to safeguard the value of the judgment pending decision on appeal).

[929] Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).

[930] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[931] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (finding sufficient constraints on jury discretion in jury instructions and in post-verdict review). *See also* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[932] BMW v. Gore, 517 U.S. 559 (1996) (holding that a $2 million judgement for failing to disclose to a purchaser that a "new" car had been repainted was "grossly excessive" in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state). *But see* TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).

[933] BMW v. Gore, 517 U.S. at 574–75 (1996)

may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.[934]

Thus, where a receiver for property is appointed 13 years after the disappearanceof the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property after an interval of only one year after such appointment.[935] When a State, by law, suddenly prohibits all actions to contest tax deeds which have been of record for two years unless they are brought within six months after its passage, no unconstitutional deprivation is effected.[936] No less valid is a statute which provides that when a person has been in possession of wild lands under a recorded deed continuously for 20 years and had paid taxes thereon during the same, and the former owner in that interval pays nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.[937] Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.[938]

Moreover, a State may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. Thus, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation . . . [is not] a vested right," such as is protected by the Constitution. Accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a

[934] Wheeler v. Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 156 (1911). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

[935] Blinn v. Nelson, 222 U.S. 1 (1911).

[936] Turner v. New York, 168 U.S. 90, 94 (1897).

[937] Soper v. Lawrence Brothers, 201 U.S. 359 (1906). Nor is a former owner who had not been in possession for five years after and fifteen years before said enactment thereby deprived of any property without due process.

[938] Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).

child for the use of her property,[939] or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[940] or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.[941]

However, for suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.[942] Also unconstitutional is the application of a statute of limitation to extend a period that parties to a contract have agreed should limit their right to remedies under the contract. "When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired" unconstitutionally imposes a burden in excess of that contracted.[943]

***Burden of Proof and Presumptions***.—It is clearly within the domain of the legislative branch of government to establish presumptions and rules respecting burden of proof in litigation.[944] Nonetheless, the Due Process Clause does prevent the deprivation of liberty or property upon application of a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[945]

Applying the formula it has worked out for determining what process is due in a particular situation,[946] the Court has held that a standard at least as stringent as clear and convincing evidence

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[939] Campbell v. Holt, 115 U.S. 620, 623, 628 (1885).

[940] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[941] Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945).

[942] Campbell v. Holt, 115 U.S. 620, 623 (1885). *See also* Stewart v. Keyes, 295 U.S. 403, 417 (1935).

[943] Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930).

[944] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Co. v. Harry, 273 U.S. 119, 124 (1927). Congress' power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. Vance v. Terrazas, 444 U.S. 252, 264–67 (1980); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has determined the evidentiary standard in certain statutory actions. Nishikawa v. Dulles, 356 U.S. 129 (1958); Woodby v. INS, 385 U.S. 276 (1966).

[945] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970) (Justice Harlan concurring)).

[946] Mathews v. Eldridge, 424 U.S. 319 (1976).

is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.[947] Similarly, because the interest of parents in retaining custody of their children is fundamental, the State may not terminate parental rights through reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove that the parents are unfit by clear and convincing evidence.[948] Further, unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.[949]

As long as a presumption is not unreasonable and is not conclusive, it does not violate the Due Process Clause. Legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property, however, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.[950] On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact will be sustained.[951]

For a brief period, the Court utilized what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment based on presumed characteristics based on the existence of another characteristic.[952]

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[947] Addington v. Texas, 441 U.S. 418 (1979).

[948] Santosky v. Kramer, 455 U.S. 745 (1982). Four Justices dissented, arguing that considered as a whole the statutory scheme comported with due process. Id. at 770 (Justices Rehnquist, White, O'Connor, and Chief Justice Burger). Application of the traditional preponderance of the evidence standard is permissible in paternity actions. Rivera v. Minnich, 483 U.S. 574 (1987).

[949] Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit parents). *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (statutory presumption of legitimacy accorded to a child born to a married woman living with her husband defeats the right of the child's biological father to establish paternity

[950] Presumptions were voided in Bailey v. Alabama, 219 U.S. 219 (1911) (anyone breaching personal services contract guilty of fraud); Manley v. Georgia, 279 U.S. 1 (1929) (every bank insolvency deemed fraudulent); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929) (collision between train and auto at grade crossing constitutes negligence by railway company); Carella v. California, 491 U.S. 263 (1989) (conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle).

[951] Presumptions sustained include Hawker v. New York, 170 U.S. 189 (1898) (person convicted of felony unfit to practice medicine); Hawes v. Georgia, 258 U.S. 1 (1922) (person occupying property presumed to have knowledge of still found on property); Bandini Co. v. Superior Court, 284 U.S. 8 (1931) (release of natural gas into the air from well presumed wasteful); Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) (rebuttable presumption of railroad negligence for accident at grade crossing). *See also* Morrison v. California, 291 U.S. 82 (1934).

[952] The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. Schlesinger v. Wisconsin,

Thus, in *Stanley v. Illinois*,[953] the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.[954]

Major controversy developed over the application of "irrebuttable presumption doctrine" in benefits cases. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the State to presume conclusively that because the legal address of a student was outside the State at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The due process clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.[955]

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[956] The rule which emerged for subjecting persons to detriment or qualifying them for benefits was that the legislature may not presume the existence of the decisive characteristic upon a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the equal protection clause or to the due process clause in judging the

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270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate's right to prove gift was not made in contemplation of death); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

[953] 405 U.S. 645 (1972).

[954] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[955] Vlandis v. Kline, 412 U.S. 441 (1973).

[956] Department of Agriculture v. Murry, 413 U.S. 508 (1973).

validity of certain classifications,[957] and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Utilization of the doctrine was curbed if not halted, however, in *Weinberger v. Salfi*,[958] in which the Court upheld the validity of a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse. Purporting to approve but to distinguish the prior cases in the line,[959] the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[960] Extensions of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."[961] Whether the Court will now limit the doctrine to the detriment area only, exclusive of benefit programs, whether it will limit it to those areas which involve fundamental rights or suspect classifications (in the equal protection sense of those expressions)[962] orwhether it will simply permit the doctrine to pass from the scene remains unsettled, but it is noteworthy that it now rarely appears on the Court's docket.[963]

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[957] Thus, on the some day Murry was decided, a similar food stamp qualification was struck down on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[958] 422 U.S. 749 (1975).

[959] *Stanley* and *LaFleur* were distinguished as involving fundamental rights of family and childbearing, 422 U.S. at 771, and *Murry* was distinguished as involving an irrational classification. Id. at 772. *Vlandis*, said Justice Rehnquist for the Court, meant no more than that when a State fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id. at 771. *But see* id. at 802–03 (Justice Brennan dissenting).

[960] 422 U.S. at 768-70, 775-77, 785 (utilizing Dandridge v. Williams, 397 U.S. 471 (1970), Richardson v. Belcher, 404 U.S. 78 (1971), and similar cases).

[961] Weinberger v. Salfi, 422 U.S. 749, 772 (1975).

[962] *Vlandis*, which was approved but distinguished, is only marginally in this doctrinal area, involving as it does a right to travel feature, but it is like *Salfi* and *Murry* in its benefit context and order of presumption. The Court has avoided deciding whether to overrule, retain, or further limit *Vlandis*. Elkins v. Moreno, 435 U.S. 647, 658–62 (1978).

[963] In Turner v. Department of Employment Security, 423 U.S. 44 (1975), decided after *Salfi*, the Court voided under the doctrine a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. *But see* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1977) (provision granting benefits to miners "irrebuttably presumed" to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption); Califano v. Boles, 443 U.S. 282,

***Trials and Appeals***.—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the States in retaining or abolishing civil juries.[964] Thus, abolition of juries in proceedings to enforce liens,[965] mandamus[966] and quo warranto[967] actions, and in eminent domain[968] and equity[969] proceedings has been approved. States are also free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,[970] and petit juries containing eight rather than the conventional number of twelve members may be established.[971]

If a full and fair trial on the merits is provided, due process does not require a State to provide appellate review.[972] But if an appeal is afforded, the State must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.[973]

## PROCEDURAL DUE PROCESS—CRIMINAL

### Generally: The Principle of Fundamental Fairness

The Court in recent years has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law under the Fourteenth Amendment.[974] Further, the Court has held that the due process clause protects against practices and

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284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).

[964] Walker v. Sauvinet, 92 U.S. 90 (1876); New York Central R.R. v. White, 243 U.S. 188, 208 (1917).

[965] Marvin v. Trout, 199 U.S. 212, 226 (1905).

[966] In re Delgado, 140 U.S. 586, 588 (1891).

[967] Wilson v. North Carolina, 169 U.S. 586 (1898); Foster v. Kansas, 112 U.S. 201, 206 (1884).

[968] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897).

[969] Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 171 (1894).

[970] *See* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[971] *See* Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[972] Lindsey v. Normet, 405 U.S. 56, 77 (1972) (citing cases).

[973] 405 U.S. at 74-79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). *Cf.* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

[974] *See* analysis under the Bill of Rights, "Fourteenth Amendment," supra.

policies which violate precepts of fundamental fairness,[975] even if they do not violate specific guarantees of the Bill of Rights.[976] The standard query in such cases is whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government."[977]

This inquiry contains a historical component, as "recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore, the limitations imposed by the Court on the States are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the

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[975] For instance, In re Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is a due process requirement. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, *see, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state).; Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged).; Estelle v. Williams, 425 U.S. 501 (1976) (a State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances) ; Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant's sentence cannot be sustained, even if sentence falls within range of unenhanced sentences).

[976] Justice Black thought the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights. *See, e.g.*, In re Winship, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan's response, *see* id. at 372 n.5 (concurring).

[977] Twining v. New Jersey, 211 U.S. 78, 106 (1908). The question is phrased as whether a claimed right is "implicit in the concept of ordered liberty," whether it partakes "of the very essence of a scheme of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or whether it "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," Rochin v. California, 342 U.S. 165, 169 (1952).

context of the criminal processes maintained by the American States."[978]

**The Elements of Due Process**

***Initiation of the Prosecution***.—Indictment by a grand jury is not a requirement of due process; a State may proceed instead by information.[979] Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried,[980] even aside from the notice requirements of the Sixth Amendment.[981] Where, of course, a grand jury is utilized, it must be fairly constituted and free from prejudicial influences.[982]

***Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine***.—Criminal statutes which lack sufficient definiteness or specificity are commonly held "void for vagueness."[983] Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[984]

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[978] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

[979] Hurtado v. California, 110 U.S. 516 (1884). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

[980] Smith v. O'Grady, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of "burglary with explosives" carrying a much lengthier sentence voided). *See also* Cole v. Arkansas, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); In re Ruffalo, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—grounds neither covered in the statute nor listed in the charge—was invalid).

[981] See Sixth Amendment, Notice of Accusation, *supra.*

[982] Norris v. Alabama, 294 U.S. 587 (1935); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Pierre v. Louisiana, 306 U.S. 354 (1939). On prejudicial publicity, *see* Beck v. Washington, 369 U.S. 541 (1962).

[983] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[984] Musser v. Utah, 333 U.S. 95, 97 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." Id. at 97. "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with

'Men of common intelligence cannot be required to guess at the meaning of [an] enactment.' [985]

For instance, the Court voided for vagueness a criminal statute providing that a person was a "gangster" and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons." The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct. [986]

A statute may be so vague or so threatening to constitutionally-protected activity that it can be pronounced wholly unconstitutional; in other words, it is "unconstitutional on its face." [987] Thus, for instance, a unanimous Court in *Papachristou v. City of Jacksonville* [988] struck down as invalid on its face a vagrancy ordinance which punished "dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by fre-

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the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972), *quoted in* Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).

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

[986] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Edelman v. California, 344 U.S. 357 (1953).

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

[988] 405 U.S. 156 (1972).

quenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . ."[989] The ordinance was found to be facially invalid, according to Justice Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities which by modern standards are normally innocent.[990]

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.[991] For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied.[992] Thus, in *Palmer v. City of Euclid*,[993] an ordinance punishing "suspicious persons" defined as "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio,

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[989] 405 U.S. at 156 n.1. Similar concerns regarding vagrancy laws had been expressed previously. *See, e.g.*, Winters v. New York, 333 U.S. 507, 540 (1948) (Justice Frankfurter dissenting); Edelman v. California, 344 U.S. 357, 362 (1953) (Justice Black dissenting); Hicks v. District of Columbia, 383 U.S. 252 (1966) (Justice Douglas dissenting).

[990] Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (conviction under statute imposing penalty for failure to "move on" voided); Bouie v. City of Columbia, 378 U.S. 347 (1964) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so); Kolender v. Lawson, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

[991] Where the terms of a vague statute do not threaten a constitutionally protected right, and where the conduct at issue in a particular case is clearly proscribed, then a due process challenge is unlikely to be successful. Where the conduct in question is at the margins of the meaning of an unclear statute, however, it will be struck down as applied. *E.g.*, United States v. National Dairy Corp., 372 U.S. 29 (1963).

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

[993] 402 U.S. 544 (1971).

was engaging in conduct which could not reasonably be anticipated as fitting within the "without any visible or lawful business" portion of the ordinance's definition.

Loitering statutes which are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.[994] Thus, a Chicago ordinance which required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose," failed to meet the "requirement that a legislature establish minimal guidelines to govern law enforcement."[995] The Court noted that "no apparent purpose" is inherently subjective because its application depends on whether some purpose is "apparent" to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.[996] On the other hand, where such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the ticketing of a car by the police.[997]

Statutes with vague standards may nonetheless be upheld if the text of statute is interpreted by a court with sufficient clarity. Thus, the civil commitment of persons of "such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons" was upheld by the Court, based on a state court's construction of the statute as only applying to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.[998]

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, it can be said that ignorance of the law affords no excuse, or, in other instances, that the nature of the subject matter or conduct may be sufficient to

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[994] Kolender v. Lawson, 461 U.S. 352, 358 (1983).
[995] City of Chicago v. Morales, 527 U.S. 41 (1998).
[996] 527 U.S. at 62.
[997] Colten v. Kentucky, 407 U.S. 104 (1972).
[998] Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).

alert one that there are laws which must be observed.[999] On occasion the Court has even approved otherwise vague statutes because the statute forbade only "willful" violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.[1000] Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.[1001]

The question of notice has also arisen in the context of "judge-made" law. While the Ex Post Facto Clauses forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a "year and a day" in order for homicide charges to be brought in *Rogers v. Tennessee*,[1002] the question arose whether such rule could be applied to acts occurring before the court's decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court's decision was an outright reversal of existing law. Under this reasoning, the new "law" could not be applied retrospectively. The majority held, however, that only those holdings which were "unexpected and indefensible by reference to the law which had been express prior to the conduct in issue"[1003] could not be applied retroactively. The relatively archaic nature of "year and a day rule", its abandonment by most jurisdictions, and its inapplicability to modern times

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

[1000] *E.g.*, Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court have even done so when the statute did not explictly include such a *mens rea* requirement. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952).

[1001] *See, e.g.* Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In Lambert, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." Id. at 228, 229-30.

[1002] 532 U.S. 451 (2001).

[1003] Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

were all cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

***Entrapment***.—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems.[1004] Thus, in order to deter such criminal behavior, police agents may "encourage" persons to engage in criminal behavior, such as selling narcotics or contraband,[1005] or they may may seek to test the integrity of public employees, officers or public officials by offering them bribes.[1006] In such cases, an "entrapment" defense is often made, though it is unclear whether the basis for the defense is the due process clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws to find that the legislature would not have intended to punish conduct induced by police agents).[1007]

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[1004] Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, or informers may be utilized, which also has constitutional implications.

[1005] For instance, in Sorrells v. United States, 287 U.S. 435, 446–49 (1932) and Sherman v. United States, 356 U.S. 369, 380 (1958) government agents solicited defendants to engage in the illegal activity, in United States v. Russell, 411 U.S. 423, 490 (1973) the agents supplied a commonly available ingredient, and in Hampton v. United States, 425 U.S. 484, 488–89 (1976) the agents supplied an essential and difficult to obtain ingredient.

[1006] For instance, this strategy was seen in the "Abscam" congressional bribery controversy. The defense of entrapment was rejected as to all the "Abscam" defendants. *E.g.*, United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

[1007] For a thorough evaluation of the basis for and the nature of the entrapment defense, *see* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111. The Court's first discussion of the issue was based on statutory grounds, *see* Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. But, utilization of that power was rejected in United States v. Russell, 411 U.S. 423, 490 (1973), and by the plurality in Hampton, 425 U.S. at 490. The Hampton plurality thought the due process clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); Russell, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S.

The Court has employed the so-called "subjective approach" in evaluating the defense of entrapment.[1008] This subjective approach follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."[1009] If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement.[1010] On the other hand, "[w]hen the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."[1011]

***Criminal Identification Process***.—The use by police of procedures seeking to identify the perpetrators of crimes—by lineups, showups, photographic displays, and the like—can raise due process problems. When police use lineups or showups[1012] and other identification processes at which the defendant is not present,[1013]

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540 (1992) (invalidating a conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography).

[1008] An "objective approach," while rejected by the Supreme Court, has been advocated by some Justices and recommended for codification by Congress and the state legislatures. *See American Law Institute*, MODEL PENAL CODE § 2.13 (Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (Final Draft, 1971). The objective approach disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense would be available. Sorrells v. United States, 287 U.S. 435, 458–59 (1932) (separate opinion of Justice Roberts); Sherman v. United States, 356 U.S. 369, 383 (1958) (Justice Frankfurter concurring); United States v. Russell, 411 U.S. 423, 441 (1973) (Justice Stewart dissenting); Hampton v. United States, 425 U.S. 484, 496–97 (1976) (Justice Brennan dissenting).

[1009] Jacobson v. United States, 503 U.S. 540, 548-49 (1992). Here the Court held that the government had failed to prove that the defendant was initially predisposed to purchase child pornography, even though he had become so predisposed following solicitation through an undercover "sting" operation. For several years government agents had sent the defendant mailings soliciting his views on pornography and child pornography, and urging him to obtain materials in order to fight censorship and stand up for individual rights.

[1010] Sorrells v. United States, 287 U.S. 435, 451–52 (1932); Sherman v. United States, 356 U.S. 369, 376–78 (1958); Masciale v. United States, 356 U.S. 386, 388 (1958); United States v. Russell, 411 U.S. 423, 432–36 (1973); Hampton v. United States, 425 U.S. 484, 488–489 (1976) (plurality opinion), and id. at 491 (Justices Powell and Blackmun concurring).

[1011] Jacobson v. United States, 503 U.S. 540, 553-54 (1992) (pre-indictment); Stovall v. Denno, 388 U.S. 293 (1967) (post-arrest) .

[1012] Kirby v. Illinois, 406 U.S. 682 (1972).

[1013] United States v. Ash, 413 U.S. 300 (1973).

the admissibility of a subsequent in-court identification or of testimony about an out-of-court identification is whether there is "a very substantial likelihood of misidentification," and that question must be determined "on the totality of the circumstances." [1014]

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." [1015] But, balancing the factors that it thought furnished the guidance for decision, the Court declined to lay down a *per se* rule of exclusion of an identification because it was obtained under conditions of unnecessary suggestiveness alone, feeling that the fairness standard of due process does not require an evidentiary rule of such severity. [1016]

***Fair Trial***.—As noted, the provisions of the Bill of Rights now applicable to the States contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others." [1017] Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." [1018]

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[1014] Neil v. Biggers, 409 U.S. 188, 196–201 (1972); Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also* Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

[1015] Neil v. Biggers, 409 U.S. 188, 198 (1972).

[1016] Manson v. Brathwaite, 432 U.S. 98, 107–14 (1977). The possibility of a *per se* rule in post- Stovall cases had been left open in Neil v. Biggers, 409 U.S. 188, 199 (1972). In Manson, the Court evaluated what the *per se* rule and the less strict rule contributed to excluding unreliable eyewitness testimony from jury consideration, to deterrence of suggestive procedures, and to the administration of justice. Due process does not require that the in-court hearing to determine whether to exclude a witness' identification as arrived at improperly be out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).

[1017] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

[1018] Lisenba v. California, 314 U.S. 219, 236 (1941).

For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio* [1019] it was held to violate due process for a judge to receive, in addition to his salary, the costs imposed on a convicted defendant, the judge in this case also being a mayor of the municipality which received part of the money collected in fines. Or, in other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify such judge from citing and sentencing the contemnors. [1020] Due process is also violated by the participation of a biased or otherwise partial juror, although there is no presumption that all jurors with a potential bias are in fact prejudiced. [1021]

Public hostility toward a defendant which intimidates a jury is, or course, a classic due process violation. [1022] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they

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[1019] 273 U.S. 510 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972). *But see* Dugan v. Ohio, 277 U.S. 61 (1928). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

[1020] Mayberry v. Pennsylvania, 400 U.S. 455 (1971) ( . . . it is generally wise where the marks of unseemly conduct have left persons stings [for a judge] to ask a fellow judge to take his place); Taylor v. Hayes, 418 U.S. 488, 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) ("[w]e cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority"). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955).

[1021] Ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162, 167–72 (1950) (government employees on jury). But, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on *voir dire* asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. Mu'Min v. Virginia, 500 U.S. 415 (1991). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury's attention to the defendant's prior criminal record, if the jury has been given a sentencing function to increase the sentence which would otherwise be given under a recidivist statute. Spencer v. Texas, 385 U.S. 554 (1967). For discussion of the requirements of jury impartiality about capital punishment, *see* discussion under Sixth Amendment, *supra*.

[1022] Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[1023] For instance, the impact of televising trials on a jury has been a source of some concern.[1024]

The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions need to be made based on the totality of the circumstance surrounding such procedures.[1025] For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding

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[1023] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); *But see* Stroble v. California, 343 U.S. 181 (1952); Murphy v. Florida, 421 U.S. 794 (1975).

[1024] Initially, the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that Estes had established a *per se* constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court's position. Id. at 570–74.

[1025] For instance, the presumption of innocence has been central to a number of Supreme Court cases. Thus, under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, even though the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case, Kentucky v. Whorton, 441 U.S. 786 (1979), (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in Taylor included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event State would not have carried its burden of proving guilt). *And see* Cupp v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1973). For other cases applying Sandstrom, *see* Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase Sandstrom error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (Sandstrom error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

all hypnotically refreshed testimony.[1026] Or, while a State may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the State give defendant pretrial notice of its rebuttal evidence on the alibi issue.[1027] Due process is also violated when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[1028]

The combination of otherwise acceptable rules of criminal trials may in some instances deny a defendant due process. Thus, based on the particular circumstance of a case, two rules that (1) denied defendant the right to cross-examine his own witness in order to elicit evidence exculpatory to defendant[1029] and (2) denied defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, denied defendant his constitutional right to present his own defense in a meaningful way.[1030] Similarly, a questionable procedure may be saved by its combination with another. Thus, it does not deny a defendant due process to subject him initially to trial before a non-lawyer police court judge when there is a later trial *de novo* available under the State's court system.[1031]

***Prosecutorial Misconduct***.—When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . .

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[1026] Rock v. Arkansas, 483 U.S. 44 (1987).

[1027] Wardius v. Oregon, 412 U.S. 470 (1973).

[1028] Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied *habeas* relief, however, because of failure to object at trial. *But cf.* Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation).

[1029] The defendant called the witness because the prosecution would not.

[1030] Chambers v. Mississippi, 410 U.S. 284 (1973). *See also* Davis v. Alaska, 415 U.S. 308 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession). *But see* Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of *mens rea*).

[1031] North v. Russell, 427 U.S. 328 (1976).

is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[1032]

The above quoted language was dictum in the case in which it was set forth,[1033] but the principle enunciated has required state officials to controvert allegations that knowingly false testimony had been used to convict[1034] and has upset convictions found to have been so procured.[1035] Extending the principle, the Court in *Miller v. Pate*[1036] overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a *habeas corpus* proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact blood-stained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial.[1037] In *Brady v. Maryland*,[1038] the Court held "that the

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[1032] Mooney v. Holahan, 294 U.S. 103, 112 (1935).

[1033] The Court dismissed the petitioner's suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in Ex parte Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937), *cert. denied* 305 U.S. 598 (1938).

[1034] Pyle v. Kansas, 317 U.S. 213 (1942); White v. Ragen, 324 U.S. 760 (1945). *See also* New York ex rel. Whitman v. Wilson, 318 U.S. 688 (1943); Ex parte Hawk, 321 U.S. 114 (1914). *But see* Hysler v. Florida, 315 U.S. 411 (1942); Lisenba v. California, 314 U.S. 219 (1941).

[1035] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). In the former case, the principal prosecution witness was defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. *See also* Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the *habeas corpus* hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? *Cf.* Durley v. Mayo, 351 U.S. 277 (1956). *But see* Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).

[1036] 386 U.S. 1 (1967).

[1037] It should be noted that the obligations discussed below regarding a prosecutor's obligation to provide information to a defendant do not appear to apply where the defendant has agreed to plead guilty, even though such information might have affected a defendant's decision as to whether to accept a plea bargain. United States v. Ruiz, 122 S. Ct. 2450 (2002).

[1038] 373 U.S. 83, 87 (1963). In Jencks v. United States, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder.[1039] "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."[1040]

In *United States v. Agurs*,[1041] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[1042] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[1043] Third (the new law created in *Agurs*), if the defense did not make a request at all, or simply asked for "all *Brady* material"

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the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. *Cf.* Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

[1039] While the state court in Brady had allowed a partial retrial so that the accomplice's confession could be considered in the jury's determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant's appeal of this latter decisions was rejected, as the issue, as seen by the Court, was whether the state court could have excluded the defendant's confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

[1040] Moore v. Illinois 408 U.S. 786, 794–95 (1972) (finding Brady inapplicable because the evidence withheld was not material and not exculpatory). Joining Justice Blackmun's opinion were Justices Brennan, White, Rehnquist, and Chief Justice Burger. Dissenting were Justices Douglas, Stewart, Marshall, and Powell. Id. at 800. *See also* Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no Due Process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The beginning in Brady toward a general requirement of criminal discovery was not carried forward. *See* the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967).

[1041] 427 U.S. 97 (1976).

[1042] 427 U.S. at 103-04. This situation is the Mooney v. Holohan type of case.

[1043] 427 U.S. at 104-06. This the Brady situation.

or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence; if the prosecutor does not reveal it, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt. [1044]

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a *Brady* inquiry by requiring a reviewing court to establish the appropriate level of materiality by classifying the situation under which the exculpating information was withheld. Secondly, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issues in *United States v. Bagley* [1045] .

In *Bagley*, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. [1046] This materiality standard, found in contexts outside of *Brady* inquiries, [1047] is applied not only to exculpatory material, but also to material which would be relevant to the impeachment of witnesses. [1048] Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result. [1049]

***Proof, Burden of Proof, and Presumptions***.—In 1970, the Court held in *In re Winship* that the due process clauses of the Fifth and Fourteenth Amendments "[protect] the accused against

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[1044] 427 U.S. at 106-14. This was the *Agurs* fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples which have been utilized in a breath-analysis test; the *Agurs* materiality standard is met only by evidence which "possess[es] an exculpatory value . . . apparent before [it] was destroyed, and also [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police).

[1045] 473 U.S. 667 (1985).

[1046] 473 U.S. at 682.

[1047] *See* United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (incompetence of counsel).

[1048] 473 U.S. at 676-77.

[1049] Strickler v. Greene, 527 U.S. 263 (1999).

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[1050] "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[1051] In many past cases, this standard was assumed to be the required one,[1052] but because it was so widely accepted only recently has the Court had the opportunity to pronounce it guaranteed by due process.[1053] The presumption of innocence is valuable in assuring defendants a fair trial,[1054] and it operates to ensure that the jury considers the case solely on the evidence.[1055]

The Court had long held that, under the due process clause, it would set aside convictions that are supported by no evidence at all.[1056] The *Winship* case, however, necessitated a consideration of

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[1050] In re Winship, 397 U.S. 358, 364 (1970). *See also* Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt).

[1051] 397 U.S. at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). Justice Harlan's Winship concurrence, id. at 368, proceeded on the basis that inasmuch as there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard.

[1052] Miles v. United States, 103 U.S. 304, 312 (1881); Davis v. United States, 160 U.S. 469, 488 (1895); Holt v. United States, 218 U.S. 245, 253 (1910); Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

[1053] In addition to *Winship*, *see also* Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979). On the interrelated concepts of the burden of the prosecution to prove guilt beyond a reasonable doubt and defendant's entitlement to a presumption of innocence, *see* Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979).

[1054] *E.g.*, Deutch v. United States, 367 U.S. 456, 471 (1961). *See also* Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring "a moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). *But see* Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.)

[1055] Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897). These cases overturned Coffin v. United States, 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

[1056] Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962); Barr v. City of Co-

whether reviewing courts should weigh the sufficiency of trial evidence. Thus, in *Jackson v. Virginia*,[1057] it held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1058]

Inasmuch as due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, the Court held in *Mullaney v. Wilbur*[1059] that it was unconstitutional to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. The Court indicated that a balancing of interests test was to be employed to determine when the due process clause required the prosecution to carry the burden and when some part of the burden might be shifted to the defendant, but the decision called into question the practice in many States under which some burdens of persuasion were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion, a significant and weighty task given the large numbers of affirmative defenses.

The Court, however, summarily rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense,[1060] and later, in *Patterson v. New York*,[1061] upheld a state statute that provided that required a defendant asserting "extreme

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lumbia, 378 U.S. 146 (1964); Johnson v. Florida, 391 U.S. 596 (1968). *See also* Chessman v. Teets, 354 U.S. 156 (1957).

[1057] 443 U.S. 307 (1979).

[1058] 443 U.S. at 3116, 318-19. On a somewhat related point, the Court has ruled that a general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conspiracy, but is adequate to support conviction as to another. Griffin v. United States, 112 U.S. 466 (1991).

[1059] 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979).

[1060] Rivera v. Delaware, 429 U.S. 877 (1976), dismissing as not presenting a substantial federal question an appeal from a holding that Mullaney did not prevent a State from placing on the defendant the burden of proving insanity by a preponderance of the evidence. *See* Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of Rivera). Justice Rehnquist and Chief Justice Burger concurring in Mullaney, 421 U.S. at 704, 705, had argued that the case did not require any reconsideration of the holding in Leland v. Oregon, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt.

[1061] 432 U.S. 197 (1977).

emotional disturbance" as an affirmative defense to murder [1062] to prove such by a preponderance of the evidence. According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the State to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, while allowing the defendant to prove an affirmative defense by preponderance of the evidence that would reduce the degree of the offense. [1063] This distinction has been criticized as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses. [1064]

Another important distinction which can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. While a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence" standard. The Court has taken a formalistic approach to this issue, allowing states to essentially designate which facts fall under which of these two categories. For instance, the Court has held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. [1065]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in *Apprendi*

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[1062] Proving the defense would reduce a murder offense to manslaughter.

[1063] The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense.

[1064] Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts which historically have made a substantial difference in the punishment and stigma flowing from a criminal act the State always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. Patterson was followed in Martin v. Ohio, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.

[1065] McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these type of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* discussion in "Criminal Proceedings to Which the Guarantee Applies", *supra*.

*v. New Jersey*. In *Apprendi* the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[1066] This led, in turn, to the Court overruling conflicting prior case law which had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment.[1067] These holding are subject to at least one exception, however,[1068] and the decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a "presumed fact" which is a required element of a crime, is established by another fact, the "basic fact."[1069] In *Tot v. United States*,[1070] the Court held that a statutory presumption was valid under the due process clause only if it met a "rational connection" test. In that case, the Court struck down a presumption that person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

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[1066] 530 U.S. 466, 490 (2000) (interpreting New Jersey's "hate crime" law). It should be noted that prior to its decision in *Apprendi* the Court had held that sentencing factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of McMillan was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in Harris v. United States, 122 S. Ct. 2406 (2002).

[1067] Walton v. Arizona, 497 U.S. 639 (1990) *overruled by* Ring v. Arizona, 122 S. Ct. 2428 (2002).

[1068] This limiting principle does not apply to sentencing enhancements based on recidivism. Apprendi, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[1069] *See, e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

[1070] 319 U.S. 463, 467-68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

In *Leary v. United States*,[1071] this due process test was stiffened to require that for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, a provision which permitted a jury to infer from defendant's possession of marijuana his knowledge of its illegal importation was voided. A lengthy canvass of factual materials established to the Court's satisfaction that while the greater part of marijuana consumed here is of foreign origin, there was still a good amount produced domestically and there was thus no way to assure that the majority of those possessing marijuana have any reason to know their marijuana is imported.[1072] The Court left open the question whether a presumption which survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[1073]

In its most recent case, a closely divided Court drew a further distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."[1074] But, with respect to permissive presumptions, "the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted." Thus, because the jury was told it had to believe in defendants' guilt beyond a reasonable doubt and that it could consider the inference, due process was not violated by the application of the statutory presumption that the presence of a firearm in an

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[1071] 395 U.S. 6, 36 (1969).

[1072] 395 U.S. at 37-54. While some of the reasoning in *Yee Hem*, supra, was disapproved, it was factually distinguished as involving users of "hard" narcotics.

[1073] 395 U.S. at 36 n.64. The matter was also left open in Turner v. United States, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in Barnes v. United States, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

[1074] Ulster County Court v. Allen, 442 U.S. 140, 166–67 (1979).

automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.[1075] The division of the Court in these cases and in the *Mullaney v. Wilbur* line of cases clearly shows the unsettled doctrinal nature of the issues.

***The Problem of the Incompetent or Insane Defendant or Convict***.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial.[1076] When it becomes evident during the trial that a defendant is or has become insane or incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue.[1077] Although there is no constitutional requirement that the state assume the burden of proving the defendant competent, the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process[1078]

When a State determines that a person charged with a criminal offense is incompetent to stand trial he cannot be committed indefinitely for that reason. The court's power is to commit him to a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that this is not the case, then the State must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen.[1079]

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the

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[1075] The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168 (Justices Powell, Brennan, Stewart, and Marshall). *See also* Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, to dissenting Justices O'Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering).

[1076] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)).

[1077] Pate v. Robinson, 383 U.S. 375, 378 (1966). For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, *see* Drope v. Missouri, 420 U.S. 162 (1975). Also, an indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

[1078] Medina v. California, 112 S. Ct. 2572 (1992). It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

[1079] Jackson v. Indiana, 406 U.S. 715 (1972).

person could have been sentenced if convicted.[1080] The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment."[1081] Thus, the insanity acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society."[1082] It follows, however, that a state may not indefinitely confine an insanity acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[1083]

The Court held in *Ford v. Wainwright* that the Eighth Amendment prohibits the state from executing an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process.[1084] Those minimum standards are not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.[1085]

***Guilty Pleas***.—A defendant may plead guilty instead of insisting that the prosecution prove him guilty. Often the defendant does so as part of a "plea bargain" with the prosecution, where the defendant is guaranteed a light sentence or is allowed to plead to a lesser offense.[1086] While the government may not structure its system so as to coerce a guilty plea,[1087] a guilty plea that is entered

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[1080] Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

[1081] 463 U.S. at 368.

[1082] 463 U.S. at 370.

[1083] Foucha v. Louisiana, 504 U.S. 71 (1992).

[1084] 477 U.S. 399 (1986).

[1085] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411-12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[1086] There are a number of other reasons why a defendant may be willing to plead guilty. There may be overwhelming evidence against him or his sentence after trial will be more severe than if he pleads guilty.

[1087] United States v. Jackson, 390 U.S. 570 (1968).

voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.[1088] The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[1089] and it is permissible for a prosecutor during such plea bargains to require a defendant to forego his right to go to trial in return for escaping additional charges which are likely to result in a much more severe penalty.[1090] But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[1091]

In accepting a guilty pleas, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly,[1092] and "the adjudicative element inherent in accepting a

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[1088] North Carolina v. Alford, 400 U.S. 25 (1971); Parker v. North Carolina, 397 U.S. 790 (1970). *See also* Brady v. United States, 397 U.S. 742 (1970). A guilty plea will ordinarily waive challenges to alleged unconstitutional police practices occurring prior to the plea, unless the defendant can show that the plea resulted from incompetent counsel. Tollett v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973). *But see* Blackledge v. Perry, 417 U.S. 21 (1974). The State can permit pleas of guilty in which the defendant reserves the right to raise constitutional questions on appeal, and federal *habeas* courts will honor that arrangement. Lefkowitz v. Newsome, 420 U.S. 283 (1975). Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not *per se* invalid. Town of Newton v. Rumery, 480 U.S. 386 (1987).

[1089] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[1090] Bordenkircher v. Hayes, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes, because of two prior felony convictions, would receive a mandatory life sentence if convicted. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id. at 365, 368, contending that the Court had watered down North Carolina v. Pearce, 395 U.S. 711 (1969). *See also* United States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the Government obtained a four-count felony indictment and conviction).

[1091] Blackledge v. Perry, 417 U.S. 21 (1974). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a *de novo* trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court draws between this case and Bordenkircher and Goodwin is that of pretrial conduct, in which vindictiveness is not likely, and posttrial conduct, in which vindictiveness is more likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

[1092] Boykin v. Alabama, 395 U.S. 238 (1969). In Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because

plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." [1093]

***Sentencing***.—In the absence errors by the sentencing judge, [1094] or of sentencing jurors considering invalid factors, [1095] the significance of procedural due process at sentencing is limited. [1096] In *Williams v. New York*, [1097] the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel. The

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the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id. at 645 n.13. *See also* Blackledge v. Allison, 431 U.S. 63 (1977).

[1093] Santobello v. New York, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984).

[1094] In Townsend v. Burke, 334 U.S. 736, 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

[1095] In Hicks v. Oklahoma, 447 U.S. 343 (1980), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewning v. Cunningham, 368 U.S. 443 (1962); Oyler v. Boles, 368 U.S. 448 (1962); Spencer v. Texas, 385 U.S. 554 (1967); Parke v. Raley, 506 U.S. 20 (1992).

[1096] Due process does not impose any limitation upon the sentence that a legislature may affix to any offense; that function is in the Eighth Amendment. Williams v. Oklahoma, 358 U.S. 576, 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915). On recidivist statutes, *see* Graham v. West Virginia, 224 U.S. 616, 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980).

[1097] 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959).

Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material. Further, disclosure of such information to the defense could well dry up sources which feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In *Gardner v. Florida*,[1098] however, the Court limited the application of *Williams* to capital cases.[1099]

In *United States v. Grayson*,[1100] a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his *belief* that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. the Court declared that under the current scheme of individualized indeterminate sentencing, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation; defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[1101]

There are various sentencing proceedings, however, which so implicate substantial rights that additional procedural protections are required.[1102] Thus, in *Specht v. Patterson*,[1103] the Court consid-

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[1098] 430 U.S. 349 (1977).

[1099] In Gardner, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Justices Stevens, Stewart, and Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when Williams was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357-61. All but one of the other Justices joined the result on various other bases. Justice Brennan without elaboration thought the result was compelled by due process, id. at 364, while Justices White and Blackmun thought the result was necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

[1100] 438 U.S. 41 (1978).

[1101] 438 U.S. at 49-52. *See also* United States v. Tucker, 404 U.S. 443, 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[1102] *See, e.g.*, Kent v. United States, 383 U.S. 541, 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report which formed the basis for the court's decision. Kent was ambiguous whether it was based on statutory interpretation or constitutional analysis. In re Gault, 387 U.S. 1 (1967), however, appears to have constitutionalized the language.

[1103] 386 U.S. 605 (1967).

ered a defendant who had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statute to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. And in *Mempa v. Rhay*,[1104] the Court held that when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the convicted defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected.

Due process considerations can also come into play in sentencing if the State attempts to withhold relevant information from the jury. For instance, in *Simmons v. South Carolina*, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole.[1105] But in *Ramdass v. Angelone*,[1106] the Court refused to apply the reasoning of *Simmons* because the defendant was not technically parole ineligible at the time of sentencing.

A defendant should not be penalized for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others.[1107] If the judge does impose a longer sentence the second time, he must justify it on the

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[1104] 389 U.S. 128 (1967).

[1105] 512 U.S. 154 (1994). *See also* Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of Simmons).

[1106] 530 U.S. 156 (2000).

[1107] North Carolina v. Pearce, 395 U.S. 711 (1969). Pearce was held to be nonretroactive in Michigan v. Payne, 412 U.S. 47 (1973). When a State provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial *de novo* in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in Pearce, inasmuch as the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). *But see* Blackledge v. Perry, 417 U.S. 21 (1974), discussed supra.

record by showing, for example, the existence of new information meriting a longer sentence.[1108]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury that sentences, however, the requirement of justifying a more severe sentence upon resentencing is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence.[1109] The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.[1110]

***Corrective Process: Appeals and Other Remedies***.—"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review."[1111] This holding has been reaffirmed[1112] although the Court has also held that when a State does provide appellate process it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[1113]

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[1108] An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).

[1109] Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials. Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986).

[1110] Alabama v. Smith, 490 U.S. 794 (1989).

[1111] McKane v. Durston, 153 U.S. 684, 687 (1894). *See also* Andrews v. Swartz, 156 U.S. 272, 275 (1895); Murphy v. Massachusetts, 177 U.S. 155, 158 (1900); Reetz v. Michigan, 188 U.S. 505, 508 (1903).

[1112] Griffin v. Illinois, 351 U.S. 12, 18 (1956); id. at 21 (Justice Frankfurter concurring), 27 (dissenting opinion); Ross v. Moffitt, 417 U.S. 600 (1974).

[1113] The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956), in which it was deemed to violate both the due process and the equal protection clauses for a State to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. *See*

But it is not the case that a State is free to have no corrective process at all in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*,[1114] the Court asserted that a conviction obtained in a mob-dominated trial was contrary to due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." Consequently, it has been stated numerous times that the absence of some form of corrective process when the convicted defendant alleges a federal constitutional violation contravenes the Fourteenth Amendment,[1115] and it has been held that to burden this process, such as limiting the right to petition for *habeas corpus*, is to deny the convicted defendant his constitutional rights.[1116]

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at a place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."[1117] If a State provides a mode of redress, a defendant must first exhaust that mode, and if unsuccessful may seek relief in federal court; if there is no adequate remedy in state court, the defendant may petition a federal court for relief through a writ of *habeas corpus*.[1118]

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analysis under "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally" infra.

[1114] 237 U.S. 309, 335 (1915).

[1115] Moore v. Dempsey, 261 U.S. 86, 90, 91 (1923); Mooney v. Holohan, 294 U.S. 103, 113 (1935); New York ex rel. Whitman v. Wilson, 318 U.S. 688, 690 (1943); Young v. Ragan, 337 U.S. 235, 238–39 (1949).

[1116] Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).

[1117] Carter v. Illinois, 329 U.S. 173, 175–76 (1946).

[1118] Note that in Case v. Nebraska, 381 U.S. 336 (1965), the Court had taken for review a case which raised the issue whether a State could simply omit any corrective process for hearing and determining claims of federal constitutional viola-

When appellate or other corrective process is made available, inasmuch as it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny for any alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court's sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law.[1119] But in *Moore v. Dempsey*,[1120] while insisting that it was not departing from precedent, the Court directed a federal district court in which petitioners had sought a writ of *habeas corpus* to make an independent investigation of the facts alleged by the petitioners—mob domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, *Moore* marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality, and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in *Brown v. Mississippi*[1121] and now taken for granted.

***Rights of Prisoners***.—Until relatively recently the view prevailed that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[1122] This view is not now the law, and may never have been wholly correct.[1123] In 1948 the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights";[1124] "many," indicated less than "all," and it was clear that the due process and equal protection clauses to some extent do apply to prisoners.[1125] More direct acknowledgment of constitutional protection came in 1972: "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are

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tions, but it dismissed the case when the State in the interim enacted provisions for such process.

[1119] Frank v. Mangum, 237 U.S. 309 (1915).

[1120] 261 U.S. 86 (1923).

[1121] 297 U.S. 278 (1936).

[1122] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[1123] *Cf.* In re Bonner, 151 U.S. 242 (1894).

[1124] Price v. Johnston, 334 U.S. 266, 285 (1948).

[1125] "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances . . . ." [1126] However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems. [1127]

Save for challenges to conditions of confinement of pretrial detainees, [1128] the Court has generally treated challenges to prison conditions as a whole under the cruel and unusual punishments clause of the Eighth Amendment, [1129] while challenges to particular incidents and practices are pursued under the due process clause [1130] or more specific provisions, such as the First Amendment speech and religion clauses. [1131] Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline. [1132] They have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints, [1133]

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[1126] Cruz v. Beto, 405 U.S. 319, 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (invalidating state prison mail censorship regulations).

[1127] Bell v. Wolfish, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337, 347, 351–352 (1981).

[1128] Bell v. Wolfish, 441 U.S. 520 (1979). Persons not yet convicted of a crime may be detained by government upon the appropriate determination of probable cause and the detention may be effectuated through subjection of the prisoner to the restrictions and conditions of the detention facility. But a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Therefore, unconvicted detainees may not be subjected to conditions and restrictions that amount to punishment. However, the Court limited its concept of punishment to practices intentionally inflicted by prison authorities and to practices which were arbitrary or purposeless and unrelated to legitimate institutional objectives.

[1129] *See* "Prisons and Punishment," supra.

[1130] *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, 425 U.S. 308 (1976); Vitek v. Jones, 445 U.S. 480 (1980); Washington v. Harper, 494 U.S. 210 (1990) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[1131] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977). On religious practices and ceremonies, *see* Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319 (1972).

[1132] Lee v. Washington, 390 U.S. 333 (1968).

[1133] Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim.

and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.[1134] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration.

In *Turner v. Safley*,[1135] the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[1136] Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests unreasonableness.[1137]

Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions," hence a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches designed to root out weapons, drugs, and other contraband.[1138] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.[1139] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[1140] Due process is not impli-

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*See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the State "enable [a] prisoner to discover grievances, and to litigate effectively").

[1134] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973).

[1135] 482 U.S. 78 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child).

[1136] 482 U.S. at 89.

[1137] 482 U.S. at 91.

[1138] Hudson v. Palmer, 468 U.S. 517, 526 (1984); Block v. Rutherford, 468 U.S. 576 (1984) (holding also that prison security needs support a rule prohibiting pretrial detainees contact visits with spouses, children, relatives, and friends).

[1139] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[1140] Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not "unauthorized").

cated at all by negligent deprivation of life, liberty, or property by prison officials.[1141]

In *Wolff v. McDonnell*,[1142] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a defendant is not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances.[1143] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. The Court held in *Wolff* that the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the action taken; also, the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests.[1144] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose.[1145] Revocation of good time credits, the Court later ruled, must be supported

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[1141] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[1142] 418 U.S. 539 (1974).

[1143] 418 U.S. at 557. This analysis, of course tracks the interest analysis discussed under "The Interests Protected: Entitlements and Positivist Recognition," supra.

[1144] However, the Court later ruled, reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).

[1145] 418 U.S. at 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496–97 (1980), and id. at 497–500 (Justice Powell concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[1146]

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Since the State had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[1147] The same principles govern interstate prison transfers.[1148] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must be preceded by a hearing for two alternative reasons. First, the statute gave the inmate a liberty interest since it presumed he would not be moved absent a finding he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[1149]

What *kind* of a hearing is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in *Washington v. Harper*.[1150] There the Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

***Probation and Parole***.—Sometimes convicted defendants are not sentenced to jail, but instead are placed on probation subject to incarceration upon violation of the conditions which are imposed; others who are jailed may subsequently qualify for release on pa-

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[1146] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

[1147] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[1148] Olim v. Wakinekona, 461 U.S. 238 (1983).

[1149] Vitek v. Jones, 445 U.S. 480 (1980).

[1150] 494 U.S. 210 (1990).

role before completing their sentence, and are subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the governmental authority,[1151] it was long assumed that the administrators of the systems did not have to accord procedural due process either in the granting stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa v. Rhay*,[1152] the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed which indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he was entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer*[1153] a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal."[1154] What process is due, then, turned upon the State's interests. Its principal interest was that having once convicted a defendant, imprisoned him, and released him for rehabilitation purposes at some risk, it should "be able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." But the State has no interest in revoking parole without some informal procedural guarantees, inasmuch as this will not interfere with its reasonable interest.[1155]

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[1151] Ughbanks v. Armstrong, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In Escoe v. Zerbst, 295 U.S. 490 (1935), the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process. Then-Judge Burger in Hyser v. Reed, 318 F. 2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

[1152] 389 U.S. 128 (1967).

[1153] 408 U.S. 471 (1972).

[1154] 408 U.S. at 480, 482.

[1155] 408 U.S. at 483-84.

Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though he need not be a judicial officer. The parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his own behalf and produce other evidence, and he should be allowed to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed. Also, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.[1156]

Prior to the final decision on revocation, there should be a more formal revocation hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the States to develop but the Court specified minimum requirements of due process. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole."[1157] Ordinarily the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[1158] but a sentencing court must consider such alternatives if the probation

[1156] 408 U.S. at 484-87.

[1157] 408 U.S. at 487-89.

[1158] Black v. Romano, 471 U.S. 606 (1985).

violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[1159]

The Court has applied a flexible due process standard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The State should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[1160]

With respect to the granting of parole, the Court's analysis of the due process clause's meaning in *Greenholtz v. Nebraska Penal Inmates*[1161] is much more problematical. The theory was rejected that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,[1162] and the full panoply of due process guarantees is not required.[1163] Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expect-

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[1159] Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[1160] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[1161] 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id. at 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id. at 22.

[1162] Following *Greenholtz*, the Court held in Board of Pardons v. Allen, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner "shall" be released upon certain findings by a parole board.

[1163] The Court in Greenholtz held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. This goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due.

ancy. The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.[1164]

***The Problem of the Juvenile Offender***.—All of the States of the Union and the District of Columbia make provision for dealing with juvenile offenders outside of the criminal system for adult offenders.[1165] These juvenile justice systems apply both to offenses that would be criminal if committed by an adult and to delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, deportment endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of this century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment, and offering the theory that the state was acting as *parens patriae* for the juvenile offender and was in no sense his adversary.[1166]

Disillusionment with the results of juvenile reforms coupled with judicial emphasis on constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in *In re Gault*[1167] that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the proc-

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[1164] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Jago v. Van Curen, 454 U.S. 14 (1981). The former case involved not parole but commutation of a life sentence, commutation being necessary to become eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had their sentences commuted were promptly paroled. In *Van Curen*, the Court made express what had been implicit in Dumschat; the "mutually explicit understandings" concept under which some property interests are found protected does not apply to liberty interests. *Van Curen* is also interesting because there the parole board had granted the petition for parole but within days revoked it before the prisoner was released, upon being told that he had lied at the hearing before the board.

[1165] For analysis of the state laws as well as application of constitutional principles to juveniles, *see* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 1989).

[1166] *In re* Gault, 387 U.S. 1, 12–29 (1967).

[1167] 387 U.S. 1 (1967).

ess—but that the consequences of the absence of due process standards made their application necessary.[1168]

Thus, the Court in *Gault* required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which the juvenile could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination.[1169] It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in *Gault*.[1170] Subsequently, it was held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult,[1171] but still later the Court held that jury trials were not constitutionally required in juvenile trials.[1172]

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[1168] "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 27-28.

[1169] 387 U.S. at 31-35. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78.

[1170] Kent v. United States, 383 U.S. 541 (1966), noted on this point in *In re* Gault, 387 U.S. 1, 30–31 (1967).

[1171] *In re* Winship, 397 U.S. 358 (1970). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in Gault. "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court." Id. at 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id. at 377.

[1172] McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion was concurred in by a majority of the Justices. Justice Blackmun's opinion of the Court, which was

On a few occasions the Court has considered whether rights accorded to adults during investigation of crime are to be accorded juveniles. In one such case the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but indicated as well that a juvenile's waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach "permits—indeed it mandates—inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him . . . ." [1173] In another case the Court ruled that, while the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate. [1174] Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities. [1175]

The Court ruled in *Schall v. Martin* [1176] that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous

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joined by Chief Justice Burger and Justices Stewart and White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so that jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair factfinding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. Id. at 551. Justice Brennan concurred in one case and dissented in another because in his view open proceedings would operate to protect juveniles from oppression in much the same way as a jury would. Id. at 553. Justice Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. Id. at 557. Justices Douglas, Black, and Marshall dissented. Id. at 557.

[1173] Fare v. Michael C., 442 U.S. 707, 725 (1979).

[1174] New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the search of a student's purse to determine whether the student possessed cigarettes in violation of schoool rule; evidence of drug activity held admissible in a prosecution under the juvenile laws).

[1175] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9.

[1176] 467 U.S. 253 (1984).

and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of "serious risk" that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

Each state has a procedure by which juveniles may be tried as adults.[1177] With the Court having clarified the consitutional requirements for imposition of capital punishment, it was only a matter of time before the Court would have to determine whether states may subject juveniles to capital punishment. In *Stanford v. Kentucky*,[1178] the Court held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17; earlier the Court had invalidated a statutory scheme permitting capital punishment for crimes committed before age 16.[1179] In weighing validity under the Eighth Amendment, the Court has looked to state practice to determine whether a consensus against execution exists.[1180] Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is non-criminal delinquent behavior.

***The Problem of Civil Commitment***.—As is the case with juvenile offenders, several other classes of persons are subject to confinement by court processes deemed civil rather than criminal. Within this category of "protective commitment" are involuntary commitments for treatment of insanity and other degrees of mental incompetence, retardation, alcoholism, narcotics addiction, sexual psychopathy, and the like. Inasmuch as the deprivation of liberty is as severe as that experienced by juveniles adjudged delinquent, can be accompanied with harm to reputation, it is surprising that the Court has only recently dealt with the issue.[1181]

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[1177] *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, ch. 4, "Waiver of Jurisdiction" (2d ed. 1989).

[1178] 492 U.S. 361 (1989).

[1179] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[1180] *See* analysis of Eighth Amendment principles, under "Capital Punishment," supra.

[1181] Only in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), did the Court earlier approach consideration of the problem. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Lynch v. Overholser, 369 U.S. 705 (1962); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); McNeil v. Director, 407 U.S. 245 (1972). *Cf.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

In *O'Connor v. Donaldson*,[1182] the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[1183] The trial jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined.[1184] Left to another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness"[1185] and the right, if any, to receive treatment for the confined person's illness. To conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful postdeprivation remedy can cure the due process violation.[1186]

Procedurally, it is clear that an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment.

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[1182] 422 U.S. 563 (1975). The Court bypassed "the difficult issues of constitutional law" raised by the lower courts' resolution of the case, that is, the right to treatment of the involuntarily committed, discussed under "Liberty Interests of Retarded and Mentally Ill: Commitment and Treatment," supra.

[1183] 422 U.S. at 576.

[1184] 422 U.S. at 576-77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[1185] O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[1186] Zinermon v. Burch, 494 U.S. 113 (1990).

The Court therefore imposed a standard of "clear and convincing" evidence.[1187]

Difficult questions of what due process may require in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the State when such children are wards of the State were confronted in *Parham v. J.R.*[1188] Under the challenged laws there were no formal preadmission hearings, but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.[1189] Similarly, the same concerns, reflected in the statutory obligation of the State to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the Government.[1190] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[1191]

## EQUAL PROTECTION OF THE LAWS

### Scope and Application

***State Action***.—"[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[1192] The Amendment by its express terms provides that "[n]o

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[1187] Addington v. Texas, 441 U.S. 418 (1979). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[1188] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[1189] 442 U.S. at 598-617. The dissenters agreed on this point. Id. at 626–37.

[1190] 442 U.S. at 617-20. The dissenters would have required a preconfinement hearing. Id. at 637–38.

[1191] 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.

[1192] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Similarly, the due process clause of the Fifth Amendment, with its equal protection component, limits only federal governmental action and not that of private parties, as is true of each of the provisions of the Bill of Rights. The scope and reach of the "state action" doctrine is thus

State . . .” and “nor shall any State . . .” engage in the proscribed conduct. “It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.” [1193] While the state action doctrine is equally applicable to denials of privileges or immunities, due process, and equal protection, it is actually only with the last great right of the Fourteenth Amendment that the doctrine is invariably associated. [1194]

“The vital requirement is State responsibility,” Justice Frankfurter once wrote, “that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme” to deny protected rights. [1195] Certainly, state legislation commanding a discriminatory result is state action condemned by the first section of the Fourteenth Amendment, and is void. [1196] But the difficulty for the Court has begun when the conduct complained of is not so clearly the action of a State but is, perhaps, the action of a minor state official not authorized or perhaps forbidden by state law so to act, or is, perhaps on the other hand, the action of a private party who nonetheless has some relationship with governmental authority.

The continuum of state action ranges from obvious legislated denial of equal protection to private action that is no longer so sig-

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the same whether a State or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[1193] Civil Rights Cases, 109 U.S. 3, 11 (1883). With regard to the principal issue in this decision, the limitation of the state action requirement on Congress' enforcement powers, *see* “State Action,” infra.

[1194] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the due process clause. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

[1195] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring). The Justice was speaking of the state action requirement of the Fifteenth Amendment. The Nineteenth and Twenty-sixth Amendments also hinge on state action; the Thirteenth Amendment, banning slavery and involuntary servitude, does not.

[1196] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in Brown v. Board of Education, 347 U.S. 483 (1954). *And see* Peterson v. City of Greenville, 373 U.S. 244 (1963), holding that trespass convictions of African Americans “sitting-in” at a lunch counter over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

nificantly related to state action that the Amendment applies. The prohibitions of the Amendment "have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." [1197]

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." [1198] That the doctrine serves certain values and disserves others is not a criticism of it but a recognition that in formulating and applying the several tests by which the presence of "state action" is discerned, [1199] the Court has considerable discretion and the weights of the opposing values and interests will lead to substantially different applications of the tests. Thus, following the Civil War, when the Court sought to reassert federalism values, it imposed a rather rigid state action standard. During the civil rights movement of the 1950s and 1960s, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As

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[1197] Ex parte Virginia, 100 U.S. 339, 346–47 (1880).

[1198] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).

[1199] "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original *Brown* cases and subsequent ones arose in the context of statutorily mandated separation of the races and occasioned therefore no controversy in finding state action.[1200] The aftermath in the South involved not so much state action as the determination of the remedies necessary to achieve a unitary system.[1201] But if racial segregation is not the result of state action in some aspect, then its existence is not subject to constitutional remedy.[1202] Distinguishing between the two situations has occasioned much controversy.

Confronting in a case arising from Denver, Colorado, the issue of a school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that racial segregation caused by "intentionally segregative school board actions" is *de jure* and not *de facto*, just as if it had been mandated by statute. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[1203] Where it is proved that a meaningful portion of a school system is segregated as a result of official action, the official agency must bear the burden of proving that other school segregation within the system is adventitious and not the result of official action. It is not the responsibility of complainants to show that each school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan.[1204] Moreover, the Court has also apparently adopted a rule to the effect that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can be said to have devolved upon the agency at that earlier point so that its subsequent actions can be held to a standard of having promoted desegregation or of not having promoted it, so that facially neutral or ambiguous school board policies

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[1200] Brown v. Board of Education, 347 U.S. 483 (1954).

[1201] *See* "Brown's Aftermath," supra.

[1202] *Compare* Washington v. Seattle School Dist., 458 U.S. 457 (1982), *with* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

[1203] Keyes v. Denver School District, 413 U.S. 189, 208 (1973) (emphasis by Court). *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979).

[1204] 413 U.S. at 208-13. The continuing validity of the Keyes shifting-of-the-burden principle, after Washington v. Davis, 426 U.S. 229 (1976), and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), was asserted in Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455–458 & n.7, 467–68 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 540–42 (1979).

can form the basis for a judicial finding of intentional discrimination.[1205]

Different results, however, follow when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation."[1206] The *de jure*/ *de facto* distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the State. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded African Americans from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge's action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner.[1207] The fact that the "state action" category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in *Yick Wo v. Hopkins*,[1208] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action nonattributable to the State for purposes of the Fourteenth Amendment.[1209] "Misuse of power, pos-

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[1205] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–61 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–40 (1979).

[1206] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[1207] Ex parte Virginia, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935), state and local election officials, United States v. Classic, 313 U.S. 299 (1941), and law enforcement officials. Griffin v. Maryland, 378 U.S. 130 (1964); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). One need not be an employee of the State to act "under color of" state law; he may merely participate in an act with state officers. United States v. Price, 383 U.S. 787 (1966).

[1208] 118 U.S. 356 (1886).

[1209] Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). *See also* United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in Iowa-Des Moines

sessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[1210] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of "custom"[1211] or through hortatory admonitions by public officials to private parties to act in a discriminatory manner,[1212] the action is state action. When a State clothes a private party with official authority, he may not engage in conduct forbidden the State.[1213]

Beyond this point the discriminatory intent is that of a private individual and the question is whether a State has encouraged the effort or has impermissibly aided it.[1214] Of notable importance and a subject of controversy since it was decided is *Shelley v. Kraemer*.[1215] There, property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by white sellers to black buyers. The covenants standing alone, Chief Justice Vinson said, violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, that was not all. "These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."[1216] Establishing that the precedents

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Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that for purposes of being amenable to suit in federal court, however, the immunity of the States does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. Ex parte Young, 209 U.S. 123 (1908). *Cf.* Screws v. United States, 325 U.S. at 147–48.

[1210] United States v. Classic, 313 U.S. 299, 326 (1941).

[1211] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[1212] Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance mandated segregation at lunch counters but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing policy of separation. Thus, the conviction of African Americans for trespass because they refused to leave a segregated lunch counter was voided.

[1213] Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertainment ground was also deputy sheriff; he could not execute the racially discriminatory policies of his private employer. *See also* Williams v. United States, 341 U.S. 97 (1951).

[1214] Examples already alluded to include Lombard v. Louisiana, 373 U.S. 267 (1963), in which certain officials had advocated continued segregation, Peterson v. City of Greenville, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and Robinson v. Florida, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establishment serving both races.

[1215] 334 U.S. 1 (1948).

[1216] 334 U.S. at 13-14.

were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."

"These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." [1217]

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the State, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the State in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by *Shelley* left this issue unanswered. [1218] But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules. [1219] It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus,

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[1217] 334 U.S. at 19. In Hurd v. Hodge, 334 U.S. 24 (1948), the Court outlawed judicial enforcement of restrictive covenants in the District of Columbia as violative of civil rights legislation and public policy. Barrows v. Jackson, 346 U.S. 249 (1953), held that damage actions for violations of racially restrictive covenants would not be judicially entertained.

[1218] Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W. 2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), *rehearing granted, judgment vacated & certiorari dismissed*, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with* id. at 326 (Justices Black, Harlan, and White dissenting).

[1219] In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and Court imposed varying limiting rules on such rules of law. *See* id. at 265 (finding state action). Similarly, in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. Id. at 916 n.51.

in *Evans v. Abney*,[1220] a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park should never be used by African Americans, ruled that the city could not operate the park in a segregated fashion; instead of striking the segregation requirement from the will, the court ordered return of the property to the decedent's heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator's intent with no racial motivation itself, and distinguished *Shelley* on the basis that African Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.[1221]

Similar to *Shelley* in controversy and the indefiniteness of its rationale, the latter element of which appears to have undergone a modifying rationalization, is *Reitman v. Mulkey*,[1222] in which, following enactment of an "open housing" law by the California legislature, an initiative and referendum measure was passed that repealed the law and amended the state constitution to prevent any agency of the State or of local government from henceforth forbidding racial discrimination in private housing. Upholding a state court invalidation of this amendment, the Court appeared to ground its decision on two lines of reasoning, either on the state court's premise that passage of the provision encouraged private racial discrimination impermissibly or on the basis that the provision made discriminatory racial practices immune from the ordinary legislative process, while not so limiting other processes, and thus impermissibly burdened minorities in the achievement of legitimate aims in a way other classes of persons were not burdened.[1223] In a subsequent case, the latter rationale was utilized in a unanimous decision voiding an Akron ordinance, which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective, while any

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[1220] 396 U.S. 435 (1970). The matter had previously been before the Court in Evans v. Newton, 382 U.S. 296 (1966).

[1221] 396 U.S. at 445. Note the use of the same rationale in another context in Palmer v. Thompson, 403 U.S. 217, 226 (1971). On a different result in the "Girard College" will case, *see* Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957), discussed *infra*.

[1222] 387 U.S. 369 (1967). The decision was 5-to-4, Justices Harlan, Black, Clark, and Stewart dissenting. Id. at 387.

[1223] *See, e.g.*, 387 U.S. at 377 (language suggesting both lines of reasoning).

other ordinance would become effective when passed, except that it could be petitioned to referendum.[1224]

That *Mulkey* and *Hunter* stand for the proposition that imposing a barrier to racial amelioration legislation is the decisive and condemning factor is evident from two recent decisions with respect to state referendum decisions on busing for integration.[1225] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[1226] It is thus not impermissible to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play; that is, the private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[1227] There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[1228] State action was found in a number of circumstances. The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the State and it in fact controlled the outcome of elections.[1229] Although the City of Philadelphia was act-

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[1224] Hunter v. Erickson, 393 U.S. 385 (1969). In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate *de facto* segregation. The federal court held the law void, holding in reliance on Mulkey that the statute encouraged racial discrimination *and* that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the *de facto* segregation problem.

[1225] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A five-to-four majority in Seattle found the fault to be a racially-based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-to-1 majority in Crawford found that repeal of a measure to bus to undo *de facto* segregation, without imposing any barrier to other remedial devices, was permissible.

[1226] Crawford, 458 U.S. at 539, *quoted in Seattle*, 458 U.S. at 483. *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977).

[1227] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[1228] 365 U.S. at 722.

[1229] Smith v. Allwright, 321 U.S. 649 (1944).

ing as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the city was held to be engaged in forbidden state action in discriminating against African Americans in admission.[1230] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such use in a will, and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[1231] In a significant case in which the Court explored a lengthy list of contacts between the State and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African Americans from its restaurant. It was emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee and had made stipulations but nothing related to racial discrimination, and that the financial success of the restaurant benefited the governmental agency; "the degree of state participation and involvement in discriminatory action" was sufficient to condemn it.[1232]

The question arose, then, what degree of state participation was "significant"? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960's presented all these questions and more but did not resolve them.[1233] The basics of an answer came in *Moose Lodge No. 107 v. Irvis*,[1234] in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not

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[1230] Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. In re Girard College Trusteeship, 391 Pa. 434, 138 A. 2d 844, cert. denied, 357 U.S. 570 (1958). This expedient was, however, ultimately held unconstitutional. Brown v. Pennsylvania, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968).

[1231] Evans v. Newton, 382 U.S. 296 (1966). Justices Black, Harlan, and Stewart dissented. Id. at 312, 315. For the subsequent ruling in this case, *see* Evans v. Abney, 396 U.S. 435 (1970).

[1232] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[1233] *See, e.g.*, the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[1234] 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. Id. at 177–79.

bar it from discriminating against African Americans. It denied that private discrimination became constitutionally impermissible "if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever," since any such rule would eviscerate the state action doctrine. Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.'" [1235] Moreover, while the State had extensive powers to regulate in detail the liquor dealings of its licensees, "it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." [1236] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" which the Court had found in *Burton*. [1237]

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." [1238] Or, to quote Judge Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private, must be the subject of the complaint." [1239] Therefore, the Court found no such nexus between the State and a public utility's action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the State had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision included therein (but had not required the practice, had "not put its

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[1235] 407 U.S. at 173.
[1236] 407 U.S. at 176-77.
[1237] 407 U.S. at 174-75.
[1238] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the due process clause).
[1239] Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). *See also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (where individual state has minimal influence over national college athletic association's activities, the application of association rules leading to a state university's suspending its basketball coach could not be ascribed to the state.). *But see* Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001) (where statewide public school scholastic association is "overwhelmingly" composed of public school officials for that state, this "entwinement" is sufficient to ascribe actions of association to state).

own weight on the side of the proposed practice by ordering it")[1240] operated to make the utility's action the State's action.[1241] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ."[1242] And the actions are to be attributable to the State apparently only if the State compelled the actions and not if the State merely established the process through statute or regulation under which the private party acted. Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain his charges out of the proceeds, his actions are not governmental action and need not follow the dictates of the due process clause.[1243] Or, where a state worker's compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the state, and thus pre-deprivation notice of the suspension was not required.[1244] In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.[1245]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a "public function." This rationale is one of those which emerges from the various

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[1240] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent, Justice Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." Id. at 369. Note that in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[1241] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351–58 (1974). On the due process limitations on the conduct of public utilities, *see* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[1242] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (due process).

[1243] 436 U.S. at 164-66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[1244] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[1245] Blum v. Yaretsky, 457 U.S. 991 (1982).

opinions in *Terry v. Adams*.[1246] In *Marsh v. Alabama*,[1247] a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town and the Court reversed. It is not at all clear from the opinion of the Court what it was that made the privately-owned town one to which the Constitution applied. In essence, it appears to have been that the town "had all the characteristics of any other American town," that it was "like" a State. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[1248] Subsequent efforts to expand upon *Marsh* were at first successful and then turned back, and the "public function" theory in the context of privately-owned shopping centers was sharply curtailed.[1249]

Attempts to apply such a theory to other kinds of private conduct, such as to private utilities,[1250] to private utilization of permissive state laws to secure property claimed to belong to creditors,[1251] to the operation of schools for "problem" children referred by public institutions,[1252] to private insurance companies providing worker's compensation coverage,[1253] and to the operations of nursing homes the patients of which are practically all funded by public resources,[1254] proved unavailing. The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.'"[1255] Therefore, the question is not "whether a private group is serving a 'public function.'. . . That a private entity performs a function which serves the public does not make its acts state action."[1256] Public function did play an important part, however, in the Court's finding state action in exercise of peremptory challenges in jury selection by non-governmental parties.

In finding state action in the racially discriminatory use of peremptory challenges by a private party during *voir dire* in a civil case,[1257] the Court applied tests developed in an earlier case in-

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[1246] 345 U.S. 461 (1953).
[1247] 326 U.S. 501 (1946).
[1248] 326 U.S. at 506.
[1249] *See* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *limited in* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and *overruled in* Hudgens v. NLRB, 424 U.S. 507 (1976). The Marsh principle is good only when private property has taken on *all* the attributes of a municipality. Id. at 516–17.
[1250] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).
[1251] Flagg Bros. v. Brooks, 436 U.S. 149, 157–159 (1978).
[1252] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[1253] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).
[1254] Blum v. Yaretsky, 457 U.S. 991, 1011–1012 (1982).
[1255] Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).
[1256] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[1257] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

volving garnishment and attachment.[1258] The Court first asks "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and then "whether the private party charged with the deprivation could be described in all fairness as a state actor." In answering the second question, the Court considers three factors: "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[1259] There was no question that exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the "overt" and "significant" assistance of the court. So too, jury selection is the performance of a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor," and it followed, so the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.[1260] Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."[1261] Dissenting Justice O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes."[1262]

Even though in a criminal case it is the government and the defendant who are adversaries, rather than two private parties, as is ordinarily the case in civil actions, the Court soon applied these same principles to hold that exercise of peremptory challenges by the defense in a criminal case also constitutes state action.[1263] The same generalities apply with at least equal force: there is overt and

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[1258] Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).

[1259] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–22 (1991) (citations omitted).

[1260] 500 U.S. at 624, 625.

[1261] 500 U.S. at 628.

[1262] 500 U.S. at 639, 643.

[1263] Georgia v. McCollum, 505 U.S. 42 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case [1264] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense," since it involves selection of persons to wield governmental power. [1265]

The rules developed by the Court for business regulation are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment," [1266] and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State." [1267]

Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subjected to constitutional constraints. Many lower courts had held state action to exist in such circumstances. [1268] However the question might have

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[1264] Polk County v. Dodson, 454 U.S. 512 (1981).

[1265] 505 U.S. at 54. Justice O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with Dodson's declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 65-66. Justice Scalia, also dissenting again, decried reduction of Edmonson "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." Id. at 69-70. Chief Justice Rehnquist, who had dissented in Edmonson, concurred in McCollum in the belief that it was controlled by Edmonson, and Justice Thomas, who had not participated in Edmonson, expressed similar views in a concurrence.

[1266] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[1267] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[1268] On funding, *see* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974). *But cf.* Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). On tax benfits, *see* Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd. sub nom*. Coit v. Green, 404 U.S. 997 (1971); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). *But*

been answered under the older cases, it is evident that a negative answer flows from the premises of the more recent cases. In *Rendell-Baker v. Kohn*,[1269] the private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99% of its operating budget from public funds. In *Blum v. Yaretsky*,[1270] the nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the State included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the State was involved, either through coercion or encouragement. "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business."[1271]

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being "no affirmative right to governmental aid," the Court announced in *DeShaney v. Winnebago County Social Services Department*[1272] that "as a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, while the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,[1273] and for failure to ensure reasonable safety for involuntarily committed mental patients,[1274] no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency

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*cf.* New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1976); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

[1269] 457 U.S. 830 (1982).

[1270] 457 U.S. 991 (1982).

[1271] 457 U.S. at 1011.

[1272] 489 U.S. 189, 197 (1989).

[1273] Estelle v. Gamble, 429 U.S. 97 (1976).

[1274] Youngberg v. Romeo, 457 U.S. 307 (1982).

had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and "did not occur while [the child] was in the State's custody."[1275] While the State may have incurred liability in tort through the negligence of its social workers, "[not] every tort committed by a state actor [is] a constitutional violation."[1276] "[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child's] father."[1277]

Judicial inquiry into the existence of "state action" may be directed toward the implementation of either of two remedies, and this may well lead to some difference in the search. In the cases considered here suits were against a private actor to compel him to halt his discriminatory action, to enjoin him to admit blacks to a lunch counter, for example. But one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Recurrence to the latter remedy might well avoid constitutional issues that an order directed to the private party would raise.[1278] In any event, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy; in a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood v. Harrison*,[1279] the Court struck down the provision of free textbooks by the State to private schools set up as racially segregated institutions to avoid desegregated public schools, even though the textbook program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'. . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or

[1275] 489 U.S. at 201.
[1276] 489 U.S. at 202.
[1277] 489 U.S. at 203.
[1278] For example, rights of association protected by the First Amendment. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Justice Douglas dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. *See* Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).
[1279] 413 U.S. 455 (1973).

other invidious discriminations." [1280] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses "involve government so directly in the actions of those users as to warrant court intervention on constitutional grounds." [1281] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations. [1282]

It should be noted, however, that the Court has interposed, without mentioning these cases, a potentially significant barrier to utilization of the principle set out in them. In a 1976 decision, which it has expanded since, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must in order to bring the suit show that revocation of the benefit would cause the institutions to cease the complained-of conduct. [1283]

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[1280] Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973)).

[1281] Gilmore v. City of Montgomery, 417 U.S. 556, 570 (1974).

[1282] 417 U.S. at 573-74. In Blum v. Yaretsky, 457 U.S. 991 (1982), plaintiffs, objecting to decisions of the nursing home in discharging or transferring patients, sued public officials, but they objected to the discharges and transfers, not to the changes in Medicaid benefits made by the officials.

[1283] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *See* id. at 46, 63–64 (Justice Brennan concurring and dissenting).

***"Person"***.—In the case in which it was first called upon to interpret this clause, the Court doubted whether "any action of a State not directed by way of discrimination against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[1284] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause.[1285] Nine years later, Chief Justice Waite announced from the bench that the Court would not hear argument on the question whether the equal protection clause applied to corporations. "We are all of the opinion that it does."[1286] The word has been given the broadest possible meaning. "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . ."[1287] The only qualification is that a municipal corporation cannot invoke the clause against its State.[1288]

***"Within Its Jurisdiction"***.—Persons "within its jurisdiction" are entitled to equal protection from a State. Largely because Article IV, § 2, has from the beginning guaranteed the privileges and immunities of citizens in the several States, the Court has rarely construed the phrase in relation to natural persons.[1289] It was first held that a foreign corporation not doing business in a State under conditions that subjected it to process issuing from the courts of that State was not "within the jurisdiction" and could not complain of the preferences granted resident creditors in the distribution of

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[1284] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). *Cf.* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist dissenting).

[1285] Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877); Chicago, M. & St. P. R.R. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877).

[1286] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. GRAHAM, EVERYMAN'S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY", AND AMERICAN CONSTITUTIONALISM chs. 9, 10, and pp. 566–84 (1968). Justice Black, in Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938), and Justice Douglas, in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949), have disagreed that corporations are persons for equal protection purposes.

[1287] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). For modern examples, *see* Levy v. Louisiana, 391 U.S. 68, 70 (1968); Graham v. Richardson, 403 U.S. 365, 371 (1971).

[1288] City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

[1289] *See* Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens illegally present in a State are "within its jurisdiction" and may thus raise equal protection claims).

assets of an insolvent corporation,[1290] but this holding was subsequently qualified, the Court holding that a foreign corporation which sued in a court of a State in which it was not licensed to do business to recover possession of property wrongfully taken from it in another State was "within the jurisdiction" and could not be subjected to unequal burdens in the maintenance of the suit.[1291] The test of amenability to service of process within the State was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual.[1292] When a State has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws but not necessarily to identical treatment with domestic corporations.[1293]

**Equal Protection: Judging Classifications by Law**

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of section 1 of the Fourteenth Amendment.[1294] Important to its sponsors was the desire to provide a firm constitutional basis for already-enacted civil rights legislation,[1295] and, by amending the Constitution, to place repeal beyond the accomplishment of a simple majority in a future Congress.[1296] No doubt there were conflicting interpretations of the phrase "equal protection" among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was.[1297] While the Court

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[1290] Blake v. McClung, 172 U.S. 239, 261 (1898); Sully v. American Nat'l Bank, 178 U.S. 289 (1900).

[1291] Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[1292] Hillsborough v. Cromwell, 326 U.S. 620 (1946).

[1293] Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hanover Ins. Co. v. Harding, 272 U.S. 494 (1926). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886).

[1294] The story is recounted in J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956). *See also* JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (B. Kendrick, ed. 1914). The floor debates are collected in 1 STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS 181 (B. Schwartz, ed. 1970).

[1295] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now in part 42 U.S.C. §§ 1981, 1982. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968).

[1296] As in fact much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36; 35 Stat. 1088. *See* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 45–46 (1947).

[1297] TENBROEK, EQUAL UNDER LAW (rev. ed. 1965); Frank & Munro, *The Original Understanding of 'Equal Protection of the Laws'*, 50 COLUM. L. REV. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); *and see* the essays collected in H. GRAHAM, EVERYMAN'S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY", AND AMERICAN CONSTITUTIONALISM (1968). In calling for reargument in Brown v. Board of Education, 345 U.S. 972 (1952), the Court asked for and received

early recognized that African Americans were the primary intended beneficiaries of the protections thus adopted,[1298] the spare language was majestically unconfined to so limited a class or to so limited a purpose. Thus, as will be seen, the equal protection standard came to be applicable to all classifications by legislative and other official bodies, though not with much initial success,[1299] until now the equal protection clause in the fields of civil rights and fundamental liberties looms large as a constitutional text affording the federal and state courts extensive powers of review with regard to differential treatment of persons and classes.

***The Traditional Standard: Restrained Review***.—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation.[1300] It is still most validly applied there, although it appears in many other contexts as well.[1301] A more active review has been developed for classifications based on a "suspect" indicium or affecting a "fundamental" interest.

"The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote. "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[1302] The mere fact of classification will not void legislation,[1303] then, because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations.[1304] "Class legislation, discrimi-

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extensive analysis of the legislative history of the Amendment with no conclusive results. Brown v. Board of Education, 347 U.S. 483, 489–90 (1954).

[1298] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

[1299] In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the equal protection clause as "the last resort of constitutional arguments."

[1300] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

[1301] Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).

[1302] Tigner v. Texas, 310 U.S. 141, 147 (1980).

[1303] Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899). *See also* from the same period, Orient Ins. Co. v. Daggs, 172 U.S. 557 (1869); Bachtel v. Wilson, 204 U.S. 36 (1907); Watson v. Maryland, 218 U.S. 173 (1910), and later cases. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948); McGowan v. Maryland, 366 U.S. 420 (1961); Schilb v. Kuebel, 404 U.S. 357 (1971); Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[1304] Barrett v. Indiana, 229 U.S. 26 (1913).

nating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." [1305] Or, more succinctly, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." [1306]

How then is the line between permissible and invidious classification to be determined? In *Lindsley v. Natural Carbonic Gas Co.*, [1307] the Court summarized one version of the rules still prevailing. "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Especially because of the emphasis upon the necessity for total arbitrariness, utter irrationality, and the fact that the Court will strain to conceive of a set of facts that will justify the classification, the test is extremely lenient and, assuming the existence of a constitutionally permissible goal, no classification will ever be upset. But, contemporaneously with this test, the Court also pronounced another lenient standard which did leave to the courts a judgmental role. In this test, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons

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[1305] Barbier v. Connolly, 113 U.S. 27, 32 (1885).

[1306] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[1307] 220 U.S. 61, 78–79 (1911), *quoted in full in* Morey v. Doud, 354 U.S. 457, 463–64 (1957). Classifications which are purposefully discriminatory fall before the equal protection clause without more. *E.g.*, Barbier v. Connolly, 113 U.S. 27, 30 (1885); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979). Explicit in all the formulations is that a legislature must have had a permissible purpose, a requirement which is seldom failed, given the leniency of judicial review. *But see* Zobel v. Williams, 457 U.S. 55, 63–64 (1982), and id. at 65 (Justice Brennan concurring).

similarly circumstanced shall be treated alike."[1308] Use of the latter standard did in fact result in some invalidations.[1309]

But then, coincident with the demise of substantive due process in the area of economic regulation,[1310] the Court reverted to the former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification.[1311] Strengthening the deference was the recognition of discretion in the legislature not to try to deal with an evil or a class of evils all within the scope of one enactment but to approach the problem piecemeal, to learn from experience, and to ameliorate the harmful results of two evils differently, resulting in permissible over- and under-inclusive classifications.[1312]

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have reflected this. It has upheld economic classifications that suggested impermissible intention to discriminate, reciting at length the *Lindsley* standard, complete with the conceiving-of-a-basis and the one-step-at-a-time rationale,[1313] and it has applied this relaxed standard to social welfare regulations.[1314] In other cases, it has utilized the *Royster Guano* standard and has looked to the actual goal articulated by the legislature in determining whether the classification had a reasonable relationship to that goal,[1315] although it has

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[1308] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

[1309] *E.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936).

[1310] In Nebbia v. New York, 291 U.S. 502, 537 (1934), speaking of the limits of the due process clause, the Court observed that "in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."

[1311] *E.g.*, Tigner v. Texas, 310 U.S. 141 (1940); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948); Railway Express Agency v. City of New York, 336 U.S. 106 (1949); McGowan v. Maryland, 366 U.S. 420 (1961).

[1312] Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); Schilb v. Kuebel, 404 U.S. 357, 364–65 (1971); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).

[1313] City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1314] Dandridge v. Williams, 397 U.S. 471, 485–86 (1970); Jefferson v. Hackney, 406 U.S. 535, 549 (1972). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587–94 (1979).

[1315] *E.g.*, McGinnis v. Royster, 410 U.S. 263, 270–77 (1973); Johnson v. Robison, 415 U.S. 361, 374–83 (1974); City of Charlotte v. International Ass'n of Firefighters, 426 U.S. 283, 286–89 (1976). It is significant that these opinions were written by Justices who subsequently dissented from more relaxed standard of review cases

usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some classifications in the areas traditionally most subject to total deference.[1316]

Attempts to develop a consistent principle have so far been unsuccessful. In *Railroad Retirement Board v. Fritz*,[1317] the Court acknowledged that "[t]he most arrogant legal scholar would not claim that all of these cases cited applied a uniform or consistent test under equal protection principles," but then went on to note the differences between *Lindsley* and *Royster Guano* and chose the former. But, shortly, in *Schweiker v. Wilson*,[1318] in an opinion written by a different Justice,[1319] the Court sustained another classification, using the *Royster Guano* standard to evaluate whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. In between these decisions, the Court approved a state classification after satisfying itself that the legislature had pursued a permissible goal, but setting aside

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and urged adherence to at least a standard requiring articulation of the goals sought to be achieved and an evaluation of the "fit" of the relationship between goal and classification. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 182 (1980) (Justices Brennan and Marshall dissenting); Schweiker v. Wilson, 450 U.S. 221, 239 (1981) (Justices Powell, Brennan, Marshall, and Stevens dissenting). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (Justice Powell concurring in part and dissenting in part), and id. at 597, 602 (Justices White and Marshall dissenting).

[1316] *E.g.*, Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); James v. Strange, 407 U.S. 128 (1972); Department of Agriculture v. Moreno, 413 U.S. 528 (1973); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted). The Court in Reed v. Reed, 404 U.S. 71, 76 (1971), utilized the *Royster Guano* formulation and purported to strike down a sex classification on the rational basis standard, but, whether the standard was actually used or not, the case was the beginning of the decisions applying a higher standard to sex classifications.

[1317] 449 U.S. 166, 174–79 (1980). The quotation is at 176–77 n.10. The extent of deference is notable, inasmuch as the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Id. at 186–97 (Justice Brennan dissenting). The Court observed, however, that it was "constitutionally irrelevant" whether the plausible basis was in fact within Congress' reasoning, inasmuch as the Court has never required a legislature to articulate its reasons for enactng a statute. Id. at 179. For a continuation of the debate over actual purpose and conceivable justification, *see* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 680–85 (1981) (Justice Brennan concurring), and id. at 702–06 (Justice Rehnquist dissenting). *Cf.* Schweiker v. Wilson, 450 U.S. 221, 243–45 (1981) (Justice Powell dissenting).

[1318] 450 U.S. 221, 230–39 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had in fact no purpose in mind, and that the classification was not rational. Id. at 239.

[1319] Justice Blackmun wrote the Court's opinion in Wilson, Justice Rehnquist in Fritz.

the decision of the state court that the classification would not promote that goal; the Court announced that it was irrelevant whether in fact the goal would be promoted, the question instead being whether the legislature "could rationally have decided" that it would.[1320]

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to.[1321] In the main, the issues in recent years have not involved the validity of classifications, but rather the care with which the Court has reviewed the facts and the legislation with its legislative history to uphold the challenged classifications. The recent decisions voiding classifications have not clearly set out which standard they have been using.[1322] Determination in this area, then, must await presentation to the Court of a classification which it would sustain under the *Lindsley* standard and invalidate under *Royster Guano*.

***The New Standards: Active Review***.—When government legislates or acts either on the basis of a "suspect" classification or with regard to a "fundamental" interest, the traditional standard of equal protection review is abandoned, and the Court exercises a "strict scrutiny." Under this standard government must demonstrate a high degree of need, and usually little or no presumption favoring the classification is to be expected. After much initial controversy within the Court, it has now created a third category, finding several classifications to be worthy of a degree of "intermediate" scrutiny requiring a showing of important governmental purposes and a close fit between the classification and the purposes.

Paradigmatic of "suspect" categories is classification by race. First in the line of cases dealing with this issue is *Korematsu v. United States*,[1323] concerning the wartime evacuation of Japanese-Americans from the West Coast, in which the Court said that because only a single ethnic-racial group was involved the measure

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[1320] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466.

[1321] In City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294 (1982), the Court observed that it was not clear whether it would apply Royster Guano to the classification at issue, citing Fritz as well as Craig v. Boren, 429 U.S. 190 (1976), an intermediate standard case involving gender. Justice Powell denied that Royster Guano or Reed v. Reed had ever been rejected. Id. at 301 n.6 (dissenting). *See also* id. at 296–97 (Justice White).

[1322] The exception is Reed v. Reed, 404 U.S. 71 (1971), which, though it purported to apply Royster Guano, may have applied heightened scrutiny. *See* Zobel v. Williams, 457 U.S. 55, 61–63 (1982), in which it found the classifications not rationally related to the goals, without discussing which standard it was using.

[1323] 323 U.S. 214, 216 (1944). In applying "rigid scrutiny," however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.

was "immediately suspect" and subject to "rigid scrutiny." The school segregation cases [1324] purported to enunciate no *per se* rule, however, although subsequent summary treatment of a host of segregation measures may have implicitly done so, until in striking down state laws prohibiting interracial marriage or cohabitation the Court declared that racial classifications "bear a far heavier burden of justification" than other classifications and were invalid because no "overriding statutory purpose" [1325] was shown and they were not necessary to some "legitimate overriding purpose." [1326] "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." [1327] Remedial racial classifications, that is, the development of "affirmative action" or similar programs that classify on the basis of race for the purpose of ameliorating conditions resulting from past discrimination, are subject to more than traditional review scrutiny, but whether the highest or some intermediate standard is the applicable test is uncertain. [1328] A measure that does not draw a distinction explicitly on race but that does draw a line between those who seek to use the law to do away with or modify racial discrimination and those who oppose such efforts does in fact create an explicit racial classification and is constitutionally suspect. [1329]

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect, [1330] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review, [1331] and to pass on statutory and administrative treatments of illegitimates in-

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[1324] Brown v. Board of Education, 347 U.S. 483 (1954).

[1325] McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964).

[1326] Loving v. Virginia, 388 U.S. 1, 11 (1967). In Lee v. Washington, 390 U.S. 333 (1968), it was indicated that preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary.

[1327] Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979), *quoted in* Washington v. Seattle School Dist., 458 U.S. 457, 485 (1982).

[1328] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287–20 (1978) (Justice Powell announcing judgment of Court) (suspect), and id. at 355–79 (Justices Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980) (Chief Justice Burger announcing judgment of Court) ("a most searching examination" but not choosing a particular analysis), and id. at 495 (Justice Powell concurring), 523 (Justice Stewart dissenting) (suspect), 548 (Justice Stevens dissenting) (searching scrutiny).

[1329] Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School Dist., 458 U.S. 457 (1982).

[1330] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[1331] Reed v. Reed, 404 U.S. 71 (1971); for the hint, *see* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

consistently.[1332] Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.[1333]

However, in a major evaluation of equal protection analysis early in this period, Justice Powell for the Court utilized solely the two-tier approach, determining that because the interests involved did not occasion strict scrutiny the Court would thus decide the case on minimum rationality standards.[1334] Decisively rejected was the contention that a *de facto* wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis,[1335] a holding that has several times been strongly reaffirmed by the Court.[1336] But the Court's rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[1337] And classifications that disadvantage illegitimates are

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[1332] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (strict review); Labine v. Vincent, 401 U.S. 532 (1971) (lenient review); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (modified strict review).

[1333] *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Bullock v. Carter, 405 U.S. 134 (1972). *See* Shapiro v. Thompson, 394 U.S. 618, 658–59 (1969) (Justice Harlan dissenting). *But cf.* Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[1334] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1335] 411 U.S. at 44-45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id. at 20.

[1336] *E.g.*, United States v. Kras, 409 U.S. 434 (1973); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[1337] Craig v. Boren, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, id. at 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much

subject to a similar though less exacting scrutiny of purpose and fit.[1338] This period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.[1339]

Expansion of the characteristics which when used as a basis for classification must be justified by a higher showing than ordinary economic classifications has so far been resisted, the Court holding, for example, that age classifications are neither suspect nor entitled to intermediate scrutiny.[1340] While resisting creation of new suspect or "quasi-suspect" classifications, however, the Court may nonetheless apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[1341]

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, gov-

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is clear from our recent cases." Id. at 210, n.*. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id. at 211, 212. Chief Justice Burger and Justice Rehnquist would employ the rational basis test for gender classification. Id. at 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, *E.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (military); Michael M. v. Superior Court, 450 U.S. 464 (1981) (application of statutory rape prohibition to boys but not to girls). Four Justices in Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973), were prepared to find sex a suspect classification, and in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect.

[1338] Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). In Mathews v. Lucas, 427 U.S. 495, 506 (1976), it was said that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." Lucas sustained a statutory scheme virtually identical to the one struck down in Califano v. Goldfarb, 430 U.S. 199 (1977), except that the latter involved sex while the former involved illegitimacy.

[1339] Applying strict scrutiny, *see, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, *see* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Plyler v. Doe, 457 U.S. 202 (1982).

[1340] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age 50 for state police); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age 60 for foreign service officers); Gregory v. Ashcroft, 501 U.S. 452 (1991) (mandatory retirement at age 70 for state judges). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[1341] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *See* discussion *supra*.

ernment classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.[1342]

It is thought[1343] that the "fundamental right" theory had its origins in *Skinner v. Oklahoma ex rel. Williamson*,[1344] in which the Court subjected to "strict scrutiny" a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because the law affected "one of the basic civil rights." In the apportionment decisions, Chief Justice Warren observed that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[1345] A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility[1346] and the phrase "compelling state interest" was used several times in Justice Brennan's opinion in *Shapiro v. Thompson*.[1347] Thereafter, the phrase was used in several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.[1348]

While no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[1349] it was evident from the cases that the right to vote,[1350] the right of interstate travel,[1351] the right to be free of wealth distinctions in the criminal process,[1352] and the right of procreation[1353] were at least some of those interests that triggered

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[1342] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[1343] Shapiro v. Thompson, 394 U.S. at 660 (Justice Harlan dissenting).

[1344] 316 U.S. 535, 541 (1942).

[1345] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[1346] Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

[1347] 394 U.S. 618, 627, 634, 638 (1969).

[1348] Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972).

[1349] This indefiniteness has been a recurring theme in dissents. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Justice Harlan); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist).

[1350] *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

[1351] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[1352] *E.g.*, Tate v. Short, 401 U.S. 395 (1971).

[1353] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

active review when *de jure* or *de facto* official distinctions were made with respect to them. This branch of active review the Court also sought to rationalize and restrict in *Rodriguez*,[1354] which involved both a claim of *de facto* wealth classifications being suspect and a claim that education was a fundamental interest so that affording less of it to people because they were poor activated the compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[1355] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as *Rodriguez* was unable to prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review in the first phase of the active-review doctrine, so it did not by stressing the requirement that an interest be expressly or impliedly protected by the Constitution prevent the addition of other interests to the list of "fundamental" interests. The difficulty was that the Court decisions on the right to vote, the right to travel, the right to procreate, as well as others, premise the constitutional violation to be of the equal protection clause, which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right.[1356] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right which required a compelling justification.[1357] While denials of public funding of abortions were held to implicate no fundamental interest—abortion being a fundamental interest—and no suspect classification—because only poor women needed public funding[1358] —other denials of public assistance because of illegitimacy, alienage, or sex have been deemed governed by the same standard of review as affirmative harms imposed on those

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[1354] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1355] 411 U.S. at 30, 33-34. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

[1356] Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–80 (Justice O'Connor concurring) (travel).

[1357] Zablocki v. Redhail, 434 U.S. 374 (1978).

[1358] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

grounds.[1359] And in *Plyler v. Doe*,[1360] the complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

Thus, the nature of active review in equal protection jurisprudence remains in flux, subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. But the cases, more fully reviewed hereafter, clearly indicate that a sliding scale of review is a fact of the Court's cases, however much its doctrinal explanation lags behind.

### Testing Facially Neutral Classifications Which Impact on Minorities

A classification expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[1361] But when it is contended that a law, which is in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the equal protection clause, a much more difficult case is presented.

It is necessary that one claiming harm through the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[1362] In reli-

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[1359] *E.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).

[1360] 457 U.S. 202 (1982).

[1361] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Government may make a racial classification that, for example, does not separate whites from blacks but that by focussing on an issue of racial import creates a classification that is suspect. Washington v. Seattle School Dist., 458 U.S. 457, 467–74 (1982).

[1362] Washington v. Davis, 426 U.S. 229, 242 (1976). A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. Id. at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). *And see* Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4-H Clubs is permissible, given wholly voluntary nature of membership).

ance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation [1363] and upon the Court's decisions reading congressional civil rights enactments as providing that when employment practices disqualifying disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices, [1364] a number of lower federal courts had developed in constitutional litigation a "disproportionate impact" analysis under which a violation could be established upon a showing that a statute or practice adversely affected a class without regard to discriminatory purpose, absent some justification going substantially beyond what would be necessary to validate most other classifications. [1365] These cases were disapproved in

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[1363] The principal case was Palmer v. Thompson, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id. at 224–26, but it also, and the *Davis* Court so read it as actually deciding, drew the conclusion that since the pools were closed for both whites and blacks there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. *See also* Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

[1364] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238–39, 246–48 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of Griggs, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether Griggs applies to each section of the antidiscrimination provision of Title VII. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). *But see* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

[1365] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases not cited by the Court included the Fifth Circuit's wrestling with the *de facto/ de jure* segregation distinction. In Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 148–50 (5th Cir. 1972) (*en banc*), *cert. denied*, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "*de facto* and *de jure* nomenclature" to be "meaningless." After the distinction was reiterated in Keyes v. Denver School District, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and thus that a school board decision, whatever its facial motivation, that results in segregation is intentional in the constitutional sense. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir.), *vacated and remanded for reconsideration in light of Washington v. Davis*, 426 U.S. 229 (1976), *modified and adhered to*, 564 F.2d 162, *reh. denied*, 579 F.2d 910 (5th Cir. 1977–78), *cert. denied*, 443 U.S. 915 (1979). *See also* United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979).

>Davis; but the Court did note that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." [1366]

Both elucidation and not a little confusion followed upon application of *Davis* in the following Terms. Looking to a challenged zoning decision of a local board which had a harsher impact upon blacks and low-income persons than on others, the Court explained in some detail how inquiry into motivation would work. [1367] First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing "a discriminatory purpose" among permissible purposes shifts the burden to the defendant to show that the same decision would have resulted absent the impermissible motive. [1368] Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case. [1369] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined, and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privi-

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[1366] Washington v. Davis, 426 U.S. 229, 242 (1976).

[1367] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[1368] 429 U.S. at 265-66, 270 n.21. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

[1369] Arlington Heights, 429 U.S. at 266.

lege." [1370] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender based; too many men are non-veterans to permit such a conclusion and there are women veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." [1371]

Moreover, in *City of Mobile v. Bolden* [1372] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to evaluate standing on its own each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics, without considering whether its ruling was pre-

[1370] 429 U.S. 267-68.

[1371] Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the equal protection clause. *But compare* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), *and* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the Davis standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

[1372] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the equal protection clause in the "fundamental interest" context, vote dilution, rather than just in the suspect classification context.

mised on discriminatory purpose or adverse impact but listing and weighing a series of factors the totality of which caused the Court to find invidious discrimination.[1373] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[1374] Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[1375] But, contemporaneously with Congress' statutory rejection of the *Mobile* plurality standards,[1376] the Court, in *Rogers v. Lodge*,[1377] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evidence"[1378] that is more reminiscent of pre- *Washington v. Davis* cases than of the more recent decisions.

*Rogers v. Lodge* was also a multimember electoral district case brought under the equal protection clause[1379] and the Fifteenth Amendment. The fact that the system operated to cancel out or di-

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[1373] White v. Regester, 412 U.S. 755 (1972), was the prior case. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice White, the author of *Register*, dissented in Mobile, 446 U.S. at 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*." Justice Blackmun, id. at 80, and Justices Brennan and Marshall, agreed with him as alternate holdings, id. at 94, 103.

[1374] 446 U.S. at 65-74.

[1375] 446 U.S. at 73-74. The principal formulation of the test was in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom*. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.

[1376] By the Voting Rights Act Amendments of 1982, P.L. 97–205, 96 Stat. 131, 42 U.S.C. § 1973 (as amended), *see* S. Rep. No. 417, 97th Congress, 2d sess. 27–28 (1982), Congress proscribed a variety of electoral practices "which results" in a denial or abridgment of the right to vote, and spelled out in essence the *Zimmer* factors as elements of a "totality of the circumstances" test.

[1377] 458 U.S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice White and joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, and O'Connor. Justices Powell and Rehnquist dissented, id. at 628, as did Justice Stevens. Id. at 631.

[1378] 458 U.S. at 618-22 (describing and disagreeing with the Mobile plurality, which had used the phrase at 446 U.S. 74). The Lodge Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. Id. at 618 (quoting Arlington Heights, 429 U.S. at 266).

[1379] The Court confirmed the Mobile analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. 458 U.S. at 619 n.6.

lute black voting strength, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. "[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." [1380] Turning to the lower court's enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no black had ever been elected in the county, in which blacks were a majority of the population but a minority of registered voters, was "important evidence of purposeful exclusion." [1381] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the black population as being both a result of past discrimination and a barrier to black access to voting power. [1382] As for the district court's application of the test, the Court reviewed it under the deferential "clearly erroneous" standard and affirmed it.

The Court in a jury discrimination case has also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit. [1383] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that plaintiff's showing that 79 percent of the county's population was Spanish-surnamed while jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are

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[1380] 458 U.S. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

[1381] 458 U.S. at 623-24.

[1382] 458 U.S. at 624-27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[1383] Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-to-4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id. at 504–07.

not random.[1384] Second, the jury selection process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights* which was regularized and open to inspection.[1385] Thus, jury cases are likely to continue to be special cases and in the usual fact situation, at least where the process is open, plaintiffs will beara heavy and substantial burden in showing discriminatory racial and other animus.

## TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER

### Taxation

At the outset, the Court did not regard the equal protection clause as having any bearing on taxation.[1386] It soon, however, took jurisdiction of cases assailing specific tax laws under this provision,[1387] and in 1890 it cautiously conceded that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition."[1388] But it observed that the equal protection clause "was not intended to compel the States to adopt an iron rule of equal taxation" and propounded some conclusions that remain valid today.[1389] In succeeding years the clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases in-

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[1384] 430 U.S. at 493-94. This had been recognized in Washington v. Davis, 426 U.S. 229, 241 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 n.13 (1977).

[1385] Castaneda v. Partida, 430 U.S. 482, 494, 497–99 (1977).

[1386] Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).

[1387] Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886); Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

[1388] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890) (emphasis supplied).

[1389] The State "may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon various trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." 134 U.S. at 237. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

validating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

***Classification for Purpose of Taxation***.—The power of the State to classify for purposes of taxation is "of wide range and flexibility." [1390] A State may adjust its taxing system in such a way as

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[1390] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a State in contrast with a rate of 10 cents per $100 on deposits in the State. Madden v. Kentucky, 309 U.S. 83 (1940).

Coal: a tax of 2 1/2 percent on anthracite but not on bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the State, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

Oleomargarine: classified separately from butter. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).

Peddlers: classified separately from other vendors. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941).

Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

Cigarette dealers: taxing retailers and not wholesalers. Cook v. Marshall County, 196 U.S. 261 (1905).

Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license

to favor certain industries or forms of industry [1391] and may tax different types of taxpayers differently, despite the fact that they compete. [1392] It does not follow, however, that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed." [1393] Classification may not be arbitrary. It must be based on a real and substantial difference [1394] and the difference need not be great or conspicuous, [1395] but there must be no discrimination in favor of one as against another of the same class. [1396] Also, discriminations of an unusual character are scrutinized with special care. [1397] A gross sales tax graduated at increasing rates with the volume of sales, [1398] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country, [1399] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals, [1400] have been held to be a repugnant to the equal protection clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which

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tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouses v. Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the State selling their own product. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Sugar refineries: exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesalers in other products. Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910).

[1391] Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912). *See also* Hammond Packing Co. v. Montana, 233 U.S. 331 (1914); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959).

[1392] Puget Sound Co. v. Seattle, 291 U.S. 619, 625 (1934). *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1393] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[1394] Southern Ry. v. Greene Co., 216 U.S. 400, 417 (1910); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[1395] Keeney v. New York, 222 U.S. 525, 536 (1912); Tax Comm'rs v. Jackson, 283 U.S. 527, 538 (1931).

[1396] Giozza v. Tierman, 148 U.S. 657, 662 (1893).

[1397] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). *See also* Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[1398] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936).

[1399] Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[1400] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928). This case was formally overruled in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

prompted the adoption of the statute.[1401] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[1402]

One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection of the law.[1403] If a tax applies to a class which may be separately taxed, those within the class may not complain because the class might have been more aptly defined nor because others, not of the class, are taxed improperly.[1404]

***Foreign Corporations and Nonresidents***.—The equal protection clause does not require identical taxes upon all foreign and domestic corporations in every case.[1405] In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that State in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the State, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.[1406] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,"[1407] and that where it has acquired property of a fixed and permanent nature in a State, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations.[1408] A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the equal protection clause where foreign companies writing only casualty insurance were not subject to a similar tax.[1409] Later, the doctrine of *Philadelphia Fire Association v. New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from

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[1401] Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931).
[1402] Colgate v. Harvey, 296 U.S. 404, 422 (1935).
[1403] Darnell v. Indiana, 226 U.S. 390, 398 (1912); Farmers Bank v. Minnesota, 232 U.S. 516, 531 (1914).
[1404] Morf v. Bingaman, 298 U.S. 407, 413 (1936).
[1405] Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).
[1406] Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).
[1407] Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).
[1408] Southern Ry. v. Green, 216 U.S. 400, 418 (1910).
[1409] Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).

foreign but not from domestic corporations.[1410] Even though the right of a foreign corporation to do business in a State rests on a license, yet the equal protection clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.[1411] The Court, in *WHYY v. Glassboro*[1412] held that a foreign nonprofit corporation licensed to do business in the taxing State is denied equal treatment in violation of the equal protection clause where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister State and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing State.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*,[1413] the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[1414] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[1415]

***Income Taxes***.—A state law which taxes the entire income of domestic corporations which do business in the State, including

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[1410] Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945). This decision was described as "an anachronism" in Western & Southern Life Ins. Co. v. State Bd. Of Equalization, 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[1411] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).

[1412] 393 U.S. 117 (1968).

[1413] 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court being joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O'Connor's dissent was joined by Justices Brennan, Marshall, and Rehnquist.

[1414] 470 U.S. at 880.

[1415] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual *per se* invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

that derived within the State, while exempting entirely the income received outside the State by domestic corporations which do no local business, is arbitrary and invalid.[1416] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the State, although residents are permitted to deduct all losses, wherever incurred.[1417] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year which were deductible from gross income under the law in effect when they were received, does not violate the equal protection clause.[1418]

***Inheritance Taxes***.—There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[1419] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs.[1420] There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.[1421] Vested and contingent remainders may be treated differently.[1422] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the State.[1423] In computing the tax collectible from a nonresident decedent's property within the State, a State may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the State bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.[1424]

***Motor Vehicle Taxes***.—In demanding compensation for the use of highways, a State may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax

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[1416] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also* Walters v. City of St. Louis, 347 U.S. 231 (1954), sustaining municipal income tax imposed on gross wages of employed persons but only on net profits of business men and self-employed.

[1417] Shaffer v. Carter, 252 U.S. 37, 56, 57 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

[1418] Welch v. Henry, 305 U.S. 134 (1938).

[1419] Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 288, 300 (1898).

[1420] Billings v. Illinois, 188 U.S. 97 (1903).

[1421] Campbell v. California, 200 U.S. 87 (1906).

[1422] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).

[1423] Board of Educ. v. Illinois, 203 U.S. 553 (1906).

[1424] Maxwell v. Bugbee, 250 U.S. 525 (1919).

on carriers.[1425] A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than similar vehicles carrying property not for hire is reasonable, since the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less than that of one engaged in business as a common carrier.[1426] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than taxes on property not so employed.[1427] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[1428] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the State for purpose of sale does not violate the equal protection clause as applied to cars moving in caravans.[1429] The exemption from a tax for a permit to bring cars into the State in caravans of cars moved for sale between zones in the State is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt.[1430] Also sustained as valid have been exemptions of vehicles weighing less than 3000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed;[1431] and exemptions from vehicle license taxes levied on private motor carriers of persons whose vehicles haul passengers and farm products between points not having railroad facilities or farm and dairy products for producers thereof.[1432]

***Property Taxes***.—The State's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[1433] whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.[1434] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist

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[1425] Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).
[1426] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).
[1427] Alward v. Johnson, 282 U.S. 509 (1931).
[1428] Bekins Van Lines v. Riley, 280 U.S. 80 (1929).
[1429] Morf v. Bingaman, 298 U.S. 407 (1936).
[1430] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).
[1431] Carley & Hamilton v. Snook, 281 U.S. 66 (1930).
[1432] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935).
[1433] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
[1434] Missouri v. Dockery, 191 U.S. 165 (1903).

only in a part of the State.[1435] Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[1436] Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the equal protection clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimination.[1437] More recently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Commission*,[1438] found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals. Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, while assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.[1439] *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a coherent state policy.[1440] California's acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting "local neighborhood preservation, continuity, and stability," and in protecting reasonable reliance interests of existing homeowners.[1441]

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[1442] Equal protection is denied if a State does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[1443] A corporation whose valuations were accepted by the assessing commission cannot complain that it

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[1435] Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).

[1436] Charleston Fed. S. & L. Ass'n v. Alderson, 324 U.S. 182 (1945); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[1437] Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918); Raymond v. Chicago Traction Co., 207 U.S. 20, 35, 37 (1907); Coutler v. Louisville & Nashville R.R., 196 U.S. 599 (1905). *See also* Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585 (1907).

[1438] 488 U.S. 336 (1989).

[1439] Nordlinger v. Hahn, 505 U.S. 1 (1992).

[1440] 505 U.S. at 14-15.

[1441] 505 U.S. at 12-13.

[1442] Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).

[1443] Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).

was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[1444]

***Special Assessment***.—A special assessment is not discriminatory because apportioned on an *ad valorem* basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[1445] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.[1446] A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone.[1447] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[1448] In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having less than 25 miles of main line within the district than for those having more.[1449]

**Police Power Regulation**

***Classification***.—Justice Holmes' characterization of the equal protection clause as the "usual last refuge of constitutional arguments"[1450] was no doubt made with the practice in mind of contestants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[1451] The Court has made it

[1444] St. Louis-San Francisco Ry v. Middlekamp, 256 U.S. 226, 230 (1921).
[1445] Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931).
[1446] Kansas City So. Ry. v. Road Imp. Dist. No. 6, 256 U.S. 658 (1921); Thomas v. Kansas City So. Ry., 261 U.S. 481 (1923).
[1447] Road Imp. Dist. v. Missouri Pac. R.R., 274 U.S. 188 (1927).
[1448] Branson v. Bush, 251 U.S. 182 (1919).
[1449] Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).
[1450] Buck v. Bell, 274 U.S. 200, 208 (1927).
[1451] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

clear that only the totally irrational classification in the economic field will be struck down,[1452] and it has held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[1453] So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature "*could rationally have decided*" that its classification would foster its goal.[1454] The Court

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[1452] City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a super-legislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id. at 303–04.

[1453] The "grandfather" clause upheld in *Dukes* preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305-06. *See also* Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

[1454] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Advertising: discrimination between billboard and newpaper advertising of cigarettes, Packer Corp. v. Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911); prohibition of advertising on motor vehicles except notices or advertising of products of the owner, Railway Express Agency v. New York, 336 U.S. 106 (1949); prohibition

against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon v. Walker, 204 U.S. 311 (1907). *See also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm'n v. Lowe, 281 U.S. 431 (1930).

Debt adjustment business: operation only as incident to legitimate practice of law. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Rfg. Co. v. Eddy, 249 U.S. 427 (1919)

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a State, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd char-

acter shall dwell, L'Hote v. New Orleans, 177 U.S. 587, 595 (1900). *And see* North v. Russell, 427 U.S. 328, 338 (1976).

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller v. Strahl, 239 U.S. 426 (1915).

Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

Intoxicating liquors: exception of druggist or manufacturers from regulation. Lloyd v. Dollison, 194 U.S. 445 (1904); Eberle v. Michigan, 232 U.S. 700 (1914).

Landlord-tenant: requiring trial no later than six days after service of complaint and limiting triable issues to the tenant's default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for nonpayment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

Markets: prohibition against operation of private market within six squares of public market. Natal v. Louisiana, 139 U.S. 621 (1891).

Medicine: a uniform standard of professional attainment and conduct for all physicians, Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S 339 (1917); exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other States from registration requirement, Storaasli v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a State may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute

has condemned a variety of statutory classifications as failing to survive the rational basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court invalidated a statute which forbade stock insurance companies to act through agents who were their salaried employees but

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or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).

Railroads: prohibition on operation on a certain street, Railroad Co. v. Richmond, 96 U.S. 521 (1878); requirement that fences and cattle guards and allow recovery of multiple damages for failure to comply, Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. Louis Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the equal protection clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry. 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961). *See also* Soon Hing v. Crowley, 113 U.S. 703 (1885); Petit v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Telegraph Co. v. Milling Co., 218 U.S. 406 (1910).

permitted mutual companies to operate in this manner.[1455] A law which required private motor vehicle carriers to obtain certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.[1456] The same result befell a statute which permitted mill dealers without well advertised trade names the benefit of a price differential but which restricted this benefit to such dealers entering the business before a certain date.[1457] In a decision since overruled, the Court struck down a law which exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of "currency exchanges" engaged in the sale of money orders.[1458]

**Other Business and Employment Relations**

***Labor Relations***.—Objections to labor legislation on the ground that the limitation of particular regulations to specified industries was obnoxious to the equal protection clause have been consistently overruled.[1459] Statutes limiting hours of labor for employees in mines, smelters,[1460] mills, factories,[1461] or on public works[1462] have been sustained. And a statute forbidding persons engaged in mining and manufacturing to issue orders for payment of labor unless redeemable at face value in cash was similarly held unobjectionable.[1463] The exemption of mines employing less than ten persons from a law pertaining to measurement of coal to determine a miner's wages is not unreasonable.[1464] All corporations[1465] or public service corporations[1466] may be required to issue to employees who leave their service letters stating the nature of the

[1455] Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).

[1456] Smith v. Cahoon, 283 U.S. 553 (1931).

[1457] Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936). *See* United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of case's validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).

[1458] Morey v. Doud, 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.

[1459] Central State Univ. v. American Ass'n of Univ. Professors, 526 U.S. 124 (1999) (upholding limitation on the authority of public university professors to bargain over instructional workloads).

[1460] Holden v. Hardy, 169 U.S. 366 (1988).

[1461] Bunting v. Oregon, 243 U.S. 426 (1917).

[1462] Atkin v. Kansas, 191 U.S. 207 (1903).

[1463] Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914). *See also* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901).

[1464] McLean v. Arkansas, 211 U.S. 539 (1909).

[1465] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

[1466] Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922).

service and the cause of leaving even though other employers are not so required.

Industries may be classified in a workmen's compensation act according to the respective hazards of each,[1467] and the exemption of farm laborers and domestic servants does not render such an act invalid.[1468] A statute providing that no person shall be denied opportunity for employment because he is not a member of a labor union does not offend the equal protection clause.[1469] At a time when protective labor legislation generally was falling under "liberty of contract" applications of the due process clause, the Court generally approved protective legislation directed solely to women workers[1470] and this solicitude continued into present times in the approval of laws which were more questionable,[1471] but passage of the sex discrimination provision of the 1964 Civil Rights Act has generally called into question all such protective legislation addressed solely to women.[1472]

***Monopolies and Unfair Trade Practices***.—On the principle that the law may hit the evil where it is most felt, state antitrust laws applicable to corporations but not to individuals,[1473] or to vendors of commodities but not to vendors of labor,[1474] have been upheld. Contrary to its earlier view, the Court now holds that an antitrust act which exempts agricultural products in the hands of the producer is valid.[1475] Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried.[1476] A provision, superimposed upon the general antitrust law, for revocation of the licenses of fire insurance companies that enter into illegal combinations, does not violate the equal protec-

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[1467] Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[1468] New York Central R.R. v. White, 243 U.S. 188 (1917); Middletown v. Texas Power & Light Co., 249 U.S. 152 (1919); Ward & Gow v. Krinsky, 259 U.S. 503 (1922).

[1469] Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Neither is it a denial of equal protection for a city to refuse to withhold from its employees' paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. City of Charlotte v. Firefighters, 426 U.S. 283 (1976).

[1470] *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908).

[1471] Goesaert v. Cleary, 335 U.S. 464 (1948).

[1472] Title VII, 78 Stat. 253, 42 U.S.C. § 2000e. On sex discrimination generally, *see* "Classifications Meriting Close Scrutiny—Sex," supra.

[1473] Mallinckrodt Works v. St. Louis, 238 U.S. 41 (1915).

[1474] International Harvester Co. v. Missouri, 234 U.S. 199 (1914).

[1475] Tigner v. Texas, 310 U.S. 141 (1940) (overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)).

[1476] Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910).

tion clause.[1477] A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.[1478] Likewise, enforcement of an unfair sales act, whereby merchants are privileged to give trading stamps, worth two and one-half percent of the price, with goods sold at or near statutory cost, while a competing merchant, not issuing stamps, is precluded from making an equivalent price reduction, effects no discrimination. There is a reasonable basis for concluding that destructive, deceptive competition results from selective loss-leader selling whereas such abuses do not attend issuance of trading stamps "across the board," as a discount for payment in cash.[1479]

***Administrative Discretion***.—A municipal ordinance which vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality.[1480] But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city,[1481] or from building line restrictions.[1482] Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.[1483] The mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of cigarettes.[1484] In a later case,[1485] the Court held that the unfettered discretion of river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not a denial of equal protection to persons not selected despite the fact that such apprenticeship was requisite for appointment as a pilot.

***Social Welfare***.—The traditional "reasonable basis" standard of equal protection adjudication developed in the main in cases involving state regulation of business and industry. "The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and

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[1477] Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

[1478] Pacific States Co. v. White, 296 U.S. 176 (1935); *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873): Nebbia v. New York, 291 U.S. 502, 529 (1934).

[1479] Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 339–41 (1959).

[1480] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1481] Fischer v. St. Louis, 194 U.S. 361 (1904).

[1482] Gorieb v. Fox, 274 U.S. 603 (1927).

[1483] Wilson v. Eureka City, 173 U.S. 32 (1899).

[1484] Gundling v. Chicago, 177 U.S. 183 (1900).

[1485] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

this one, but we can find no basis for applying a different constitutional standard."[1486] Thus, a formula for dispensing aid to dependent children which imposed an upper limit on the amount one family could receive, regardless of the number of children in the family, so that the more children in a family the less money per child was received, was found to be rationally related to the legitimate state interest in encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor.[1487] Similarly, a state welfare assistance formula which, after calculation of individual need, provided less of the determined amount to families with dependent children than to those persons in the aged and infirm categories did not violate equal protection because a State could reasonably believe that the aged and infirm are the least able to bear the hardships of an inadequate standard of living, and that the apportionment of limited funds was therefore rational.[1488] While reiterating that this standard of review is "not a toothless one," the Court has nonetheless sustained a variety of distinctions on the basis that Congress could rationally have believed them justified,[1489] acting to invalidate a provision only once and then on the premise that Congress was actuated by an improper purpose.[1490]

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest which would place a bar upon the legislature's giving landlords a much more favorable and summary process of judicially-con-

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[1486] Dandridge v. Williams, 397 U.S. 471, 485 (1970). Decisions respecting the rights of the indigent in the criminal process and dicta in Shapiro v. Thompson, 394 U.S. 618, 627 (1969), had raised the prospect that because of the importance of "food, shelter, and other necessities of life," classifications with an adverse or perhaps severe impact on the poor and needy would be subjected to a higher scrutiny. Dandridge was a rejection of this approach, which was more fully elaborated in another context in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 18–29 (1973).

[1487] Dandridge v. Williams, 397 U.S. 471, 483–87 (1970).

[1488] Jefferson v. Hackney, 406 U.S. 535 (1972). *See also* Richardson v. Belcher, 404 U.S. 78 (1971) (sustaining Social Security provision reducing disability benefits by amount received from worker's compensation but not that received from private insurance).

[1489] *E.g.*, Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying benefits to divorced woman under 62 with dependents represents rational judgment with respect to likely dependency of married but not divorced women); Califano v. Boles, 443 U.S. 282 (1979) (limitation of benefits to widows and divorced wives of wage earners does not deny equal protection to mother of illegitimate child of wage earner who was never married to wage earner).

[1490] Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (also questioning rationality).

trolled eviction actions than was available in other kinds of litigation.[1491]

However, a statute which prohibited the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and which contained no limitation on dispensation to married persons was held to violate the equal protection clause on several grounds. On the basis of the right infringed by the limitation, the Court saw no rational basis for the State to distinguish between married and unmarried persons. Similarly, the exemption from the prohibition for purposes of disease prevention nullified the argument that the rational basis for the law was the deterrence of fornication, the rationality of which the Court doubted in any case.[1492] Also denying equal protection was a law affording married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing.[1493]

***Punishment of Crime***.—Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.[1494] Comparative gravity of criminal offenses is, however, largely a matter of state discretion, and the fact that some offenses are punished with less severity than others does not deny equal protection.[1495] Heavier penalties may be imposed upon habitual criminals for like offenses,[1496] even after a pardon for an earlier offense,[1497] and such persons may be made

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[1491] Lindsey v. Normet, 405 U.S. 56 (1972). The Court did invalidate one provision of the law requiring tenants against whom an eviction judgment had been entered after a trial to post a bond in double the amout of rent to become due by the determination of the appeal, because it bore no reasonable relationship to any valid state objective and arbitrarily distinguished between defendants in eviction actions and defendants in other actions. Id. at 74–79.

[1492] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[1493] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[1494] Pace v. Alabama, 106 U.S. 583 (1883). *See* Salzburg v. Maryland, 346 U.S. 545 (1954), sustaining law rendering illegally seized evidence inadmissible in prosecutions in state courts for misdemeanors but permitting use of such evidence in one county in prosecutions for certain gambling misdemeanors. Distinctions based on county areas were deemed reasonable. In North v. Russell, 427 U.S. 328 (1976), the Court sustained the provision of law-trained judges for some police courts and lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.

[1495] Collins v. Johnston, 237 U.S. 502, 510 (1915); Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[1496] McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); Graham v. West Virginia, 224 U.S. 616 (1912).

[1497] Carlesi v. New York, 233 U.S. 51 (1914).

ineligible for parole.[1498] A state law doubling the sentence on prisoners attempting to escape does not deny equal protection by subjecting prisoners who attempt to escape together to different sentences depending on their original sentences.[1499]

A statute denying state prisoners good time credit for presentence incarceration but permitting those prisoners who obtain bail or other release immediately to receive good time credit for the entire period which they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection. The distinction is rationally justified by the fact that good time credit is designed to encourage prisoners to engage in rehabilitation courses and activities which exist only in state prisons and not in local jails.[1500]

The equal protection clause does, however, render invalid a statute requiring the sterilization of persons convicted of various offenses when the statute draws a line between like offenses, such as between larceny by fraud and embezzlement.[1501] A statute which provided that convicted defendants sentenced to imprisonment must reimburse the State for the furnishing of free transcripts of their trial by having amounts deducted from prison pay denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences, or placed on probation.[1502] Similarly, a statute enabling the State to recover the costs of such transcripts and other legal defense fees by a civil action was defective under the equal protection clause because indigent defendants against whom judgment was entered under the statute did not have the benefit of exemptions and benefits afforded other civil judgment debtors.[1503] But a bail reform statute which provided for liberalized forms of release and which imposed the costs of operating the system upon one category of released defendants, generally those most indigent, was not invalid because the classification was rational and because the measure was in any event a substantial improvement upon the old bail system.[1504] The Court in the last several years has applied the clause strictly to

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[1498] Ughbanks v. Armstrong, 208 U.S. 481 (1908).

[1499] Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[1500] McGinnis v. Royster, 410 U.S. 263 (1973). *Cf.* Hurtado v. United States, 410 U.S. 578 (1973).

[1501] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[1502] Rinaldi v. Yeager, 384 U.S. 305 (1966). *But see* Fuller v. Oregon, 417 U.S. 40 (1974) (imposition of reimbursement obligation for state-provided defense assistance upon convicted defendants but not upon those acquitted or whose convictions are reversed is objectively rational).

[1503] James v. Strange, 407 U.S. 128 (1972).

[1504] Schilb v. Kuebel, 404 U.S. 357 (1971).

prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency. [1505]

## EQUAL PROTECTION AND RACE

### Overview

The Fourteenth Amendment "is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provision by appropriate legislation." [1506] Thus, a state law which on its face worked a discrimination against African Americans was void. [1507] In addition, "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations

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[1505] *See* "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," supra.

[1506] Strauder v. West Virginia, 100 U.S. 303, 306–07 (1880).

[1507] Strauder v. West Virginia, 100 U.S. 303 (1880) (law limiting jury service to white males). Moreover it will not do to argue that a law that segregates the races or prohibits contacts between them discriminates equally against both races. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting blacks from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks where blacks were predominant). *Compare* Pace v. Alabama, 106 U.S. 583 (1883) (sustaining conviction under statute that imposed a greater penalty for adultery or fornication between a white person and a Negro than was imposed for similar conduct by members of the same race, using "equal application" theory), *with* McLaughlin v. Florida, 379 U.S. 184, 188 (1964), *and* Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting theory).

between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." [1508]

**Education**

***Development and Application of "Separate But Equal".***—Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race, [1509] but the Court in *Plessy v. Ferguson* [1510] adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts. [1511] *Plessy* concerned not schools but a state law requiring "equal but separate" facilities for rail transportation and requiring the separation of "white and colored" passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power." [1512] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where the political rights of the colored race have been longest and most earnestly enforced." [1513]

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[1508] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (discrimination against Chinese).

[1509] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1880); Ex parte Virginia, 100 U.S. 339, 344–45 (1880).

[1510] 163 U.S. 537 (1896).

[1511] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[1512] Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896). "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." Id. at 552, 559.

[1513] 163 U.S. at 544-45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African Americans with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Id. at 552, 559.

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African Americans and sent to school with them rather than with whites,[1514] and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for African Americans.[1515] And no violation of the equal protection clause was found when a state law prohibited a private college from teaching whites and African Americans together.[1516]

In 1938, the Court began to move away from "separate but equal." It then held that a State which operated a law school open to whites only and which did not operate any law school open to African Americans violated an applicant's right to equal protection, even though the State offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the State.[1517] When Texas established a law school for African Americans after the plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.[1518] Equally objectionable was the fact that when Oklahoma admitted an African American law student to its only law school it required him to remain physically separate from the other students.[1519]

***Brown v. Board of Education***.—"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[1520] involving challenges to segregation *per se* in the schools of four States in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867. . . or even to 1896," but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the

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[1514] Gong Lum v. Rice, 275 U.S. 78 (1927).
[1515] Cummings v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).
[1516] Berea College v. Kentucky, 211 U.S. 45 (1908).
[1517] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).
[1518] Sweatt v. Painter, 339 U.S. 629 (1950).
[1519] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
[1520] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in Bolling v. Sharpe, 347 U.S. 497 (1954).

opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the equal protection clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." [1521]

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." But in any event the lower courts were to require compliance "with all deliberate speed." [1522]

***Brown's Aftermath***.—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock. [1523] In the main, these years were taken up with enactment and administration of "pupil placement laws" by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, and which required the exhaustion of state administrative remedies before each pupil seeking reassignment could bring individual litigation. [1524] The lower courts eventually began voiding these laws for discriminatory application, permitting class actions, [1525] and the Supreme Court voided the exhaustion of state remedies require-

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[1521] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

[1522] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[1523] Cooper v. Aaron, 358 U.S. 1 (1958).

[1524] *E.g.*, Covington v. Edwards, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir.), *cert. denied*, 361 U.S. 818 (1959); Dove v. Parham, 271 F.2d 132 (8th Cir. 1959).

[1525] *E.g.*, McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960); Green v. School Board of Roanoke, 304 F.2d 118 (4th Cir. 1962); Gibson v. Board of Pub. Instruction of Dade County, 272 F.2d 763 (5th Cir. 1959); Northcross v. Board of Educ. of Memphis, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

ment.[1526] In the early 1960's, various state practices—school closings,[1527] minority transfer plans,[1528] zoning,[1529] and the like—were ruled impermissible, and the Court indicated that the time was running out for full implementation of the *Brown* mandate.[1530]

About this time, "freedom of choice" plans were promulgated under which each child in the school district could choose each year which school he wished to attend, and, subject to space limitations, he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered.[1531] Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate[1532] led to a change of attitude in the lower courts and the Supreme Court. In *Green v. School Board of New Kent County*,[1533] the Court posited the principle that the only desegregation plan permissible is one which actually results in the abolition of the dual school, and charged school officials with an af-

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[1526] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[1527] Griffin v. Board of Supervisors of Prince Edward County, 377 U.S. 218 (1964) (holding that "under the circumstances" the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant/tax credit programs making an official connection with the "private" schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, *see* Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962).

[1528] Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.

[1529] Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).

[1530] The first comment appeared in dictum in a nonschool case, Watson v. City of Memphis, 373 U.S. 526, 530 (1963), and was implied in Goss v. Board of Educ. of City of Knoxville, 373 U.S. 683, 689 (1963). In Bradley v. School Bd. of City of Richmond, 382 U.S. 103, 105 (1965), the Court announced that "[d]elays in desegregating school systems are no longer tolerable." A grade-a-year plan was implicitly disapproved in Calhoun v. Latimer, 377 U.S. 263 (1964), *vacating and remanding*, 321 F.2d 302 (5th Cir. 1963). *See* Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

[1531] *E.g.*, Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), *rev'd on other grounds*, 382 U.S. 103 (1965); Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967).

[1532] Pub. L. 88–352, 78 Stat. 252, 42 U.S.C. § 2000d et seq. (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to afford guidance to state-local officials in interpretations of the law and were accepted as authoritative by the courts and utilized. Davis v. Board of School Comm'rs of Mobile County, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

[1533] 391 U.S. 430 (1968); Raney v. Gould Bd. of Educ., 391 U.S. 443 (1968). These cases had been preceded by a circuit-wide promulgation of similar standards in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *modified & aff'd. en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

firmative obligation to achieve it. School boards must present to the district courts "a plan that promises realistically to work and promises realistically to work *now*," in such a manner as "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[1534] Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students, but also the merging into one system of faculty,[1535] staff, and services, so that no school could be marked as either a "black" or a "white" school.[1536]

***Implementation of School Desegregation***.—In the aftermath of *Green*, the various Courts of Appeals held inadequate an increasing number of school board plans based on "freedom of choice," on zoning which followed traditional residential patterns, or on some combination of the two.[1537] The Supreme Court's next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district

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[1534] *Green*, 391 U.S. at 439, 442 (1968). "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id. at 437–38. The case laid to rest the dictum of Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution "does not require integration" but "merely forbids discrimination." Green and Raney v. Board of Educ. of Gould School Dist., 391 U.S. 443 (1968), found "freedom of choice" plans inadequate, and Monroe v. Board of Comm'rs of City of Jackson, 391 U.S. 450 (1968), found a "free transfer" plan inadequate.

[1535] Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).

[1536] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *mod. & aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

[1537] Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), cert. denied, 396 U.S. 904 (1969); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.), cert. denied, 396 U.S. 940 (1969); Brewer v. School Bd. of City of Norfolk, 397 F.2d 37 (4th Cir. 1968); Clark v. Board of Educ. of City of Little Rock, 426 F.2d 1035 (8th Cir. 1970).

is to terminate dual school systems at once and to operate now and hereafter only unitary schools." [1538]

In the October 1970 Term the Court in *Swann v. Charlotte-Mecklenburg Board of Education* [1539] undertook to elaborate the requirements for achieving a unitary school system and delineating the methods which could or must be used to achieve it, and at the same time struck down state inhibitions on the process. [1540] The opinion in *Swann* emphasized that the goal since *Brown* was the dismantling of an officially-imposed dual school system. "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." [1541] While "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," any such situation must be closely scrutinized by the lower courts, and school officials have a heavy burden to prove that the situation is not the result of state-fostered segregation. Any desegregation plan which contemplates such a situation must before a court accepts it be shown not to be affected by present or past discriminatory action on the part of state and local officials. [1542] When a federal court has to develop a remedial desegregation plan, it must start with an appreciation of the mathematics of the racial composition of the school district population; its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point. [1543]

Because current attendance patterns may be attributable to past discriminatory actions in site selection and location of school buildings, the Court in *Swann* determined that it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote desegregation and undo past official action; in this re-

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[1538] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). The Court summarily reiterated its point several times in the Term. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970); Northcross v. Board of Educ. of Memphis, 397 U.S. 232 (1970); Dowell v. Board of Educ. of Oklahoma City, 396 U.S. 269 (1969).

[1539] 402 U.S. 1 (1971); *see also* Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971).

[1540] McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

[1541] 402 U.S. at 18.

[1542] 402 U.S. at 25-27.

[1543] 402 U.S. at 22-25.

medial process, conscious assignment of students and drawing of boundaries on the basis of race is permissible.[1544] Transportation of students—busing—is a permissible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy may be inadequate due to past discrimination. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students; when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts.[1545] Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.[1546]

***Northern Schools: Inter- and Intradistrict Desegregation***.—The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections, required the development of standards for determining when segregation was *de jure* and what remedies should be imposed when such official separation was found.[1547]

Accepting the findings of lower courts that the actions of local school officials and the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court in *Milliken v. Bradley*[1548] set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban

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[1544] 402 U.S. at 27-29.

[1545] 402 U.S. at 29-31.

[1546] 402 U.S. at 31-32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id. at 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.

[1547] The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979). As early as *Ex parte* Virginia, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

[1548] 418 U.S. 717 (1974).

school districts. The basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district.[1549] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[1550] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through elected representatives.[1551] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[1552]

"The controlling principle consistently expounded in our holdings," said the Court in the *Detroit* case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[1553] While this axiom caused little problem when

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[1549] 418 U.S. at 745.

[1550] 418 U.S. at 741-42.

[1551] 418 U.S. at 742-43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id. at 294, and in still others paired the two reasons. Id. at 296.

[1552] Milliken v. Bradley, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id . at 757, 762, 781.

[1553] 418 U.S. at 744. *See* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in Milliken).

the violation consisted of statutorily mandated separation,[1554] it has required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs, but later the Court had appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes v. Denver School District*.[1555] The lower courts had found the school segregation existing within one part of the City to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived. The burden the shifts to the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[1556]

*Keyes* then was consistent with earlier cases requiring a showing of official complicity in segregation and limiting the remedy to

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[1554] When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[1555] 413 U.S. 189 (1973).

[1556] 413 U.S. at 207-11. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id. at 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id. at 217, 236 (concurring and dissenting). *See* his opinion in Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (concurring).

the violation found; by creating presumptions *Keyes* simply afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the "controlling principle" of school desegregation cases, the Court appeared to move away from the *Keyes* approach.[1557] First, the Court held that federal equity power was lacking to impose orders to correct demographic shifts "not attributed to any segregative actions on the part of the defendants."[1558] A district court that had ordered implementation of a student assignment plan that resulted in a racially neutral system exceeded its authority, the Court held, by ordering annual readjustments to offset the demographic changes.[1559]

Second, in the first *Dayton* case the lower courts had found three constitutional violations that had resulted in some pupil segregation, and, based on these three, viewed as "cumulative violations," a district-wide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'"[1560] The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."[1561] The Court then sent the case back to the district court for the taking of evidence, the finding of

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[1557] Of significance was the disallowance of the disproportionate impact analysis in constitutional interpretation and the adoption of an apparently strengthened intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). This principle applies in the school area. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977).

[1558] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[1559] 427 U.S. at 436.

[1560] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (quoting Hills v. Gautreaux, 425 U.S. 284, 294 (1976)).

[1561] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permitted by Keyes. Justice Brennan, the author of Keyes, concurred on the basis that the violations found did not justify the remedy imposed, asserting that the methods of proof utilized in Keyes were still valid. Id. at 421.

the nature of the violations, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal from Columbus, Ohio.[1562] Following the Supreme Court standards, the *Dayton* district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown v. Board of Education*. The *Keyes* presumption therefore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it was subject to an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[1563] Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be utilized to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards.[1564] The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.[1565]

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the *Detroit* case, the Court

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[1562] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[1563] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (quoting Green v. School Bd. of New Kent County, 391 U.S. 430, 437–38 (1968)). *Contrast* the Court's more recent decision in Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam), holding that adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy. There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools. Id. at 408 (concurring opinion of Justice White, endorsed by the Court's per curiam opinion).

[1564] 443 U.S. at 461-65.

[1565] 443 U.S. at 465-67.

unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who had been subjected to past acts of *de jure* segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.[1566]

The broad scope of federal courts' remedial powers was more recently reaffirmed in *Missouri v. Jenkins*.[1567] There the Court ruled that a federal district court has the power to order local authorities to impose a tax increase in order to pay to remedy a constitutional violation, and if necessary may enjoin operation of state laws prohibiting such tax increases. However, the Court also held, the district court had abused its discretion by itself imposing an increase in property taxes without first affording local officials "the opportunity to devise their own solutions."[1568]

***Efforts to Curb Busing and Other Desegregation Remedies***.—Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for *de jure* racial separation in the public schools, both North and South. Busing of school children created the greatest amount of controversy. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the more recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that courts must observe limits occasioned by the nature of the educational process and the well-being of children,[1569] and subsequent cases declared the principle that the remedy must be no more extensive than the violation found.[1570] Congress has enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage, have been

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[1566] Milliken v. Bradley, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id. at 288–91.

[1567] 495 U.S. 33 (1990).

[1568] 495 U.S. at 52. Similarly, the Court held in Spallone v. United States, 493 U.S. 265 (1990), that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[1569] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30–31 (1971).

[1570] Milliken v. Bradley, 418 U.S. 717, 744 (1974).

largely ineffectual.[1571] Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both Houses.[1572]

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for *de jure* segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other remedies in Washington State and California.[1573] Voters in Washington, following a decision by the school board in Seattle to undertake a mandatory busing program, approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students' course of study; there were so many exceptions, however, that the prohibition in effect applied only to busing for racial purposes. In California the state courts had interpreted the state constitution to require school systems to eliminate both *de jure* and *de facto* segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment, and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure, and with near unanimity of result if not of reasoning it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation—and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school

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[1571] *E.g.*, § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. § 2000c–6, construed to cover only *de facto* segregation in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in Drummond v. Acree, 409 U.S. 1228 (1972) (Justice Powell in Chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (1974), 20 U.S.C. §§ 1701–1757, *see especially* § 1714, interpreted in Morgan v. Kerrigan, 530 F.2d 401, 411–15 (1st Cir.), cert. denied, 426 U.S. 995 (1976), and United States v. Texas Education Agency, 532 F.2d 380, 394 n.18 (5th Cir.), *vacated on other grounds sub nom.*, Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 108, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460, 42 U.S.C.§ 2000d, upheld against facial attack in Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

[1572] *See, e.g.*, The 14th Amendment and School Busing: Hearings Before the Senate Judiciary Subcommittee on the Constitution, 97th Congress, 1st Sess. (1981); and School Desegregation: Hearings Before the House Judiciary Subcommittee on Civil and Constitutional Rights, 97th Congress, 1st Sess. (1981).

[1573] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). The decisions were in essence an application of Hunter v. Erickson, 393 U.S. 385 (1969).

boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.[1574] The Court discerned no such impediment in the California measure, a simple repeal of a remedy that had been within the government's discretion to provide. Moreover, the State continued under an obligation to alleviate *de facto* segregation by every other feasible means. The initiative had merely foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.[1575]

***Termination of Court Supervision***.—With most school desegregation decrees having been entered decades ago, the issue arose as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in *Oklahoma City Board of Education v. Dowell*,[1576] upon a showing that the purposes of the litigation have been "fully achieved,"—i.e., that the school district is being operated "in compliance with the commands of the Equal Protection Clause," that it has been so operated "for a reasonable period of time," and that it is "unlikely" that the school board would return to its former violations. On remand, the trial court was directed to determine "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [*de jure*] discrimination had been eliminated to the extent practicable."[1577] In *United States v. Fordice*,[1578] the Court determined that the State of Mississippi had not, by adopting and implementing race-neutral policies, eliminated all vestiges of its prior *de jure*, racially segregated, "dual" system of higher education. The State must also, to the extent practicable and consistent with sound educational practices, eradicate policies and practices that are traceable to the dual system and that continue to have segregative effects. The Court identified several surviving aspects of Mis-

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[1574] Washington v. Seattle School Dist., 458 U.S. 457, 470–82 (1982). Justice Blackmun wrote the opinion of the Court and was joined by Justices Brennan, White, Marshall, and Stevens. Dissenting were Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger. Id. at 488. The dissent essentially argued that because the State was ultimately entirely responsible for all educational decisions, its choice to take back part of the power it had delegated did not raise the issues the majority thought it did.

[1575] Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535–40 (1982).

[1576] 498 U.S. 237 (1991).

[1577] 498 U.S. at 249-50.

[1578] 505 U.S. 717.

sissippi's prior dual system which are constitutionally suspect, and which must be justified or eliminated. The State's admissions policy, requiring higher test scores for admission to the five historically white institutions than for admission to the three historically black institutions, is suspect because it originated as a means of preserving segregation. Also suspect are the widespread duplication of programs, a possible remnant of the dual "separate-but-equal" system; institutional mission classifications making three historically white schools the flagship "comprehensive" universities; and the retention and operation of all eight schools rather than the possible merger of some.

**Juries**

It has been established since *Strauder v. West Virginia* [1579] that exclusion of an identifiable racial or ethnic group from a grand jury [1580] which indicts a defendant or a petit jury [1581] which tries him, or from both, [1582] denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment. [1583] Even if the defendant's race differs from that of the excluded jurors, the Court has recently held, the defendant has third party standing to assert the rights of jurors ex-

[1579] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See* Ex parte Virginia, 100 U.S. 339 (1880). In Hernandez v. Texas, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans to be a denial of equal protection, a ruling it reiterated in Castaneda v. Partida, 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[1580] Bush v. Kentucky, 107 U.S. 110 (1883); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972).

[1581] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[1582] Neal v. Delaware, 103 U.S. 370 (1881); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Patton v. Mississippi, 332 U.S. 463 (1947); Coleman v. Alabama, 377 U.S. 129 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 385 U.S. 538 (1967).

[1583] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. Cassell v. Texas, 339 U.S. 282 (1950); Alexander v. Louisiana, 405 U.S. 625 (1972); Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).

cluded on the basis of race.[1584] "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[1585] Thus, persons may bring actions seeking affirmative relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.[1586]

A *prima facie* case of deliberate and systematic exclusion is made when it is shown that no African Americans have served on juries for a period of years[1587] or when it is shown that the number of African Americans who served was grossly disproportionate to the percentage of African Americans in the population and eligible for jury service.[1588] Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that discrimination was not practiced; it is not adequate that jury selection officials testify under oath that they did not discriminate.[1589] Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices which made discrimination easy to accomplish,[1590] it has not outlawed discretionary selection pursuant to general standards of educational attainment and character which can be administered fairly.[1591] Similarly, it declined to rule that African Americans must

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[1584] Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). *See also* Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.

[1585] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970).

[1586] Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970).

[1587] Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942).

[1588] Pierre v. Louisiana, 306 U.S. 354 (1939); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); Alexander v. Louisiana, 405 U.S. 625 (1972). For an elaborate discussion of statistical proof, *see* Castaneda v. Partida, 430 U.S. 482 (1977).

[1589] Norris v. Alabama, 294 U.S. 587 (1935); Eubanks v. Georgia, 385 U.S. 545 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Turner v. Fouche, 396 U.S. 346, 360–361 (1970).

[1590] Avery v. Georgia, 345 U.S. 559 (1953) (names of whites and African Americans listed on differently colored paper for drawing for jury duty); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of African Americans were marked with a "c").

[1591] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331–37 (1970), and cases cited.

be included on all-white jury commissions which administer the jury selection laws in some States.[1592]

In *Swain v. Alabama*,[1593] African Americans regularly appeared on jury venires but no African American had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential African American jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the African Americans in the particular case was permissible, the Court held, regardless of the prosecutor's motive, although it was indicated the consistent use of such challenges to remove African Americans would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no African American had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, defendant's claims were rejected.

The *Swain* holding as to the evidentiary standard was overruled in *Batson v. Kentucky*, the Court ruling that "a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial." To rebut this showing, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[1594] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[1595] and by a defendant in a criminal case,[1596] the principal issue in these cases being the presence of state action, not the invalidity of purposeful racial discrimination.

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[1592] 396 U.S. at 340-41.

[1593] 380 U.S. 202 (1965).

[1594] 476 U.S. 79, 96, 98 (1986). The principles were applied in Trevino v. Texas, 503 U.S. 562 (1991), holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. In Hernandez v. New York, 500 U.S. 352 (1991), a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. The *Batson* ruling applies to cases pending on direct review or not yet final when Batson was decided, Griffith v. Kentucky, 479 U.S. 314 (1987), but does not apply to a case on federal habeas corpus review, Allen v. Hardy, 478 U.S. 255 (1986).

[1595] Edmonson v. Leesville Concrete Co., 500 U.S. 614.

[1596] Georgia v. McCollum, 505 U.S. 42 (1992).

Discrimination in the selection of grand jury foremen presents a closer question, answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus the Court had "assumed without deciding" that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers.[1597] That situation was distinguished, however, in a due process challenge to the federal system, where the foreman's responsibilities are "essentially clerical" and where the selection is from among the members of an already-chosen jury.[1598]

**Capital Punishment**

In *McCleskey v. Kemp*[1599] the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.[1600] "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[1601] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may

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[1597] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

[1598] Hobby v. United States, 468 U.S. 339 (1984). Note also that in this limited context where injury to the defendant was largely conjectural, the Court seemingly revived the same class rule, holding that a white defendant challenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting blacks defendants from "the injuries of stigmatization and prejudice" associated with discrimination. Id. at 347.

[1599] 481 U.S. 279 (1987). The decision was 5–4, with Justice Powell's opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.

[1600] 481 U.S. at 294. Dissenting Justices Brennan, Blackmun and Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. Id. at 340, 347–48, 366.

[1601] 481 U.S. at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or to the nature of the offense; the Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. Id. at 296.

not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry.[1602]

### Housing

*Buchanan v. Warley*[1603] invalidated an ordinance which prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and which prohibited whites from doing so where the greater number of houses were occupied by blacks. Although racially restrictive covenants do not themselves violate the equal protection clause, the judicial enforcement of them, either by injunctive relief or through entertaining damage actions, does violate the Fourteenth Amendment.[1604] Referendum passage of a constitutional amendment repealing a "fair housing" law and prohibiting further state or local action in that direction was held unconstitutional in *Reitman v. Mulkey*,[1605] though on somewhat ambiguous grounds, while a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found to accord with the equal protection clause.[1606] Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.[1607] Provision of publicly assisted housing, of course, must be on a nondiscriminatory basis.[1608]

### Other Areas of Discrimination

***Transportation***.—The "separate but equal" doctrine won Supreme Court endorsement in the transportation context,[1609] and its passing in the education field did not long predate its demise in

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[1602] The Court distinguished Batson by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. 481 U.S. at 296 n.17.

[1603] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

[1604] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953). *Cf.* Corrigan v. Buckley, 271 U.S. 323 (1926).

[1605] 387 U.S. 369 (1967).

[1606] James v. Valtierra, 402 U.S. 137 (1971). The Court did not perceive that either on its face or as applied the provision was other than racially neutral. Justices Marshall, Brennan, and Blackmun dissented. Id. at 143.

[1607] Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968, 82 Stat. 73, 42 U.S.C. § 3601 et seq.

[1608] *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

[1609] Plessy v. Ferguson, 163 U.S. 537 (1896).

transportation as well.[1610] During the interval, the Court held invalid a state statute which permitted carriers to provide sleeping and dining cars for white persons only,[1611] held that a carrier's provision of unequal, or nonexistent, first class accommodations to African Americans violated the Interstate Commerce Act,[1612] and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.[1613] *Boynton v. Virginia*[1614] voided a trespass conviction of an interstate African American bus passenger who had refused to leave a restaurant which the Court viewed as an integral part of the facilities devoted to interstate commerce and therefore subject to the Interstate Commerce Act.

***Public Facilities***.—In the aftermath of *Brown v. Board of Education*, the Court in a lengthy series of *per curiam* opinions established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function.[1615] A municipality could not operate a racially-segregated park pursuant to a will which left the property for that purpose and which specified that only whites could use the park,[1616] but it was permissible for the state courts to hold that the trust had failed and to imply a reverter to the decedent's heirs.[1617] A municipality under court order to desegregate its publicly-owned swim-

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[1610] Gayle v. Browder, 352 U.S. 903 (1956), *aff'g*, 142 F. Supp. 707 (M.D. Ala.) (statute requiring segregation on buses is unconstitutional). "We have settled beyond question that no State may require racial segregation of interstate transportation facilities. . . . This question is no longer open; it is foreclosed as a litigable issue." Bailey v. Patterson, 369 U.S. 31, 33 (1962).

[1611] McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

[1612] Mitchell v. United States, 313 U.S. 80 (1941).

[1613] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

[1614] 364 U.S. 454 (1960).

[1615] *E.g.*, Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[1616] Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee but the Court thought the city was still inextricably bound up in the operation and maintenance of the park. Justices Black, Harlan, and Stewart dissented because they thought the removal of the city as trustee removed the element of state action. Id. at 312, 315.

[1617] Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in effectuating the testator's intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the equal protection clause. Justices Douglas and Brennan dissented. Id. at 448, 450.

ming pools was held to be entitled to close the pools instead, so long as it entirely ceased operation of them.[1618]

***Marriage***.—Statutes which forbid the contracting of marriage between persons of different races are unconstitutional[1619] as are statutes which penalize interracial cohabitation.[1620] Similarly, a court may not deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[1621]

***Judicial System***.—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[1622] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[1623] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[1624]

***Public Designation***.—It is unconstitutional to designate candidates on the ballot by race[1625] and apparently any sort of designation by race on public records is suspect although not necessarily unlawful.[1626]

***Public Accommodations***.—Whether or not discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960's, but it avoided finally deciding one way or the other, generally finding forbidden state ac-

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[1618] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. at 231.

[1619] Loving v. Virginia, 388 U.S. 1 (1967).

[1620] McLaughlin v. Florida, 379 U.S. 184 (1964).

[1621] Palmore v. Sidoti, 466 U.S. 429 (1984).

[1622] Johnson v. Virginia, 373 U.S. 61 (1963).

[1623] Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[1624] Lee v. Washington, 390 U.S. 333 (1968); Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga.), *aff'd*, 393 U.S. 266 (1968).

[1625] Anderson v. Martin, 375 U.S. 399 (1964).

[1626] Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of whites and African American in voting, tax and property records).

tion in some aspect of the situation.[1627] Passage of the 1964 Civil Rights Act obviated any necessity to resolve the issue.[1628]

***Elections***.—While, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress,[1629] the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well.[1630] Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.[1631]

**Permissible Remedial Utilizations of Racial Classifications**

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account in order to formulate and implement a remedy to overcome the effects of past discrimination against the class. Often the issue is framed in terms of "reverse discrimination," inasmuch as the governmental action deliberately favors members of the class and may simultaneously impact adversely upon nonmembers of the class.[1632] While the Court in prior cases had accepted both the use of race and other suspect criteria as

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[1627] *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

[1628] Title II, 78 Stat. 243, 42 U.S.C. § 2000a to 2000a–6. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, *see* the opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[1629] *See* "Federal Remedial Legislation," infra.

[1630] *E.g.*, Hadnott v. Amos, 394 U.S. 358 (1971); Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).

[1631] *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); Rogers v. Lodge, 458 U.S. 613 (1982).

[1632] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id. at 280 n.8. In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. *Accord*, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

valid factors in formulating remedies to overcome discrmination [1633] and the according of preferences to class members when the class had previously been the object of discrimination, [1634] it had never until recently given plenary review to programs that expressly used race as the prime consideration in the awarding of some public benefit. [1635]

In *United Jewish Organizations v. Carey* [1636] the State, in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law, had drawn a plan which consciously used racial criteria to create a certain number of districts with nonwhite populations large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, the Justice argued that compliance with the Act necessarily required States to be race conscious in the drawing of lines so as not to dilute minority voting strength, that this requirement was not dependent upon a showing of past discrimination, and that the States retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances. [1637]

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[1633] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[1634] Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

[1635] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974), but the merits were not reached.

[1636] 430 U.S. 144 (1977). Chief Justice Burger dissented, id. at 180, and Justice Marshall did not participate.

[1637] 430 U.S. at 155-65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the State had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction. [1638]

With the Court so divided, light on the constitutionality of affirmative action was anticipated in *Regents of the University of California v. Bakke*, [1639] but again the Court fragmented. The Davis campus medical school each year admitted 100 students; the school set aside 16 of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places. Twice denied admission, Bakke sued, arguing that had not the 16 positions been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.

Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964 [1640] outlawed the college's program and made unnecessary any consideration of the Constitution. They thus would admit Bakke and bar use of race in admissions. [1641] The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the equal protection clause pro-

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[1638] 430 U.S. at 165-68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id. at 168. Justices Stewart and Powell concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id. at 179.

[1639] 438 U.S. 265 (1978).

[1640] 78 Stat. 252, 42 U.S.C. § 2000d to 2000d–7. The Act bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance.

[1641] 438 U.S. at 408-21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger).

scribed.[1642] They thus reached the constitutional issue but resolved it differently. Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down any remedial racial classification that stigmatized any group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[1643]

Justice Powell argued that all racial classifications are suspect and require strict scrutiny. Since none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[1644] Justice Powell thus joined the first group in agreeing that Bakke should be admitted, but he joined the second group in permitting the college to consider race to some degree in its admissions.[1645]

Finally, in *Fullilove v. Klutznick*,[1646] the Court resolved most of the outstanding constitutional question regarding the validity of race-conscious affirmative action programs. Although again there was no majority opinion of the Court, the series of opinions by the six Justices voting to uphold a congressional provision requiring

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[1642] 438 U.S. at 284-87 (Justice Powell), 328–55 (Justices Brennan, White, Marshall, and Blackmun).

[1643] 438 U.S. at 355-79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Id. at 359.

[1644] 438 U.S. at 287-320.

[1645] *See* 438 U.S. at 319-20 (Justice Powell).

[1646] 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, id. at 522, while Justice Stevens dissented in another. Id. at 532.

that at least ten percent of public works funds be set aside for minority business enterprises all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Judgment of the Court was issued by Chief Justice Burger, who emphasized Congress' preeminent role under the Commerce clause and under the Fourteenth Amendment to find as a fact the existence of past discrimination and its continuing effects and to implement remedies which were race conscious in order to cure those effects.[1647] The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, utilizing middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[1648]

Taken together, the opinions recognize that at least in Congress there resides the clear power to make the findings that will form the basis for a judgment of the necessity to use racial classifications in an affirmative way; these findings need not be extensive or express and may be collected in many ways. Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled but that they have some such power seems evident.[1649] Further, while the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving the way open for programs of a scope sufficient to remedy all the identified effects of past discrimination.[1650] But the most important part of these opinions rests in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. Rejected were the arguments that a stigma attaches to those minority beneficiaries of such programs, that burdens are placed on innocent third parties, and that the program is

[1647] 448 U.S. at 456-92. Justices White and Powell joined this opinion. Justice Powell also concurred in a separate opinion, id. at 495, which qualified to some extent his agreement with the Chief Justice.

[1648] 448 U.S. at 517.

[1649] 448 U.S. at 473-80. The program was an exercise of Congress' spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress' regulatory powers, which in this case undergirded the spending power, and found the power to repose in the commerce clause with respect to private contractors and in 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[1650] 448 U.S. at 484-85, 489 (Chief Justice Burger), 513–15 (Justice Powell).

overinclusive, benefitting some minority members who had suffered no discrimination.[1651]

The Court remains divided in ruling on constitutional challenges[1652] to affirmative action plans. As a general matter, authority to apply racial classifications is at its greatest when Congress is acting pursuant to section 5 of the Fourteenth Amendment or other of its powers, or when a court is acting to remedy proven discrimination. But impact on disadvantaged non-minorities can also be important. Two recent cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[1653] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs; in *United States v. Paradise*,[1654] the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees.[1655] By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, since the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[1656]

A clear distinction has been drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,[1657] the Court invalidated a minority set-aside require-

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[1651] 448 U.S. at 484-89 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

[1652] Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that "the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency) (emphasis original). The constitutionality of the agency's plan was not challenged. *See* id. at 620 n.2.

[1653] 476 U.S. 267 (1986).

[1654] 480 U.S. 149 (1987).

[1655] 476 U.S. at 294. A plurality of Justices in Wygant thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved. 476 U.S. at 274–76 (opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor).

[1656] 480 U.S. at 182-83 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (opinion of Justice Brennan), id. at 189 (Justice Stevens).

[1657] 488 U.S. 469 (1989). Croson was decided by a 6–3 vote. The portions of Justice O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice Rehnquist and by Justices White, Stevens, and Kennedy. The latter two Justices joined only part of Justice O'Connor's opinion; each added a separate concur-

ment that holders of construction contracts with the city subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the city's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC*[1658] applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[1659]

In *Croson*, the Court ruled that the city had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task."[1660] The overinclusive definition of minorities, including U.S. citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," also "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past discrimination against non-Blacks in the Richmond construction industry.[1661]

It followed that Richmond's set-aside program also was not "narrowly tailored" to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur "from anywhere in the country" could obtain an absolute racial preference.[1662]

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an "enhancement" for minority ownership and participation in management when the FCC con-

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ring opinion. Justice Scalia concurred separately; Justices Marshall, Brennan, and Blackmun dissented.

[1658] 497 U.S. 547 (1990). This was a 5–4 decision, Justice Brennan's opinion of the Court being joined by Justices White, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Scalia and Kennedy, and Justice Kennedy added a separate dissenting opinion joined by Justice Scalia.

[1659] 497 U.S. at 564-65.

[1660] 488 U.S. at 501–02.

[1661] 488 U.S. at 506.

[1662] 488 U.S. at 508.

siders competing license applications, and the other authorizing a "distress sale" transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore "the imprimatur of longstanding congressional support and direction." [1663]

*Metro Broadcasting* is noteworthy for several other reasons as well. The Court rejected the dissent's argument—seemingly accepted by a *Croson* majority—that Congress's more extensive authority to adopt racial classifications must trace to section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers. [1664] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest.

The distinction between federal and state power to apply racial classifications proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena* [1665] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed." [1666]

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[1663] 497 U.S. at 600. Justice O'Connor's dissenting opinion contended that the case "does not present 'a considered decision of the Congress and the President.'" Id. at 607 (quoting Fullilove, 448 U.S. at 473).

[1664] 497 U.S. at 563 & n.11. For the dissenting views of Justice O'Connor *see* id. at 606–07. *See also* Croson, 488 U.S. at 504 (opinion of Court).

[1665] 515 U.S. 200 (1995). This was a 5–4 decision. Justice O'Connor's opinion of Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

[1666] 515 U.S. at 227 (emphasis original).

## THE NEW EQUAL PROTECTION

### Classifications Meriting Close Scrutiny

***Alienage and Nationality***.—"It has long been settled . . . that the term 'person' [in the equal protection clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside."[1667] Thus, one of the earliest equal protection decisions struck down the administration of a facially-lawful licensing ordinance which was being applied to discriminate against Chinese.[1668] But the Court in many cases thereafter recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of resources and public employment to its own citizens.[1669] But in *Hirabayashi v. United States*,[1670] it was announced that "[d]istinctions between citizens solely because of their ancestry" was "odius to a free people whose institutions are founded upon the doctrine of equality." And in *Korematsu v. United States*,[1671] classifications based upon race and nationality were said to be suspect and subject to the "most rigid scrutiny." These dicta resulted in a

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[1667] Graham v. Richardson, 403 U.S. 365, 371 (1971). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948). Aliens, even unlawful aliens, are "persons" to whom the Fifth and Fourteenth Amendments apply. Plyler v. Doe, 457 U.S. 202, 210–16 (1982). The Federal Government may not discriminate invidiously against aliens, Mathews v. Diaz, 426 U.S. 67, 77 (1976). However, because of the plenary power delegated by the Constitution to the national government to deal with aliens and naturalization, federal classifications are judged by less demanding standards than are those of the States, and many classifications which would fail if attempted by the States have been sustained because Congress has made them. Id. at 78–84; Fiallo v. Bell, 430 U.S. 787 (1977). Additionally, state discrimination against aliens may fail because it imposes burdens not permitted or contemplated by Congress in its regulations of admission and conditions of admission. Hines v. Davidowitz, 312 U.S. 52 (1941); Toll v. Moreno, 458 U.S. 1 (1982). Such state discrimination may also violate treaty obligations and be void under the supremacy clause, Askura v. City of Seattle, 265 U.S. 332 (1924), and some federal civil rights statutes, such as 42 U.S.C. § 1981, protect resident aliens as well as citizens. Graham v. Richardson, 403 U.S. at 376–80.

[1668] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1669] McGready v. Virginia, 94 U.S. 391 (1877); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (limiting aliens' rights to develop natural resources); Hauenstein v. Lynham, 100 U.S. 483 (1880); Blythe v. Hinckley, 180 U.S. 333 (1901) (restriction of devolution of property to aliens); Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923) (denial of right to own and acquire land); Heim v. McCall, 239 U.S. 175 (1915); People v. Crane, 214 N.Y. 154, 108 N.E. 427, aff'd, 239 U.S. 195 (1915) (barring public employment to aliens); Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927) (prohibiting aliens from operating poolrooms). The Court struck down a statute restricting the employment of aliens by private employers, however. Truax v. Raich, 239 U.S. 33 (1915).

[1670] 320 U.S. 81, 100 (1943).

[1671] 323 U.S. 214, 216 (1944).

1948 decision which appeared to call into question the rationale of the "particular interest" doctrine under which earlier discriminations had been justified. There the Court held void a statute barring issuance of commerical fishing licenses to persons "ineligible to citizenship," which in effect meant resident alien Japanese.[1672] "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." Justice Black said for the Court that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[1673]

Announcing "that classifications based on alienage . . . are inherently suspect and subject to close scrutiny," the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.[1674] Thereafter, in a series of decisions, the Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major "political function" exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

In *Sugarman v. Dougall*,[1675] the Court voided the total exclusion of aliens from a State's competitive civil service. A State's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[1676] the Court held, and this power would extend "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[1677] But a flat ban upon much of the State's career public service, both of policy-making and non-policy-making jobs, ran

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[1672] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[1673] 334 U.S. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible to being read as questioning the premise of the earlier cases.

[1674] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[1675] 413 U.S. 634 (1973).

[1676] 413 U.S. at 647-49. *See also* Foley v. Connelie, 435 U.S. 291, 296 (1978). Aliens can be excluded from voting, Skatfe v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed for lack of substantial federal question, 430 U.S. 961 (1977), and can be excluded from service on juries. Perkins v. Smith, 370 F. Supp. 134 (D.Md. 1974) (3-judge court), aff'd, 426 U.S. 913 (1976).

[1677] Sugarman v. Dougall, 413 U.S. 634, 647 (1973). Such state restrictions are "not wholly immune from scrutiny under the Equal Protection Clause." Id. at 648.

afoul of the requirement that in achieving a valid interest through the use of a suspect classification the State must employ means that are precisely drawn in light of the valid purpose.[1678]

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the State had not met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[1679] Nor could Puerto Rico offer a justification for excluding aliens from one of the "common occupations of the community," hence its bar on licensing aliens as civil engineers was voided.[1680]

In *Nyquist v. Mauclet*,[1681] the Court seemed to expand the doctrine. Challenged was a statute that restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Therefore, since any alien could escape the limitation by a voluntary act, the disqualification was not aimed at aliens as a class, nor was it based on an immutable characteristic possessed by a "discrete and insular minority"—the classification that had been the basis for declaring alienage a suspect category in the first place. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does

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[1678] Justice Rehnquist dissented. 413 U.S. at 649. In the course of the opinion, the Court held inapplicable the doctrine of "special public interest," the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id. at 643–45. The "political function" exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. Bernal v. Fainter, 467 U.S. 216 (1984).

[1679] In re Griffiths, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id. at 730, and 649 (Sugarman dissent also applicable to Griffiths).

[1680] Examining Board v. Flores de Otero, 426 U.S. 572 (1976). Since the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immaterial since the same result would be achieved. The quoted expression is from Truax v. Raich, 239 U.S. 33, 41 (1915).

[1681] 432 U.S. 1 (1977).

not discriminate against the class." [1682] Two proffered justifications were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

However, in the following Term, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'" [1683] Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,' . . . as part of the sovereign's obligation 'to preserve the basic conception of a political community.'" [1684] When a State acts thusly by classifying against aliens, its action is not subject to strict scrutiny but rather need only meet the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities," a reservation drawn from *Sugarman*, but the critical factor in this case is the analysis finding that the police function is "one of the basic functions of government." "The execution of the broad powers vested" in police officers "affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community'. . . ." [1685]

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[1682] 432 U.S. at 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id. at 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

[1683] Foley v. Connelie, 435 U.S. 291, 295 (1978). The opinion was by Chief Justice Burger and the quoted phrase was from his dissent in Nyquist v. Mauclet, 432 U.S. 1, 14 (1977). Justices Marshall, Stevens, and Brennan dissented. Id. at 302, 307.

[1684] 435 U.S. at 295-96. Formally following Sugarman v. Dougall, supra, the opinion considerably enlarged the exception noted in that case; *see also* Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in Foley, 435 U.S. at 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including Mauclet, concurred also, finding the case consistent. Id.

[1685] 435 U.S. at 297-98. In Elrod v. Burns, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.

Continuing to enlarge the exception, the Court in *Ambach v. Norwick* [1686] upheld a bar to qualifying as a public school teacher for resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." [1687] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens." [1688] Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that "go[es] to the heart of representative government." [1689] The citizenship requirement need only bear a rational relationship to the state interest, and the Court concluded it clearly did so.

Then, in *Cabell v. Chavez-Salido*, [1690] the Court sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers," upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people who were variously classified as "peace officers" did not reach so far nor was it so broad and haphazard as to belie the claim that the State was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. "[T]he classifications used need not be precise; there need only be a substantial fit." [1691] As to the particular positions, the Court held that "they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens." [1692]

Thus, the Court so far has drawn a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose at-

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[1686] 411 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of course, that held invalid as a disqualification for receipt of educational assistance in Nyquist v. Mauclet, 432 U.S. 1 (1977).

[1687] Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[1688] 441 U.S. at 75.

[1689] 441 U.S. at 75-80. The quotation, id. at 76, is from Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

[1690] 454 U.S. 432 (1982). Joining the opinion of the Court were Justices White, Powell, Rehnquist, O'Connor, and Chief Justice Burger. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. Id. at 447.

[1691] 454 U.S. at 442.

[1692] 454 U.S. at 445.

tempts by the States to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, when government exercises principally its spending functions, such as those with respect to public employment generally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity, when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government, its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny.[1693] However, the "political function" standard is elastic, and so long as disqualifications are attached to specific occupations[1694] rather than to the civil service in general, as in *Sugarman*, the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that the proffered justifications did not sustain the classification.[1695] Inasmuch as it was clear that the undocumented status of the children was not irrelevant to valid government goals and inasmuch as the Court had previously held that access to education was not a "fundamental interest" which triggered strict scrutiny of governmental distinctions relating to education,[1696] the Court's decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that

[1693] 454 U.S. at 438-39.

[1694] Thus, the statute in *Chavez-Salido* applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.

[1695] Plyler v. Doe, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Id. at 242.

[1696] In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id. at 18, 25 n. 60, 37. The Plyler Court's emphasis upon the total denial of education and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, 457 U.S. at 238 n.2 (concurring), while Justice Blackmun thought it had not reached the question, id. at 235 n.3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children than the broader complex of factors set out in the opinion of the Court. Id. at 231, 236.

provokes special judicial protection when used as a basis for discrimination. Second, the children were innocent parties who were having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these children would stamp them with an "enduring disability" that would harm both them and the State all their lives.[1697] The Court evaluated each of the State's attempted justifications and found none of them satisfying the level of review demanded.[1698] It seems evident that *Plyler v. Doe* is a unique case and that whatever it may doctrinally stand for, a sufficiently similar factual situation calling for application of its standards is unlikely to be replicated.

***Sex***.—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones which prevailed well into the twentieth century. "The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and

[1697] 457 U.S. at 223-24.

[1698] Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the State and contribute to its welfare. 457 U.S. at 227-30.

functions of womanhood."[1699] On the same premise, a statute restricting the franchise to men was sustained.[1700]

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours[1701] or minimum wages[1702] or by restricting some of the things women could be required to do.[1703] A 1961 decision upheld a state law which required jury service of men but which gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[1704] Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women.[1705] In a highly controversial ruling, the Court sustained a state law which forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.[1706]

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[1699] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons engaged in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference." Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[1700] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (privileges and immunities).

[1701] Muller v. Oregon, 208 U.S. 412 (1908); Dominion Hotel v. Arizona, 249 U.S. 265 (1919).

[1702] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[1703] *E.g.*, Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.

[1704] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[1705] Cronin v. Adams, 192 U.S. 108 (1904).

[1706] Goesaert v. Cleary, 335 U.S. 464 (1948).

A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay for equal work.[1707] Some states have followed suit.[1708] While the proposed Equal Rights Amendment pended before the States and ultimately failed of ratification,[1709] the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification, to provide the analysis for evaluation of sex classifications.

In *Reed v. Reed*,[1710] the Court held invalid a state probate law which gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the State advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the

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[1707] Thus, title VII of the Civil Rights Act of 1964, 80 Stat. 662, 42 U.S.C. § 2000e et seq., bans discrimination against either sex in employment. *See, e.g.*, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. for Tax Deferred Plans v. Norris, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ("hostile environment" sex harassment claim is actionable). Reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), Congress enacted the Pregnancy Discrimination Act, Pub. L. 95–555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. The Equal Pay Act, 77 Stat. 56 (1963), amending the Fair Labor Standards Act, 29 U.S.C. § 206(d), generally applies to wages paid for work requiring "equal skill, effort, and responsibility." *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974). On the controversial issue of "comparable worth" and the interrelationship of title VII and the Equal Pay Act, *see* County of Washington v. Gunther, 452 U.S. 161 (1981).

[1708] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

[1709] On the Equal Rights Amendment, *see* discussion of "Ratification," *supra*.

[1710] 404 U.S. 71 (1971).

Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a State may be advanced by a classification based solely on sex.[1711]

It is now established that sex classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives."[1712] Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,[1713] a majority of the Court has arrived at the intermediate standard which many had thought it was applying in any event.[1714] The Court first examines the stat-

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[1711] 404 U.S. at 75-77. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). A statute similar to that in Reed was before the Court in Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

[1712] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion); Califano v. Webster, 430 U.S. 313, 316–317 (1977); Orr v. Orr, 440 U.S. 268, 279 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Califano v. Westcott, 443 U.S. 76, 85 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *But see* Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); id. at 483 (Justice Blackmun concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, Orr v. Orr, 440 U.S. at 279; Caban v. Mohammed, 441 U.S. at 394; Mississippi Univ. for Women v. Hogan, 458 U.S. at 724, although Justice Rehnquist and Chief Justice Burger strongly argued that when males are disadvantaged only the rational basis test is appropriate. Craig v. Boren, 429 U.S. at 217, 218–21; Califano v. Goldfarb, 430 U.S. at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

[1713] In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id. at 684–87 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. Id. at 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id. at 691. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), Justice O'Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

[1714] While their concurrences in Craig v. Boren, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. *E.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Justice Powell concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); Caban v. Mohammed, 441 U.S. at 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. *But see* Califano v. Westcott, 443 U.S. at 93 (joining Court on substantive decision). *And cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Justice Blackmun dissenting).

utory or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[1715]

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[1716] Similarly, a state jury system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.[1717]

Even when the negative "stereotype" which is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,[1718] the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would under-

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[1715] The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.

[1716] Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Stanton v. Stanton, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of classifications under the intermediate scrutiny standard. *E.g.*, Orr v. Orr, 440 U.S. 268, 279–80 (1979); Parham v. Hughes, 441 U.S. 347, 355 (1979); Kirchberg v. Feenstra, 450 U.S. 455 (1981). Justice Stevens in particular has been concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, *e.g.*, Califano v. Goldfarb, 430 U.S. 199, 222–23 (1978) (concurring), and he will sustain some otherwise impermissible distinctions if he finds the legislative reasoning to approximate the latter approach. Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting).

[1717] Taylor v. Louisiana, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in Hoyt v. Florida, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[1718] 511 U.S. 127 (1994).

mine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case which first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "non-intoxicating" 3.2 beer to males under 21 and to females under 18.[1719] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the State as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.[1720]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court acknowledged that assisting needy spouses was a legitimate and important governmental objective and would then have turned to ascertaining whether sex was a sufficiently accurate proxy for dependency, so it could be said that the classification was substantially related to achievement of the objective.[1721] However, the Court observed that the State already conducted individualized hearings with respect to the need of the wife, so that with little additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[1722]

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[1719] Craig v. Boren, 429 U.S. 190 (1976).

[1720] 429 U.S. at 198, 199-200, 201-04.

[1721] Orr v. Orr, 440 U.S. 268 (1979).

[1722] 440 U.S. at 280-83. An administrative convenience justification was not available, therefore. Id. at 281 & n.12. While such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In Lucas, 427 U.S. at 509–10, the Court interpreted Frontiero v. Richardson, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980), the Court said that "[i]t may be that there are levels of administrative con-

Various forms of discrimination between unwed mothers and unwed fathers received different treatment based on the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the State dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[1723]

On the other hand, the Court sustained a Georgia statute which permitted the mother of an illegitimate child to sue for the wrongful death of the child but which allowed the father to sue only if he had legitimated the child and there is no mother.[1724] Similarly, the Court let stand, under the Fifth Amendment, a federal statute which required that in order for an illegitimate child born overseas to gain citizenship, a citizen father, unlike a citizen

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venience that will justify discriminations that are subject to heightened scrutiny . . . , but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers." Justice Stevens apparently would demand a factual showing of substantial savings. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (concurring).

[1723] Caban v. Mohammed, 441 U.S. 380 (1979). Four Justices dissented. Id. at 394 (Justice Stewart), 401 (Justices Stevens and Rehnquist and Chief Justice Burger). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner, *see* Califano v. Boles, 443 U.S. 282 (1979).

[1724] Parham v. Hughes, 441 U.S. 347, 361 (1979). There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the State, the avoidance of difficulties in proving paternity, was an important one which was advanced by the classification. The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. Id. at 353–58. Justice Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id. at 359. Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in Caban, dissented.

mother, must acknowledge or legitimate the child before the child's 18th birthday.[1725] The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about legitimacy.

As in the instance of illegitimacy classifications, the issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.[1726] In *Weinberger v. Wiesenfeld*,[1727] the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Since the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill fitted the end and was invidiously discriminatory.

But when in *Califano v. Goldfarb*[1728] the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be

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[1725] Nguyen v. INS, 533 U.S. 53 (2001). *See also* Miller v. Albright, 523 U.S. 420 (1998) (opinion by Justice Stevens, joined by Justice Rehnquist) (equal protection not violated where paternity of a child of a citizen mother is established at birth, but child of citizen father must establish paternity by age 18).

[1726] Frontiero v. Richardson, 411 U.S. 677 (1973).

[1727] 420 U.S. 636 (1975).

[1728] 430 U.S. 199 (1977). The dissent argued that whatever the classification utilized, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id. at 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in Goldfarb, only Justice Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.

obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency which ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[1729] Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute.[1730]

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker v. Goldberg*,[1731] rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of

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[1729] 430 U.S. at 204-09, 212-17 (Justices Brennan, White, Marshall, and Powell). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the Goldfarb gender-based dependency classification for a five-year "grace period" was upheld in Heckler v. Mathews, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre- Goldfarb payment levels.

[1730] 430 U.S. at 217. Justice Stevens adhered to this view in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in Califano v. Westcott, 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[1731] 453 U.S. 57 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger. Dissenting were Justices White, Marshall, and Brennan. Id. at 83, 86.

>Craig v. Boren. However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been "unthinking" or "reflexively" based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only "sufficiently but closely" related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system. [1732]

In *Michael M. v. Superior Court*, [1733] the Court did expressly adopt the *Craig v. Boren* intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. *Michael M.* involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under 18 years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that while the law was founded on a clear sex distinction it was justified because it did serve an important governmental interest, the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that for purposes of this classification men and women were not similarly situated, and the statute did not deny equal protection. [1734]

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to over-

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[1732] 453 U.S. at 69-72, 78-83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. Id. at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, id. at 81, was contrary to recent precedent. *See* supra.

[1733] 450 U.S. 464 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, and Powell, and Chief Justice Burger, constituting only a plurality. Justice Blackmun concurred in a somewhat more limited opinion. Id. at 481. Dissenting were Justices Brennan, White, Marshall, and Stevens. Id. at 488, 496.

[1734] 450 U.S. at 470-74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. Id. at 488, 496.

come the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification. *Kahn v. Shevin* [1735] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the State had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." [1736] And in *Schlesinger v. Ballard*, [1737] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." [1738] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by

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[1735] 416 U.S. 351 (1974).

[1736] 416 U.S. at 355.

[1737] 419 U.S. 498 (1975).

[1738] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977) Orr v. Orr, 440 U.S. 268, 280–82 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150–52 (1980). In light of the stiffened standard, Justice Stevens has called for overruling Kahn, Califano v. Goldfarb, 430 U.S. at 223–24, but Justice Blackmun would preserve that case. Orr v. Orr, 440 U.S. at 284. *Cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 302–03 (1978) (Justice Powell; less stringent standard of review for benign sex classifications).

women," it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[1739]

Many of these lines of cases converged in *Mississippi University for Women v. Hogan*,[1740] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefiting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school which did accept men, and he would have had difficulty doing so and retaining his job. The State defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[1741] But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."[1742] Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men.[1743]

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[1739] Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in Webster had been adopted expressly to relieve past societal discrimination. The four Goldfarb dissenters concurred specially, finding no difference between the two provisions. Id. at 321.

[1740] 458 U.S. 718 (1982). Joining the opinion of the Court were Justices O'Connor, Brennan, White, Marshall, and Stevens. Dissenting were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Id. at 733, 735.

[1741] 458 U.S. at 728.

[1742] 458 U.S. at 730. In addition to obligating the State to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the State "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." Id. at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[1743] In the major dissent, Justice Powell argued that only a rational basis standard ought to be applied to sex classifications that would "*expand* women's choices," but that the exclusion here satisfied intermediate review because it promoted diver-

In a 1996 case, the Court required that a state demonstrate "exceedingly persuasive justification" for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.[1744] The State argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an "adversative model" that featured minute regulation of behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the State were not "exceedingly persuasive," and thus the State did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the State at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige or alumni network.

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleveland Board of Education v. LaFluer*,[1745] a case decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining pro-

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sity of educational opportunity and was premised on the belief that single-sex colleges offer "distinctive benefits" to society. Id. at 735, 740 (emphasis by Justice), 743. The Court noted that because the State maintained no other single-sex public university or college, the case did not present "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," id. at 720 n.1, although Justice Powell thought the decision did preclude such institutions. Id. at 742–44. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 (3d Cir. 1976) (finding no equal protection violation in maintenance of two single-sex high schools of equal educational offerings, one for males, one for females), aff'd by an equally divided Court, 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[1744] United States v. Virginia, 518 U.S. 515 (1996).

[1745] 414 U.S. 632 (1974). Justice Powell concurred on equal protection grounds. Id. at 651. *See also* Turner v. Department of Employment Security, 423 U.S. 44 (1975).

gram with rates low enough to permit the participation of low-income workers at affordable levels.[1746] The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

***Illegitimacy***.—After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply.[1747] Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[1748] The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly

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[1746] Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id. at 496 n.20. For a rejection of a similar attempted distinction, *see* Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). *See also* Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), now extends protection to pregnant women.

[1747] The first cases set the stage for the lack of consistency. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968), *and* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws which precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny was strict, *with* Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *and* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workmen's compensation statute distinguishing between legitimates and illegitimates, in which scrutiny was intermediate.

[1748] Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). Mathews itself illustrates the uncertainty of statement, suggesting at one point that the Labine standard may be appropriate, 401 U.S. at 506, and at another that the standard appropriate to sex classifications is to be used, id. at 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race *or* sex. Id. at 506. Trimble settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See* Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (both cases involving classifications reflecting both sex and illegitimacy interests).

consistent,[1749] but the theme that seems to be imposed on them by the more recent cases is that so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments that some illegitimates who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon illegitimates or some classes of illegitimates than upon legitimates is permissible.[1750]

Intestate succession rights for illegitimates has divided the Court over the entire period. At first adverting to the broad power of the States over descent of real property, the Court employed relaxed scrutiny to sustain a law denying illegitimates the right to share equally with legitimates in the estate of their common father, who had acknowledged the illegitimates but who had died intestate.[1751] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble v. Gordon*,[1752] which found an equal protection violation in a statute allowing illegitimate children to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been legitimated by the marriage of the parents. The father in *Trimble* had not acknowledged his child, and had not married the mother, but a court had determined that he was in fact the father and had ordered that he pay child support. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable, and that one not served closely enough by the restriction. First, it was impermissible to attempt to influence the conduct of adults not to

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[1749] The major inconsistency arises from three 5-to-4 decisions. Labine v. Vincent, 401 U.S. 532 (1971), was largely overruled by Trimble v. Gordon, 430 U.S. 762 (1977), which itself was substantially limited by Lalli v. Lalli, 439 U.S. 259 (1978). Justice Powell was the swing vote for different disposition of the latter two cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, Lalli v. Lalli, 439 U.S. at 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, Trimble v. Gordon, 430 U.S. at 776, 777 (Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell applied his own intermediate scrutiny and selectively voided and sustained. *See* Lalli v. Lalli, *supra*, (plurality opinion by Justice Powell).

[1750] A classification that absolutely distinguishes between legitimates and illegitimates is not alone subject to such review; one that distinguishes among classes of illegitimates is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. *E.g.*, Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (alienage).

[1751] Labine v. Vincent, 401 U.S. 532 (1971). Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972), had confined the analysis of Labine to the area of state inheritance laws in expanding review of illegitimacy classifications.

[1752] 430 U.S. 762 (1977). Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissented, finding the statute "constitutionally indistinguishable" from the one sustained in Labine. Id. at 776. Justice Rehnquist also dissented separately. Id. at 777.

engage in illicit sexual activities by visiting the consequences upon the offspring.[1753] Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.[1754] Third, the argument that the law presented no insurmountable barrier to illegitimates inheriting since a decedent could have left a will, married the mother, or taken steps to legitimate the child, was rejected as inapposite.[1755] Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[1756] Because the state law did not follow a reasonable middle ground, it was invalidated.

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[1753] 430 U.S. at 768-70. While this purpose had been alluded to in Labine v. Vincent, 401 U.S. 532, 538 (1971), it was rejected as a justification in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. Parham v. Hughes, 441 U.S. 347, 352–53 (1979).

[1754] Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

[1755] 430 U.S. at 773-74. This justification had been prominent in Labine v. Vincent, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170–71 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); *and compare* id. at 736 (Justice Powell dissenting).

[1756] Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist's dissent is especially critical of this approach. Id. at 777, 781–86. Also not interfering with orderly administration of estates is application of Trimble in a probate proceeding ongoing at the time Trimble was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).

A reasonable middle ground was discerned, at least by Justice Powell, in *Lalli v. Lalli*,[1757] concerning a statute which permitted legitimate children to inherit automatically from both their parents, while illegitmates could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestionably established as children of the decreased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, no doubt the State's interest could have been served by permitting other kinds of proof, but that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.[1758]

The Court's difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right

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[1757] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. Id. at 276. The four dissenters, who had joined the *Trimble* majority with Justice Powell, thought the two cases were indistinguishable. Id. at 277.

[1758] Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In Parham v. Hughes, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to a wrongful death action by the father of an illegitimate child who had not legitimated him; in Caban v. Mohammed, 441 U.S. 380 (1980), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to-4.

to illegitimate children denied the latter equal protection. "A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother." [1759]

Similarly, a federal Social Security provision was held invalid which made eligible for benefits, because of an insured parent's disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a non-obvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but which made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illigitimates was necessary to avoid fraud. [1760]

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[1759] Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis supplied). Following the decision, Texas authorized illegitimate children to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age 18. In Mills v. Habluetzel, 456 U.S. 91 (1982), the Court invalidated the one-year limitation. While a State has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a 2-year statute of limitations on paternity and support actions was held to deny equal protection to illegitimates in Pickett v. Brown, 462 U.S. 1 (1983), and a 6-year limit was struck down in Clark v. Jeter, 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in Gomez, 409 U.S. at 538. Also, the state's interest in imposing the 2-year limit was undercut by exceptions (e.g., for illegitimates receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a 6-year limit was belied by that state's more recent enactment of a non-retroactive 18-year limit for paternity and support actions.

[1760] Jiminez v. Weinberger, 417 U.S. 628 (1974). *But cf.* Califano v. Boles, 443 U.S. 282 (1979). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (limiting welfare assistance to households in which parents are ceremonially married and the children are legitimate or adopted denied illegitimate children equal protection); Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g*, 342 F. Supp. 588 (D. Conn.) (3-judge court), and Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g*, 346 F. Supp. 1226 (D. Md.) (3-judge court) (Social Security provision entitling illegitimate children to monthly benefit payments only to extent that payments to widow and legitimate children do not exhaust benefits allowed by law denies illegitimates equal protection).

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit under state intestacy laws, who were illegitimate only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had been held entitled to the father's support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits.[1761]

**Fundamental Interests: The Political Process**

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . , absent of course the discrimination which the Constitution condemns."[1762] The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the States for the electors of the most numerous branch of the legislature, and the States are authorized to determine the manner in which presidential electors are selected.[1763] The second section of the Fourteenth Amendment provides for a proportionate reduction in a State's representation in the House when it denies the franchise to its qualified male

[1761] Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to-4 decision read the purpose differently, *see* Califano v. Boles, 443 U.S. 282 (1979).

[1762] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959).

[1763] Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors); Article I, § 4, cl. 1 (times, places, and manner of holding elections).

citizens[1764] and specific discriminations on the basis of race, sex, and age are addressed in other Amendments. "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot."[1765]

The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized."[1766] "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest."

"And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a

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[1764] Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the States to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting); Carrington v. Rash, 380 U.S. 89, 97 (1965) (dissenting); Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (concurring and dissenting). Justice Brennan undertook a rebuttal of this position in Oregon v. Mitchell, 400 U.S. at 229, 250 (concurring and dissenting). *But see* Richardson v. Ramirez, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.

[1765] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

[1766] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

'rational basis' for the distinctions made are not applicable."[1767] Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years has led to some relaxation in the application of principles, but even as the Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.[1768]

***Voter Qualifications***.—A State may require residency as a qualification to vote but since durational residency requirements impermissibly restrict the right to vote and penalize the assertion of the constitutional right to travel they are invalid.[1769] The Court indicated that the States have a justified interest in preventing fraud and in facilitating determination of the eligibility of potential registrants and granted that durational residency requirements furthered these interests, but, it said, the State had not shown that the requirements were "necessary," that is that the interests could not be furthered by means which imposed a lesser burden on the right to vote. Other asserted interests—knowledgeability of voters, common interests, intelligent voting—were said either not to be served by the requirements or to be impermissible interests.

A 50-day durational residency requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the State's registration process. The period, the Court found, was necessary to achieve the State's legitimate goals.[1770]

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[1767] Kramer v. Union Free School Dist., 395 U.S. 621, 626–28 (1969). *See also* Hill v. Stone, 421 U.S. 289, 297 (1975). *But cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

[1768] Thus, in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 34–35 nn.74 & 78 (1973), a major doctrinal effort to curb the "fundamental interest" side of the "new" equal protection, the Court acknowledged that the right to vote did not come within its prescription that rights to be deemed fundamental must be explicitly or implicitly guaranteed in the Constitution. Nontheless, citizens have a "constitutionally protected right to participate in elections" which is protected by the equal protection clause. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The franchise is the guardian of all other rights. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[1769] Dunn v. Blumstein, 405 U.S. 330 (1972). Justice Blackmun concurred specially, id. at 360, Chief Justice Burger dissented, id. at 363, and Justices Powell and Rehnquist did not participate. The voided statute imposed a requirement of one year in the State and three months in the county. The Court did not indicate what duration less than ninety days would be permissible, although it should be noted that in the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa–1, Congress prescribed a thirty-day period for purposes of voting in presidential elections. Note also that it does not matter whether one travels interstate or intrastate. Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), aff'd, 405 U.S. 1035 (1972).

[1770] Marston v. Lewis, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county record-

A State that exercised general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the State, the Court held, could not treat these persons as nonresidents for voting purposes.[1771] A statute which provided that anyone who entered military service outside the State could not establish voting residence in the State so long as he remained in the military was held to deny to such a person the opportunity such as all non-military persons enjoyed of showing that he had established residence.[1772] Restricting the suffrage to those persons who had paid a poll tax was an invidious discrimination because it introduced a "capricious or irrelevant factor" of wealth or ability to pay into an area in which it had no place.[1773] Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school,[1774] and denied States the right to restrict the voteto property owners in elections on the issuance of revenue bonds[1775] or general obligation bonds.[1776]

However, the Court held that because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed

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ers before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable. However, the same period was upheld for another State on the authority of Marston in the absence of such justification, but it appeared that plaintiffs had not controverted the State's justifying evidence. Burns v. Fortson, 410 U.S. 686 (1973). Justices Brennan, Douglas, and Marshall dissented in both cases. Id. at 682, 688.

[1771] Evans v. Cornman, 398 U.S. 419 (1970).

[1772] Carrington v. Rash, 380 U.S. 89 (1965).

[1773] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Justices Black, Harlan, and Stewart dissented. Id. at 670, 680. Poll tax qualifications had previously been upheld in Breedlove v. Suttles, 302 U.S. 277 (1937); and Butler v. Thompson, 341 U.S. 937 (1951).

[1774] Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The Court assumed without deciding that the franchise in some circumstances could be limited to those "primarily interested" or "primarily affected" by the outcome, but found that the restriction permitted some persons with no interest to vote and disqualified others with an interest. Justices Stewart, Black, and Harlan dissented. Id. at 594.

[1775] Cipriano v. City of Houma, 395 U.S. 701 (1969). Justices Black, Harlan, and Stewart concurred specially. Id. at 707.

[1776] City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). Justice Stewart and Chief Justice Burger dissented. Id. at 215. In Hill v. Stone, 421 U.S. 289 (1975), the Court struck down a limitation on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district. It was not a "special interest" election since a general obligation bond issue is a matter of general interest.

valuation of land, comported with equal protection standards.[1777] Adverting to the reservation in prior local governmental unit election cases[1778] that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.[1779] Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and nonlandowning residents of such functions as flood control. The approach taken in this case seems different in great degree from that in prior cases and could in the future alter the results in other local government cases. These cases were extended somewhat in *Ball v. James*,[1780] in which the Court sustained a system in which voting eligibility was limited to landowners and votes were allocated to these voters on the basis of the number of acres they owned. The entity was a water reclamation district which stores and delivers water to 236,000 acres of land in the State and subsidizes its water operations by selling electricity to hundreds of thousands of consumers in a nearby metropolitan area. The entity's board of directors was elected through a system in which the eligibility to vote was as described above. The Court thought the entity was a specialized and limited form to which its general franchise rulings did not apply.[1781]

Finding that prevention of "raiding"—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their

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[1777] Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973). *See also* Associated Enterprises v. Toltec Watershed Improv. Dist., 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id. at 735, 745.

[1778] 410 U.S. at 727-28.

[1779] 410 U.S. at 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

[1780] 451 U.S. 355 (1981). Joining the opinion of the Court were Justices Stewart, Powell, Rehnquist, Stevens, and Chief Justice Burger. Dissenting were Justices White, Brennan, Marshall, and Blackmun. Id. at 374.

[1781] The water district cases were distinguished in Quinn v. Millsap, 491 U.S. 95. 109 (1989), the Court holding that a "board of freeholders" appointed to recommend a reorganization of local government had a mandate "far more encompassing" than land use issues, since its recommendations "affect[ ] all citizens . . . regardless of land ownership."

choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.[1782] But a law which prohibited a person from voting in the primary election of a political party if he has voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, inasmuch as it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.[1783] A less restrictive "closed primary" system was also invalidated, the Court finding insufficient justification for a state's preventing a political party from allowing independents to vote in its primary.[1784]

It must not be forgotten, however, that it is only when a State extends the franchise to some and denies it to others that a "right to vote" arises and is protected by the equal protection clause. If a State chooses to fill an office by means other than through an election, neither the equal protection clause nor any other constitutional provision prevents it from doing so. Thus, in *Rodriguez v. Popular Democratic Party*,[1785] the Court unanimously sustained a Puerto Rico statute which authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the Governor or some other official, raised a constitutional question.

The right of unconvicted jail inmates and convicted misdemeanants (who typically are under no disability) to vote by absentee ballot remains unsettled. In an early case applying rational basis scrutiny, the Court held that the failure of a State to pro-

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[1782] Rosario v. Rockefeller, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id. at 763.

[1783] Kusper v. Pontikes, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id. at 61, 65.

[1784] Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). Although independents were allowed to register in a party on the day before a primary, the state's justifications for "protect[ing] the integrity of the Party against the Party itself" were deemed insubstantial. Id. at 224.

[1785] 457 U.S. 1 (1982). *See also* Fortson v. Morris, 385 U.S. 231 (1966) (legislature could select Governor from two candidates having highest number of votes cast when no candidate received majority); Sailors v. Board of Elections, 387 U.S. 105 (1967) (appointment rather than election of county school board); Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968) (three-judge court), *aff'd*, 393 U.S. 405 (1969) (gubernatorial appointment to fill United States Senate vacancy).

vide for absentee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.[1786] Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not, or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.[1787]

***Access to the Ballot***.—The equal protection clause applies to state specification of qualifications for elective and appointive office. While one may "have no right" to be elected or appointed to an office, all persons "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees."[1788] In *Bullock v. Carter*,[1789] the Court utilized a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates which imposed the cost of the election wholly on the candidates and which made no alternative provision for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth. The system itself was voided because it was not reasonably connected with the State's interest in regulating the ballot and did not serve that interest and because the cost of the election could

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[1786] McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). *But see* Goosby v. Osser, 409 U.S. 512 (1973) (McDonald does not preclude challenge to absolute prohibition on voting).

[1787] O'Brien v. Skinner, 414 U.S. 524 (1974). *See* American Party of Texas v. White, 415 U.S. 767, 794–95 (1974).

[1788] Turner v. Fouche, 396 U.S. 346, 362–63 (1970) (voiding a property qualification for appointment to local school board). *See also* Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) (voiding a qualification for appointment as airport commissioner of ownership of real or personal property that is assessed for taxes in the jurisdiction in which airport is located); Quinn v. Millsap, 491 U.S. 95 (1989) (voiding property ownership requirement for appointment to board authorized to propose reorganization of local government). *Cf.* Snowden v. Hughes, 321 U.S. 1 (1944).

[1789] 405 U.S. 134, 142–44 (1972).

be met out of the state treasury, thus avoiding the discrimination.[1790]

Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's "important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." "[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars."[1791] In the absence of reasonable alternative means of ballot access, the Court held, a State may not disqualify an indigent candidate unable to pay filing fees.[1792]

In *Clements v. Fashing*,[1793] the Court sustained two provisions of state law, one that barred certain officeholders from seeking election to the legislature during the term of office for which they had been elected or appointed, but that did not reach other officeholders whose terms of office expired with the legislators' terms and did not bar legislators from seeking other offices during their terms, and the other that automatically terminated the terms of certain officeholders who announced for election to other offices, but that did not apply to other officeholders who could run for another office while continuing to serve. The Court was splintered in

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[1790] 405 U.S. at 144-49.

[1791] Lubin v. Panish, 415 U.S. 709, 716 (1974).

[1792] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, 415 U.S. at 722, but the Court indicated this would be inadequate. Id. at 719 n.5.

[1793] 457 U.S. 957 (1982). A plurality of four contended that save in two circumstances—ballot access classifications based on wealth and ballot access classifications imposing burdens on new or small political parties or independent candidates—limitations on candidate access to the ballot merit only traditional rational basis scrutiny, because candidacy is not a fundamental right. The plurality found both classifications met the standard. Id. at 962–73 (Justices Rehnquist, Powell, O'Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plurality's standard, but finding that inasmuch as the disparate treatment was based solely on the State's classification of the different offices involved, and not on the characteristics of the persons who occupy them or seek them, the action did not violate the equal protection clause. Id. at 973. The dissent primarily focused on the First Amendment but asserted that the classifications failed even a rational basis test. Id. at 976 (Justices Brennan, White, Marshall, and Blackmun).

such a way, however, that it is not possible to derive a principle from the decision applicable to other fact situations.

In *Williams v. Rhodes*,[1794] a complex statutory structure which had the effect of keeping off the ballot all but the candidates of the two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the State's 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties.[1795] But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party's primary election while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought is not to discriminate unlawfully, inasmuch as the State placed no barriers of any sort in the way of obtaining signatures and since write-in votes were also freely permitted.[1796]

Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.[1797] "[T]o comply with the

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[1794] 393 U.S. 23 (1968). "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." Id. at 34. Justices Douglas and Harlan would have relied solely on the First Amendment, id. at 35, 41, while Justices Stewart and White and Chief Justice Warren dissented. Id. at 48, 61, 63.

[1795] Moore v. Ogilvie, 394 U.S. 814 (1969) (overruling MacDougall v. Green, 335 U.S. 281 (1948)).

[1796] Jenness v. Fortson, 403 U.S. 431 (1971).

[1797] Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979). *And see* Indiana Communist Party v. Whitcomb, 414 U.S. 441 (1974) (impermissible to condition ballot access upon a political party's willingness to subscribe to oath that party "does not advocate the overthrow of local, state or national government by force or violence," opinion of Court based on First Amendment, four Justices concurring on equal protection grounds).

First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." [1798] Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'" [1799]

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election had to be nominated by primary elections and went on the ballot automatically, because the prior vote adequately demonstrated support. Candidates whose parties polled less than 200,000 but more than 2 percent could be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two categories had to be nominated in conventions and could obtain ballot space only if the notarized list of participants at the conventions totalled at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters signed petitions to bring the total up to one percent of the gubernatorial vote. "[W]hat is demanded may not be so exessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot," but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require." [1800] Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space. [1801] A State may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election

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[1798] Storer v. Brown, 415 U.S. 724, 746 (1974).

[1799] 415 U.S. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

[1800] American Party of Texas v. White, 415 U.S. 767, 783 (1974). In Storer v. Brown, 415 U.S. 724, 738–40 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days in 1972 to gather 325,000 signatures from a pool of qualified voters who had not voted in that year's partisan primary elections. *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).

[1801] American Party of Texas v. White, 415 U.S. 767, 788–91 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.

from signing nominating or supporting petitions for independent parties or candidates.[1802] Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination, within one year prior to the primary election at which nominations for the general election are made.[1803] So too, a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office.[1804] But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.[1805] Also invalidated was a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.[1806]

***Apportionment and Districting***.—Prior to 1962, attacks in federal courts on the drawing of boundaries for congressional and legislative election districts or the apportionment of seats to previously existing units ran afoul of the "political question" doctrine.[1807] But *Baker v. Carr*[1808] reinterpreted the doctrine in considerable degree and opened the federal courts to voter complaints founded on unequally populated voting districts. *Wesberry v. Sanders*[1809] found in Article I, § 2, of the Constitution a command that

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[1802] 415 U.S. at 785-87.

[1803] Storer v. Brown, 415 U.S. 724, 728–37 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id. at 755.

[1804] Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[1805] American Party of Texas v. White, 415 U.S. 767, 794–95 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id. at 791–94. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear. For consideration of similar contentions in the context of federal financing of presidential elections, *see* Buckley v. Valeo, 424 U.S. 1, 93–97 (1976).

[1806] Anderson v. Celebrezze, 460 U.S. 780 (1983). State interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters.

[1807] *See* discussion, supra. Applicability of the doctrine to cases of this nature was left unresolved in Smiley v. Holm, 285 U.S. 355 (1932), and Wood v. Broom, 287 U.S. 1 (1932), was supported by only a plurality in Colegrove v. Green, 328 U.S. 549 (1946), but became the position of the Court in subsequent cases. Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Hartsfield v. Sloan, 357 U.S. 916 (1958).

[1808] 369 U.S. 186 (1962).

[1809] 376 U.S. 1 (1964). Striking down a county unit system of electing a governor, the Court, in an opinion by Justice Douglas, had already coined a variant

in the election of Members of the House of Representatives districts were to be made up of substantially equal numbers of persons. In six decisions handed down on June 15, 1964, the Court required the alteration of the election districts for practically all the legislative bodies in the United States.[1810]

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State."[1811] What was required was that each State "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."[1812]

Among the principal issues raised by these decisions were which units were covered by the principle, to what degree of exactness population equality had to be achieved, and to what other elements of the apportionment and districting process the equal protection clause extended.

The first issue has largely been resolved, although some few problem areas persist. It has been held that a school board the members of which were appointed by boards elected in units of disparate populations and which exercised only administrative powers

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phrase of the more popular "one man, one vote." "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963).

[1810] Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). In the last case, the Court held that approval of the apportionment plan in a vote of the people was insufficient to preserve it from constitutional attack. "An individual's constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." Id. at 736. Justice Harlan dissented wholly, denying that the equal protection clause had any application at all to apportionment and districting and contending that the decisions were actually the result of a "reformist" nonjudicial attitude on the part of the Court. 377 U.S. at 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the equal protection clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S. at 741, 744.

[1811] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[1812] 377 U.S. at 577.

rather than legislative powers was not subject to the principle of the apportionment ruling.[1813] *Avery v. Midland County*[1814] held that when a State delegates lawmaking power to local government and provides for the election by district of the officials to whom the power is delegated, the districts must be established of substantially equal populations. But in *Hadley v. Junior College District*,[1815] the Court abandoned much of the limitation which was explicit in these two decisions and held that whenever a State chooses to vest "governmental functions" in a body and to elect the members of that body from districts, the districts must have substantially equal populations. The "governmental functions" should not be characterized as "legislative" or "administrative" or necessarily important or unimportant; it is the fact that members of the body are elected from districts which triggers the application.[1816]

The second issue has been largely but not precisely resolved. In *Swann v. Adams*,[1817] the Court set aside a lower court ruling "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts. . . . *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy." Two congressional district cases were disposed of on the basis of *Swann*,[1818] but when the Court ruled that no congressional districting could be approved without a "good-faith effort to achieve precise mathematical equal-

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[1813] Sailors v. Board of Education, 387 U.S. 105 (1967).

[1814] 390 U.S. 474 (1968). Justice Harlan continued his dissent from the Reynolds line of cases, id. at 486, while Justices Fortas and Stewart called for a more discerning application and would not have applied the principle to the county council here. Id. at 495, 509.

[1815] 397 U.S. 50 (1970). The governmental body here was the board of trustees of a junior college district. Justices Harlan and Stewart and Chief Justice Burger dissented. Id. at 59, 70.

[1816] The Court observed that there might be instances "in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* supra, might not be required. . . ." Id. at 56. For cases involving such units, *see* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973); Associated Enterprises v. Toltec Watershed Imp. Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981). Judicial districts need not comply with Reynolds. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *aff'd. per curiam*, 409 U.S. 1095 (1973).

[1817] 385 U.S. 440, 443–44 (1967). *See also* Kilgarlin v. Hill, 386 U.S. 120 (1967).

[1818] Kirkpatrick v. Preisler, 385 U.S. 450 (1967); Duddleston v. Grills, 385 U.S. 455 (1967).

ity" or the justification of "each variance, no matter how small," [1819] it did not then purport to utilize this standard in judging legislative apportionment and districting. [1820] And in *Abate v. Mundt* [1821] the Court approved a plan for apportioning a county governing body which permitted a substantial population disparity, explaining that in the absence of a built-in bias tending to favor any particular area or interest, a plan could take account of localized factors in justifying deviations from equality which might in other circumstances cause the invalidation of a plan. [1822] The total population deviation allowed in *Abate* was 11.9%; the Court refused, however, to extend *Abate* to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City's five boroughs on the New York City Board of Estimate. [1823]

Nine years after *Reynolds v. Sims*, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished state legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality,

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[1819] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

[1820] The Court relied on *Swann* in disapproving of only slightly smaller deviations (roughly 28% and 25%) in Whitcomb v. Chavis, 403 U.S. 124, 161–63 (1971). In Connor v. Williams, 404 U.S. 549, 550 (1972), the Court said of plaintiffs' reliance on *Preisler* and *Wells* that "these decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment."

[1821] 403 U.S. 182 (1971).

[1822] It should also be noted that while the Court has used total population figures for purposes of computing variations between districts, it did approve in Burns v. Richardson, 384 U.S. 73 (1966), the use of eligible voter population as the basis for apportioning in the context of a State with a large transient military population, but with the caution that such a basis would be permissible only so long as the results did not diverge substantially from that obtained by using a total population base. Merely discounting for military populations was disapproved in Davis v. Mann, 377 U.S. 678, 691 (1964), but whether some more precise way of distinguishing between resident and nonresident population would be constitutionally permissible is unclear. Kirkpatrick v. Preisler, 394 U.S. 526, 534 (1969); Hadley v. Junior College Dist., 397 U.S. 50, 57 n.9 (1970).

[1823] New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989). Under the plan each of the City's five boroughs was represented on the board by its president and each of these members had one vote; three citywide elected officials (the mayor, the comptroller, and the president of the city council) were also placed on the board and given two votes apiece (except that the mayor had no vote on the acceptance or modification of his budget proposal). The Court also ruled that, when measuring population deviation for a plan that mixes at-large and district representation, the at-large representation must be taken into account. Id. at 699–701.

the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.[1824] But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the State's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legislature was responsible for much local legislation.[1825] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justified and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State."[1826] This recognition of a *de minimis* deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts able thus to

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[1824] Mahan v. Howell, 410 U.S. 315, 320–25 (1973).

[1825] 410 U.S. at 325-30. The Court indicated that a 16.4% deviation "may well approach tolerable limits." Id. at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the State, an issue not addressed by the Court. In Chapman v. Meier, 420 U.S. 1, 21–26 (1975), holding that a 20% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. *See also* Summers v. Cenarrusa, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation). *But see* Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10% intended to preserve political subdivision boundaries). In Brown v. Thomson, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state's least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O'Connor's concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.

[1826] Gaffney v. Cummings, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the *de minimis* standard in White v. Regester, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. "Very likely, larger differences between districts would not be tolerable without justifications." Id. at 764. Justices Brennan, Douglas, and Marshall dissented. *See also* Brown v. Thomson, 462 U.S. 835, 842 (1983): "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations [insufficient to make out a *prima facie* case]."

avoid over-involvement in essentially a political process. The "goal of fair and effective representation" is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into account.[1827] But when a judicially-imposed plan is to be formulated upon state default, it "must ordinarily achieve the goal of population equality with little more than *de minimis* variation" and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.[1828]

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that racially based gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipulation of district lines.[1829] Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if racial considerations are the dominant and controlling rationale in drawing district lines.[1830] Showing that a district's "bizarre" shape departs from traditional districting principles such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim,[1831] although a plurality of the Justices would not preclude the creation of "reasonably compact" majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965.[1832] On the other

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[1827] Gaffney v. Cummings, 412 U.S. 735, 748 (1973). By contrast, the Court has held that estimated margin of error for census statistics does not justify deviation from population equality in congressional districting. Karcher v. Daggett, 462 U.S. 725 (1983).

[1828] Chapman v. Meier, 420 U.S. 1, 21–27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. Id. at 27 n.19. Apparently, therefore, the Court's reference to both "*de minimis*" variations and "approximate population equality" must be read as referring to some range approximating the Gaffney principle. *See also* Connor v. Finch, 431 U.S. 407 (1977).

[1829] Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court). Hunt v. Cromartie, 526 U.S. 541 (1999).

[1830] Miller v. Johnson, 515 U.S. 900 (1995) (drawing congressional district lines in order to comply with § 5 of the Voting Rights Act as interpreted by the Department of Justice not a compelling governmental interest).

[1831] Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). *See also* Shaw v. Hunt, 517 U.S. 899 (1996) (creating an unconventionally-shaped majority-minority congressional district in one portion of state in order to alleviate effect of fragmenting geographically compact minority population in another portion of state does not remedy a violation of § 2 of Voting Rights Act, and is thus not a compelling governmental interest).

[1832] Bush v. Vera, 517 U.S. 952, 979 (1996) (opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) (also involving congressional districts).

hand, the Court appears to have more recently weakened a challenger's ability to establish Equal Protection claims by showing both a strong deference to a legislature's articulation of legitimate political explanations for districting decisions, and by allowing for a strong correlation between race and political affiliation.[1833]

Partisan gerrymandering raises more difficult issues. Several lower courts ruled that the issue was beyond judicial cognizance,[1834] and the Supreme Court itself, upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune from judicial scrutiny, "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."[1835]

More recently, however, in a decision of potentially major import reminiscent of *Baker v. Carr*, the Court in *Davis v. Bandemer*[1836] ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause. But although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court's holding of unconstitutionality was reversed by vote of 7 to 2.[1837] Thus, while courthouse doors are now ajar for claims of partisan gerrymandering, it is unclear what it will take to succeed on the merits.

On the justiciability issue, the Court viewed the "political question" criteria as no more applicable than they had been in *Baker*

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[1833] Easley v. Cromartie, 532 U.S. 234 (2001).

[1834] *E.g.*, WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965) (three-judge court), aff'd, 382 U.S. 4 (1965); Sincock v. Gately, 262 F. Supp. 739 (D. Del. 1967) (three-judge court).

[1835] Gaffney v. Cummings, 412 U.S. 735, 751, 754 (1973).

[1836] 478 U.S. 109 (1986). The vote on justiciability was 6–3, with Justice White's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens. This represented an apparent change of view by 3 of the majority Justices, who just 2 years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." Karcher v. Daggett, 466 U.S. 910, 917 (1983) (Justice Brennan, joined by Justices White and Marshall, dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[1837] Only Justices Powell and Stevens thought the Indiana redistricting plan void; Justice White, joined by Justices Brennan, Marshall, and Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice O'Connor, joined by Chief Justice Burger and by Justice Rehnquist, would have ruled that partisan gerrymandering is nonjusticiable as constituting a political question not susceptible to manageable judicial standards.

*v. Carr*. Because *Reynolds v. Sims* had declared "fair and effective representation for all citizens" [1838] to be "the basic aim of legislative apportionment," and because racial gerrymandering issues had been treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the existence of "judicially discoverable and manageable standards for resolving" gerrymandering issues, however, did not result in a consensus as to what those standards are. [1839] While a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect. Justice White's plurality opinion suggested that there need be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." [1840] Moreover, continued frustration of the chance to influence the political process can not be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that "a heavy burden of proof" should be required, and that courts should look to a variety of factors as they relate to "the fairness of a redistricting plan" in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history. [1841]

It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently, [1842] but in *Whitcomb v. Chavis* [1843] the Court, while dealing with the issue on the merits, so enveloped it in strict stand-

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[1838] 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. *See* D. Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, and sources cited therein. It is not clear from its original context, however, that the phrase was coined with such broad application in mind.

[1839] The quotation is from the Baker v. Carr measure for existence of a political question, 369 U.S. 186, 217 (1962).

[1840] 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

[1841] 478 U.S. at 173. A similar approach had been proposed in Justice Stevens' concurring opinion in Karcher v. Daggett, 462 U.S. 725, 744 (1983).

[1842] Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88–89 (1965); Kilgarlin v. Hill, 386 U.S. 120, 125 n.3 (1967).

[1843] 403 U.S. 124 (1971). Justice Harlan concurred specially, id. at 165, and Justices Douglas, Brennan, and Marshall, dissented, finding racial discrimination in the operation of the system. Id. at 171.

ards of proof and definitional analysis as to raise the possibility that it might be beyond judicial review. In *Chavis* the Court held that inasmuch as the multimember districting represented a state policy of more than 100 years observance and could not therefore be said to be motivated by racial or political bias, only an actual showing that the multimember delegation in fact inadequately represented the allegedly submerged minority would suffice to raise a constitutional question. But the Court also rejected as impermissible the argument that any interest group had any sort of right to be represented in a legislative body, in proportion to its members' numbers or on some other basis, so that the failure of that group to elect anyone merely meant that alone or in combination with other groups it simply lacked the strength to obtain enough votes, whether the election be in single-member or in multimember districts. That fact of life was not of constitutional dimension, whether the group was composed of blacks, or Republicans or Democrats, or some other category of persons. Thus, the submerging argument was rejected, as was the argument of a voter in another county that the Court should require uniform single-member districting in populous counties because voters in counties which elected large delegations in blocs had in effect greater voting power than voters in other districts; this argument the Court found too theoretical and too far removed from the actualities of political life.

Subsequently, and surprisingly in light of *Chavis*, the Court in *White v. Regester* [1844] affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied African Americans and Mexican Americans the opportunity to participate in the election process in a reliable and meaningful manner. [1845]

Doubt was cast on the continuing vitality of *White v. Regester*, however, by the badly split opinion of the Court in *City of Mobile v. Bolden*. [1846] A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the

[1844] 412 U.S. 755, 765–70 (1973).

[1845] "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765-66.

[1846] 446 U.S. 55 (1980).

Court had been or could be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the equal protection clause.[1847] Second, the plurality read *White v. Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test utilized in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.[1848]

Again switching course, the Court in *Rogers v. Lodge*[1849] approved the findings of the lower courts that a multimember electoral system for electing a county board of commissioners was being maintained for a racially discriminatory purpose, although it had not been instituted for that purpose. Applying a totality of the circumstances test, and deferring to lower court factfinding, the Court, in an opinion by one of the *Mobile* dissenters, canvassed a range of factors which it held could combine to show a discriminatory motive, and largely overturned the limitations which the *Mobile* plurality had attempted to impose in this area. With the enactment of federal legislation specifically addressed to the issue of multimember districting and dilution of the votes of racial minorities, however, it may be that the Court will have little further opportunity to develop the matter in the context of constitutional litigation.[1850] In *Thornburg v. Gingles*,[1851] the Court held that multi-

[1847] 446 U.S. at 65-68 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, *see* discussion supra. Justices Blackmun and Stevens concurred on other grounds, id. at 80, 83, and Justices White, Brennan, and Marshall dissented. Id. at 94, 103. Justice White agreed that purposeful discrimination must be found, id. at 101, while finding it to have been shown, Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

[1848] 446 U.S. at 68-74. Four Justices rejected this view of the plurality, while Justice Stevens also appeared to do so but followed a mode of analysis significantly different than that of any other Justice.

[1849] 458 U.S. 613 (1982). Joining the opinion of the Court were Justices White, Brennan, Marshall, Blackmun, O'Connor, and Chief Justice Burger. Dissenting were Justices Powell and Rehnquist, id. at 628, and Justice Stevens. Id. at 631.

[1850] On the legislation, *see* "Congressional Definition of Fourteenth Amendment Rights," supra.

[1851] 478 U.S. 30, 50–51 (1986). Use of multimember districting for purposes of political gerrymandering was at issue in Davis v. Bandemer, 478 U.S. 109 (1986), decided the same day as Gingles, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the Whitcomb v. Chavis reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 478 U.S. at 136–37. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and "the only discernible pattern [being] the appearance of these districts in

member districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is "sufficiently large and geographically compact to constitute a majority in a single-member district," when it is politically cohesive, and when block voting by the majority "usually" defeats preferred candidates of the minority.

Finally, it should be said that the Court has approved the discretionary exercise of equity powers by the lower federal courts in drawing district boundaries and granting other relief in districting and apportionment cases,[1852] although that power is bounded by the constitutional violations found, so that courts do not have *carte blanche*, and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.[1853]

***Counting and Weighing of Votes***.—In *Bush v. Gore*,[1854] a case of dramatic result but of perhaps limited significance for equal protection, the Supreme Court ended a ballot dispute which arose during the year 2000 presidential election. The Florida Supreme Court had ordered a partial manual recount of the Florida vote for Presidential Electors, requiring that all ballots which contained a "clear indication of the intent of the voter" be counted, but allowing the relevant counties to determine what physical characteristics of a ballot would satisfy this test. The Court held that the Equal Protection Clause would be violated by allowing arbitrary and disparate methods of discerning voter intent in the recounting of ballots. The decision was surprising to many as a lack of uniformity in voting standards and procedures is inherent in the American system of decentralized voting administration. The Court, however, limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "mini-

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areas where their winner-take-all aspects can best be employed to debase [one party's] voting strength," (id. at 179–80, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.

[1852] *E.g.*, Reynolds v. Sims, 377 U.S. 533, 586–87 (1964); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 195–200 (1972); White v. Weiser, 412 U.S. 783, 794–95 (1973); Upham v. Seamon, 456 U.S. 37, 41–42 (1982). When courts draw their own plans, the court is held to tighter standards than is a legislature and has to observe smaller population deviations and utilize single-member districts more than multimember ones. Connor v. Johnson, 402 U.S. 690, 692 (1971); Chapman v. Meier, 420 U.S. 1, 14–21 (1975); Wise v. Lipscomb, 437 U.S. 535, 540 (1978). *Cf.* Mahan v. Howell, 410 U.S. 315, 333 (1973).

[1853] *E.g.*, Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) (reduction of numbers of members); Whitcomb v. Chavis, 403 U.S. 124, 160–61 (1971) (disregard of policy of multimember districts not found unconstitutional); White v. Weiser, 412 U.S. 783, 794–95 (1973); Upham v. Seamon, 406 U.S. 37 (1982). *But see* Karcher v. Daggett, 466 U.S. 910 (1983) (denying cert. over dissent's suggestion that court-adopted congressional districting plan had strayed too far from the structural framework of the legislature's invalidated plan).

[1854] 531 U.S. 98 (2000).

mal procedural safeguards."[1855] Citing the "many complexities" of application of equal protection "in election processes generally," the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.

In cases where votes are given more or less weight by operation of law, it is not the weighing of votes itself which may violate the 14th Amendment, but the manner in which it is done. *Gray v. Sanders*,[1856] for instance, struck down the Georgia county unit system under which each county was allocated either two, four, or six votes in statewide elections and the candidate carrying the county received those votes. Since there were a few very populous counties and scores of poorly-populated ones, the rural counties in effect dominated statewide elections and candidates with popular majorities statewide could be and were defeated. But *Gordon v. Lance*[1857] approved a provision requiring a 60 percent affirmative vote in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded. The Court acknowledged that the provision departed from strict majority rule but stated that the Constitution did not prescribe majority rule; it instead proscribed discrimination through dilution of voting power or denial of the franchise because of some class characteristic—race, urban residency, or the like—while the provision in issue was neither directed to nor affected any identifiable class.

**The Right to Travel**

The doctrine of the "right to travel" actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis.[1858] The second, expressly addressed by the first sentence of Article IV, provides a citizen of one State who is temporarily visiting another state the "Privileges and Immunities" of a citizen of the latter state.[1859] The third is the right

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[1855] 531 U.S. at 109.

[1856] 372 U.S. 368 (1963).

[1857] 403 U.S. 1 (1971).

[1858] Saenz v. Roe, 526 U.S. 489 (1999). "For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of free ingress and regress to and from' neighboring states which was expressly mentioned in the text of the Article of Confederation, may simply have been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" Id. at 501 (citations omitted).

[1859] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) ("without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic

of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period of time before taking advantage of the benefits of that state's citizenship.

***Durational Residency Requirements***.—Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, a majority of the Supreme Court approved a doctrinal shift, so that state laws which distinguished between their own citizens based on how long they had been in the state would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment.[1860] The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the State for the prescribed period and those who have not been.[1861] But persons who have moved recently, at least from State to State,[1862] have exercised a right protected by the Constitution of the United States, and the durational residency classification either deters the exercise of the right or penalizes those who have exercised the right.[1863] Any such classification is invalid "unless shown to be necessary to promote a *compelling governmental interest*."[1864] The constitutional right to travel has long been recognized,[1865] but it is only relatively re-

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would have constituted little more than a league of States; it would not have constituted the Union which now exists.").

[1860] Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[1861] Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Inasmuch as the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the privileges and immunities clause, Article IV, § 2, cl. 1.

[1862] Intrastate travel is protected to the extent that the classification fails to meet equal protection standards in some respect. *Compare* Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970) (three-judge court), *aff'd. per curiam*, 405 U.S. 1035 (1972), *with* Arlington County Bd. v. Richards, 434 U.S. 5 (1977). The same principle applies in the commerce clause cases, in which discrimination may run against in-state as well as out-of-state concerns. *Cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[1863] Shapiro v. Thompson, 394 U.S. 618, 629–31, 638 (1969); Dunn v. Blumstein, 405 U.S. 330, 338–42 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Jones v. Helms, 452 U.S. 412, 420–21 (1981). *See also* Oregon v. Mitchell, 400 U.S. 112, 236–39 (1970) (Justices Brennan, White, and Marshall), and id. at 285–92 (Justices Stewart and Blackmun and Chief Justice Burger).

[1864] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis by Court); Graham v. Richardson, 403 U.S. 365, 375–76 (1971).

[1865] Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and the reasons for reliance on the equal protection clause are

cently that the strict standard of equal protection review has been applied to nullify those durational residency provisions which have been brought before the Court.

Thus, in *Shapiro v. Thompson*,[1866] durational residency requirements conditioning eligibility for welfare assistance on one year's residence in the State[1867] were voided. If the purpose of the requirements was to inhibit migration by needy persons into the State or to bar the entry of those who came from low-paying States to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.[1868] If on the other hand the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity for fraud, and encouragement of early entry of new residents into the labor force—the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification which infringed on a fundamental interest.[1869] Similarly, in *Dunn v. Blumstein*,[1870] where the durational residency requirements denied the franchise to newcomers, the assertion of such administrative justifications was constitutionally insufficient to justify the classification. The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a Cali-

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questions puzzled over and unresolved by the Court. United States v. Guest, 383 U.S. 745, 758, 759 (1966), and id. at 763–64 (Justice Harlan concurring and dissenting), id. at 777 n.3 (Justice Brennan concurring and dissenting); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), and id. at 671 (Justice Harlan dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 31–32 (1973); Jones v. Helms, 452 U.S. 412, 417–19 (1981); Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–81 (Justice O'Connor concurring).

[1866] 394 U.S. 618 (1969).

[1867] The durational residency provision established by Congress for the District of Columbia was also voided. 394 U.S. at 641-42.

[1868] 394 U.S. at 627-33. Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the State solely to obtain welfare assistance.

[1869] 394 U.S. at 633–38. *Shapiro* was reaffirmed in Graham v. Richardson, 403 U.S. 365 (1971) (striking down durational residency requirements for aliens applying for welfare assistance), and in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (voiding requirement of one year's residency in county as condition to indigent's receiving nonemergency hospitalization or medical care at county's expense). When Connecticut and New York reinstituted the requirements, pleading a financial emergency as the compelling state interest, they were summarily rebuffed. Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), *aff'd per curiam*, 404 U.S. 1054 (1972); Lopez v. Wyman, Civ. No. 1971–308 (W.D.N.Y. 1971), *aff'd per curiam*, 404 U.S. 1055 (1972). The source of the funds, state or federal, is irrelevant to application of the principle. Pease v. Hansen, 404 U.S. 70 (1971).

[1870] 405 U.S. 330 (1972). *But see* Marston v. Lewis, 410 U.S. 679 (1973), and Burns v. Fortson, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in Kanapaux v. Ellisor, 419 U.S. 891 (1974), and Sununu v. Stark, 420 U.S. 958 (1975).

fornia law which limited welfare benefits for California citizens who had resided in the state for less than a year to the level ifof benefits which they would have received in the State of their prior residence.[1871]

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*.[1872] While it is not clear what the precise basis of the ruling is, it appears that the Court found that the State's interest in requiring that those who seek a divorce from its courts be genuinely attached to the State and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[1873] Similarly, durational residency requirements for lower in-state tuition at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.[1874] More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to "consume" benefits within a state's borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college education).[1875]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the State. The differences between the durational residency cases previously decided did not alter the bearing of the

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[1871] Saenz v. Roe, 526 U.S. 489, 505 (1999).

[1872] 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id. at 418.

[1873] 419 U.S. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[1874] Starns v. Malkerson, 326 F. Supp. 234 (D.Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441, 452 & n.9 (1973), and id. at 456, 464, 467 (dicta). In Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974), the Court, noting the results, stated that "some waiting periods . . . may not be penalties" and thus would be valid.

[1875] Saenz v. Roe, 526 U.S. at 505 (1999).

right to travel principle upon the distribution scheme, but the Court's decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.[1876]

Unresolved still are issues such as durational residency requirements for occupational licenses and other purposes.[1877] Too, it should be noted that this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[1878] and the cases do not inhibit the States when, having reasons for doing so, they bar travel by certain persons.[1879]

**Marriage and Familial Relations**

In *Zablocki v. Redhail*,[1880] importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a "fundamental interest" that necessitates "critical examination" of governmental restrictions which "interfere directly and substantially" with the right.[1881] Struck down was a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was receiving public assistance. Applying "critical examination," the Court observed that the statutory prohibition could not

[1876] Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court's invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

[1877] La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.

[1878] *E.g.*, McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld). *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). *See also* Martinez v. Bynum, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

[1879] Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the State).

[1880] 434 U.S. 374 (1978).

[1881] Although the Court's due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. 434 U.S. at 396-397 (Justice Powell concurring).

be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.[1882] Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circumstances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations, and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was not served, the Court found, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully distinguished by the Court as neither entitled to rigorous scrutiny nor put in jeopardy by the decision.[1883] For example, in *Califano v. Jobst*,[1884] a unanimous Court sustained a Social Security provision that revoked disabled dependents' benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents' benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued, alleging that distinguishing between classes of persons who married eligible persons and who married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception when both marriage partners were receiving benefits, as a means of lessening hardship and recognizing that dependency was

[1882] 434 U.S. at 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id. at 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id. at 400, 406 n.10.

[1883] 434 U.S. at 386-87. Chief Justice Burger thought the interference here was "intentional and substantial," whereas the provision in *Jobst* was neither. Id. at 391 (concurring).

[1884] 434 U.S. 47 (1977).

likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby." [1885]

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area. [1886]

**Sexual Orientation**

In *Romer v. Evans*, [1887] the Supreme Court struck down a state constitutional amendment which both overturned local ordinances prohibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process. [1888] The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to establish whether the legislative classification had a rational relation to a legitimate end.

The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." [1889] The Court then rejected argu-

[1885] 434 U.S. at 54. *See also* Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal protection); Califano v. Boles, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

[1886] *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978) (State's giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents). *Accord*, Lehr v. Robertson, 463 U.S. 248 (1983).

[1887] 517 U.S. 620 (1996).

[1888] Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[1889] 517 U.S. at 634, *quoting* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

ments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated purposes, and that no other legitimate rationale existed for such a restriction.

### Poverty and Fundamental Interests: The Intersection of Due Process and EqualProtection

***Generally***.—Whatever may be the status of wealth distinctions *per se* as a suspect classification,[1890] there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with *Griffin v. Illinois*,[1891] surely one of the most seminal cases in modern constitutional law. There, the State conditioned full direct appellate review, review as to which all convicted defendants were entitled, on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Black wrote in the plurality opinion, "a State can no more discriminate on account of poverty than on account of religion, race, or color." While the State was not obligated to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty." The system's fault was that it treated defendants with money differently than it treated defendants without money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1892]

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[1890] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1891] 351 U.S. 12 (1956). The opinion of the court was joined by Justices Black, Douglas, and Clark, and Chief Justice Warren. Justice Frankfurter concurred. Id. at 20. Justices Burton, Minton, Reed, and Harlan dissented. Id. at 26, 29.

[1892] 351 U.S. at 17, 18, 19. Although Justice Black was not explicit, it seems clear that the system was found to violate both the due process and the equal protection clauses. Justice Frankfurter's concurrence dealt more expressly with the premise of the Black opinion. "It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted

The principle of *Griffin* was extended in *Douglas v. California*,[1893] in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."[1894]

From the beginning, Justice Harlan opposed reliance on the equal protection clause at all, arguing that a due process analysis was the proper criterion to follow. "It is said that a State cannot discriminate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the equal protection clause. "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional."[1895] As he protested in *Douglas*: "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."[1896]

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indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." Id. at 23.

[1893] 372 U.S. 353 (1963). Justice Clark dissented, protesting the Court's "new fetish for indigency," id. at 358, 359, and Justices Harlan and Stewart dissented. Id. at 360.

[1894] 372 U.S. at 357-58.

[1895] Griffin v. Illinois, 351 U.S. 12, 34, 35 (1956).

[1896] Douglas v. California, 372 U.S. 353, 361 (1963).

Due process furnished the standard, Justice Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system which merely recognized differences between and among economic classes, which as in *Douglas* made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system which denied due process.[1897]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal."[1898]

***Criminal Procedure***.—"[I]t is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[1899] "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . ."[1900] No State may condition the right to appeal[1901] or the right to file a petition for *habeas corpus*[1902] or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the States are not required to furnish full and complete transcripts of their trials to indigents when exerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.[1903] This right may not be denied by drawing a felony-

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[1897] 372 U.S. at 363-67.

[1898] Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

[1899] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[1900] Draper v. Washington, 372 U.S. 487, 496 (1963).

[1901] Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960).

[1902] Smith v. Bennett, 365 U.S. 708 (1961).

[1903] Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge's certification that "justice will thereby be promoted"); Draper v. Washington, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge's certification that the allegations of error were not "frivolous"); Lane v. Brown, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); Long v. District Court,

misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.[1904] A defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.[1905] The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[1906]

But, deciding a point left unresolved in *Douglas*, the Court held that neither the due process nor the equal protection clause required a State to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the State's higher courts or in the United States Supreme Court. Due process fairness does not require that after an appeal has been provided the State must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[1907] Not even death row inmates

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385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, *see* Britt v. North Carolina, 404 U.S. 266 (1971); United States v. MacCollom, 426 U.S. 317 (1976).

[1904] Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971).

[1905] Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an Anders brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). *But see* Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an Anders brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

[1906] Evitts v. Lucey, 469 U.S. 387 (1985).

[1907] Ross v. Moffitt, 417 U.S. 600 (1974). *See also* Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who

have a constitutional right to an attorney to prepare a petition for collateral relief in state court.[1908]

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a State may not deny prisoners legal assistance of another inmate[1909] and it must make available certain minimal legal materials.[1910]

***The Criminal Sentence***.—A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois*[1911] held that it was a denial of equal protection for a State to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine which was also levied upon conviction. And *Tate v. Short*[1912] held that in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

***Voting***.—Treatment of indigency in a civil type of "fundamental interest" analysis came in *Harper v. Virginia Board of Elections*,[1913] in which it was held that "a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." The Court emphasized both the fundamental interest in the right to vote and the suspect character of wealth classifications. "[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate

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is convicted, and who subsequently becomes able to repay costs, must reimburse State for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[1908] Murray v. Giarratano, 492 U.S. 1 (1989) (upholding Virginia's system under which "unit attorneys" assigned to prisons are available for some advice prior to the filing of a claim, and a personal attorney is assigned if an inmate succeeds in filing a petition with at least one non-frivolous claim).

[1909] Johnson v. Avery, 393 U.S. 483 (1969).

[1910] Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).

[1911] 399 U.S. 235 (1970).

[1912] 401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is "$30 or 30 days" or some similar form where either confinement or a fine will satisfy the State's penal policy.

[1913] 383 U.S. 663, 666 (1966). The poll tax required to be paid as a condition of voting was $1.50 annually. Justices Black, Harlan, and Stewart dissented. Id. at 670, 680.

intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[1914]

The two factors—classification in effect along wealth lines and adverse effect upon the exercise of the franchise—were tied together in *Bullock v. Carter*[1915] in which the setting of high filing fees for certain offices was struck down upon analysis by a stricter standard than the traditional equal protection standard but apparently a somewhat lesser standard than the compelling state interest test. The Court held that the high filing fees were not rationally related to the State's interest in allowing only serious candidates on the ballot since some serious candidates could not pay the fees while some frivolous candidates could and that the State could not finance the costs of holding the elections from the fees when the voters were thereby deprived of their opportunity to vote for candidates of their preferences.

Extending *Bullock*, the Court has held it impermissible for a State to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A State must provide such persons a reasonable alternative for getting on the ballot.[1916] Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution.[1917]

***Access to Courts***.—In *Boddie v. Connecticut*,[1918] Justice Harlan carried a majority of the Court with him in utilizing a due process analysis to evaluate the constitutionality of a State's filing fees in divorce actions which a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that when the State monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the State could terminate the marital status—then it denied due process by inflexibly imposing fees which kept some persons from using that avenue. Justice Harlan's opinion averred that a facially neutral law or policy which did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental interest. The opinion concluded with a cautioning obser-

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[1914] 383 U.S. at 668. The Court observed that "the right to vote is too precious, too fundamental to be so burdened or conditioned." Id. at 670.

[1915] 405 U.S. 134 (1972).

[1916] Lubin v. Panish, 415 U.S. 709 (1974). Note that the Court indicated that Bullock was decided on the basis of restrained review. Id. at 715.

[1917] Bearden v. Georgia, 461 U.S. 660 (1983).

[1918] 401 U.S. 371 (1971).

vation that the case was not to be taken as establishing a general right to access to the courts.

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States v. Kras*,[1919] the Court held that the imposition of filing fees which blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as *Kras*, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[1920]

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[1921]

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[1919] 409 U.S. 434 (1973).

[1920] 409 U.S. at 443-46. The equal protection argument was rejected by utilizing the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id. at 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id. at 458. Justices Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[1921] Ortwein v. Schwab, 410 U.S. 656 (1973). The division was the same 5-to-4 that prevailed in Kras . *See also* Lindsey v. Normet, 405 U.S. 56 (1972). But cases involving the Boddie principle do continue to arise. Little v. Streater, 452 U.S. 1 (1981) (in paternity suit that State required complainant to initiate, indigent defendant entitled to have State pay for essential blood grouping test); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (recognizing general right of ap-

The continuing vitality of *Griffin v. Illinois*, however, is seen in the case of *M.L.B. v. S.L.J.*,[1922] where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the State, Mississippi, had afforded the plaintiff a trial on the merits, and thus the "monopolization" of the avenues of relief alleged in *Boddie* was not at issue. As in *Boddie*, however, the Court focused on the substantive due process implications of the state limiting "[c]hoices about marriage, family life, and the upbringing of children,"[1923] while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal,[1924] and that the forced dissolution of parental rights was "more substantial than mere loss of money,"[1925] the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

***Educational Opportunity***.—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School District v. Rodriguez*[1926] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 States of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to

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pointed counsel in indigent parents when State seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[1922] 519 U.S. 102 (1996).

[1923] 519 U.S. at 106. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[1924] Mayer v. Chicago, 404 U.S. 189 (1971).

[1925] 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

[1926] 411 U.S. 1 (1973). The opinion by Justice Powell was concurred in by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justices Douglas, Brennan, White, and Marshall dissented. Id. at 62, 63, 70.

the State's interest in protecting and promoting local control of education.[1927]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[1928] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in

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[1927] 411 U.S. at 44-55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id. at 63.

[1928] 411 U.S. at 20. *But see* id. at 70, 117–24 (Justices Marshall and Douglas dissenting).

spending and those differences could not be correlated with differences in educational quality.[1929]

*Rodriguez* clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a *per se* suspect classification but it must be related to some interest that is fundamental, and *Rodriguez* doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,[1930] the case remains strongly viable. Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas v. Dickinson Public Schools*[1931] rejected an indigent student's equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either "strict" or "heightened" scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.[1932]

***Abortion***.—*Rodriguez* furnished the principal analytical basis for the Court's subsequent decision in *Maher v. Roe*,[1933] holding that a State's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, it was held that the indigent are not a suspect class.[1934] Again, as in *Rodriguez* and in *Kras*, it was held that when the State has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not

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[1929] 411 U.S. at 29-39. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

[1930] *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.

[1931] 487 U.S. 450 (1988). This was a 5–4 decision, with Justice O'Connor's opinion of the Court being joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, and with Justices Marshall, Brennan, Stevens, and Blackmun dissenting.

[1932] 487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.

[1933] 432 U.S. 464 (1977).

[1934] 432 U.S. at 470-71.

undue governmental interference with a fundamental right.[1935] Expansion of this area of the law of equal protection seems especially limited.

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.

**APPORTIONMENT OF REPRESENTATION**

With the abolition of slavery by the Thirteenth Amendment, the African Americans formerly counted as three-fifths of persons would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, there appeared the prospect that politically the readmitted Southern States would gain the advantage in Congress when combined with Democrats from the North. Inasmuch as the South was adamantly opposed to African American suffrage, all the congressmen would be elected by whites. Many wished to provide for the enfranchisement of the African American and proposals to this effect were voted on in both the House and the Senate, but only a few Northern States

[1935] 432 U.S. at 471-74. *See also* Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of Boddie and was the basis of concurrences by Justices Stewart and Powell in Zablocki v. Redhail, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that Dandridge v. Williams, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see* Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

permitted African Americans to vote and a series of referenda on the question in Northern States revealed substantial white hostility to the proposal. Therefore, a compromise was worked out, to effect a reduction in the representation of any State which discriminated against males in the franchise.[1936]

No serious effort was ever made in Congress to effectuate § 2, and the only judicial attempt was rebuffed.[1937] With subsequent constitutional amendments adopted and the utilization of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity.[1938]

However, in *Richardson v. Ramirez*,[1939] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the equal protection clause was simply inapplicable.

SECTIONS 3 AND 4. 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

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[1936] *See generally* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956).

[1937] Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

[1938] The section did furnish a basis to Justice Harlan to argue that inasmuch as § 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying § 1 to questions relating to the franchise. *Compare* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Justice Harlan concurring and dissenting), *with* id. at 229, 250 (Justice Brennan concurring and dissenting). The language of the section recognizing 21 as the usual minimum voting age no doubt played some part in the Court's decision in Oregon v. Mitchell as well. It should also be noted that the provision relating to "Indians not taxed" is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att'y Gen. 518 (1940).

[1939] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id. at 56, 86.

thereof. But congress may by a vote of two thirds of each House, remove such disability.

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.

### DISQUALIFICATION AND PUBLIC DEBT

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals.[1940] In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States."[1941] Twenty-six years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed."[1942]

Although § 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. . . . '[T]he validity of the public debt'. . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[1943]

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[1940] *E.g.*, and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.

[1941] Ch. 193, 17 Stat. 142.

[1942] Act of June 6, 1898, ch. 389, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of § 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. Griffin's Case, 11 Fed. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this section from again holding office under the United States. 18 Op. Att'y Gen. 149 (1885). On the construction of "engaged in rebellion," *see* United States v. Powell, 27 Fed. Cas. 605 (C.C.D.N.C. 1871) (No. 16,079).

[1943] Perry v. United States, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ENFORCEMENT

### Generally

In the aftermath of the Civil War, Congress, in addition to proposing to the States the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.[1944] Several of these laws were general civil rights statutes which broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the States, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.[1945] In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[1946] Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the commerce clause[1947] until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War Amendments,[1948] which culminated in broad provisions against private in-

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congressional power." On a Confederate bond problem, *see* Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883) (citing Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1873), and Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869)). *See also* The Pietro Campanella, 73 F. Supp. 18 (D. Md. 1947).

[1944] Civil Rights Act of 1866, ch. 31, 14 Stat. 27; the Enforcement Act of 1870, ch. 114, 16 Stat. 140; Act of February 28, 1871, ch. 99, 16 Stat. 433; the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875; 18 Stat. 335. The modern provisions surviving of these statutes are 18 U.S.C. §§ 241, 242, 42 U.S.C.§§ 1981–83, 1985–1986, and 28 U.S.C. § 1343. Two lesser statutes were the Slave Kidnapping Act of 1866, ch. 86, 14 Stat. 50, and the Peonage Abolition Act, ch. 187, 14 Stat. 546, 18 U.S.C. §§ 1581–88, and 42 U.S.C.§ 1994.

[1945] *See generally* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

[1946] For cases under 18 U.S.C. §§ 241 and 242 in their previous codifications, *see* United States v. Mosley, 238 U.S. 383 (1915); United States v. Gradwell, 243 U.S. 476 (1917); United States v. Bathgate, 246 U.S. 220 (1918); United States v. Wheeler, 254 U.S. 281 (1920). The resurgence of the use of these statutes began with United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945).

[1947] The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

[1948] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases was paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). South Carolina v. Katzenbach, 383 U.S. 301 (1966).

terference with civil rights in the 1968 legislation.[1949] The story of these years is largely an account of the "state action" doctrine in terms of its limitation on congressional powers;[1950] lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

The Court, however, ultimately rejected this expansion of the powers of Congress in *United States v. Morrison*.[1951] In *Morrison*, the Court invalidated a provision of the Violence Against Women Act[1952] that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,[1953] dismissing the *dicta* in *Guest*, and reaffirming the precedents of the *Civil Rights Cases* and *United States v. Harris*. The Court also rejected the assertion that the legislation was "corrective" of bias in the courts, as the suits are not directed at the State or any state actor, but rather at the individuals committing the criminal acts.[1954]

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[1949] 82 Stat. 73, 18 U.S.C. § 245. The statute has yet to receive its constitutional testing.

[1950] On the "state action" doctrine in the context of the direct application of § 1 of the Fourteenth Amendment, *see* discussion *supra*.

[1951] 529 U.S. 528, 617-27 (2000).

[1952] Pub. L. No. 103–322, § 40302, 108 Stat. 1941, 42 U.S.C. § 13981.

[1953] 529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

[1954] This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in United States v. Harris) lacks a "color of law" requirement. Although the requirement was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (while it might be "difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State"). What the unanimous Court held in Griffin was that an "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress' powers under § 5 of the 14th Amendment. Id. at 107.

**State Action**

In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,[1955] and to provide criminal[1956] and civil[1957] liability for state officials and agents[1958] or persons associated with them[1959] who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[1960] present no problems of constitutional foundation, although there may well be other problems of application.[1961] But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875[1962] Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public

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The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under § 1985(3). *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd*, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in *Morrison*, however, appears to preclude the use of § 1985(3) in relation to Fourteenth Amendment rights absent some state action.

[1955] Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, 28 U.S.C. § 1443. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). The statute is of limited utility because of the interpretation placed on it almost from the beginning. *Compare* Georgia v. Rachel, 384 U.S. 780 (1966), *with* City of Greenwood v. Peacock, 384 U.S. 808 (1966).

[1956] 18 U.S.C. §§ 241, 242. *See* Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Johnson, 390 U.S. 563 (1968).

[1957] 42 U.S.C. § 1983. *See* Monroe v. Pape, 365 U.S. 167 (1961); *see also* 42 U.S.C. § 1985(3), construed in Griffin v. Breckenridge, 403 U.S. 88 (1971).

[1958] Ex parte Virginia, 100 U.S. 339 (1880).

[1959] United States v. Price, 383 U.S. 787 (1966).

[1960] Both 18 U.S.C. § 242 and 42 U.S.C. § 1983 contain language restricting application to deprivations under color of state law, whereas 18 U.S.C. § 241 lacks such language. The newest statute, 18 U.S.C. § 245, contains, of course, no such language. On the meaning of "custom" as used in the "under color of" phrase, *see* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[1961] *E.g.*, the problem of "specific intent" in Screws v. United States, 325 U.S. 91 (1945), and Williams v. United States, 341 U.S. 97 (1951), and the problem of what "right or privilege" is "secured" to a person by the Constitution and laws of the United States, which divided the Court in United States v. Williams, 341 U.S. 70 (1951), and which was resolved in United States v. Price, 383 U.S. 787 (1966).

[1962] 18 Stat. 335, §§ 1, 2.

amusement. The *Civil Rights Cases* [1963] found this enactment to be beyond Congress' power to enforce the Fourteenth Amendment. It was observed that § 1 was prohibitory only upon the States and did not reach private conduct. Therefore, Congress' power under § 5 to enforce § 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment." [1964] The holding in this case had already been preceded by *United States v. Cruikshank* [1965] and by *United States v. Harris* [1966] in which the Federal Government had prosecuted individuals for killing and injuring African Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the States themselves. [1967]

*Cruikshank* did, however, recognize a small category of federal rights which Congress could protect against private deprivation, rights which the Court viewed as deriving particularly from one's status as a citizen of the United States and which Congress had a general police power to protect. [1968] These rights included the right to vote in federal elections, general and primary, [1969] the right to federal protection while in the custody of federal officers, [1970] and

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[1963] 109 U.S. 3 (1883). The Court also rejected the Thirteenth Amendment foundation for the statute, a foundation revived by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[1964] 109 U.S. at 11. Justice Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function which satisfied the state action requirement in any event. Id. at 46–48, 56–57.

[1965] 92 U.S. 542 (1876). The action was pursuant to § 6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. § 241.

[1966] 106 U.S. 629 (1883). The case held unconstitutional a provision of § 2 of the 1871 Act, ch. 22, 17 Stat. 13.

[1967] *See also* Baldwin v. Franks, 120 U.S. 678 (1887); Hodges v. United States, 203 U.S. 1 (1906); United States v. Wheeler, 254 U.S. 281 (1920). Under the Fifteenth Amendment, *see* James v. Bowman, 190 U.S. 127 (1903).

[1968] United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights which the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

[1969] Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

[1970] Logan v. United States, 144 U.S. 263 (1892).

the right to inform federal officials of violations of federal law.[1971] The right of interstate travel is a basic right derived from the Federal Constitution which Congress may protect.[1972] In *United States v. Williams*,[1973] in the context of state action, the Court divided four-to-four over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in *United States v. Price*[1974] and *United States v. Guest*,[1975] again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the due process and equal protection clauses.

Inasmuch as both *Price* and *Guest* concerned conduct which the Court found implicated with sufficient state action, it did not then have to reach the question of § 241's constitutionality when applied to private action interfering with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently intepreted as language in the opinion of the Court construing Congress' power under § 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress' power was broader.[1976] "Although the Fourteenth Amendment itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state offi-

[1971] In re Quarles, 158 U.S. 532 (1895). *See also* United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).

[1972] United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[1973] 341 U.S. 70 (1951).

[1974] 383 U.S. 787 (1966) (due process clause).

[1975] 383 U.S. 745 (1966) (equal protection clause).

[1976] Justice Brennan's opinion, 383 U.S. at 774, was joined by Chief Justice Warren and Justice Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," id. at 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id. at 761, that inasmuch as Justice Brennan reached the issue the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Id. at 762. In the opinion of the Court, Justice Stewart disclaimed any intention of speaking of Congress' power under § 5. Id. at 755.

cers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection."[1977] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights which, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," *i.e.*, by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the equal protection clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that access is a right granted by the Constitution, and § 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.[1978]

**Congressional Definition of Fourteenth Amendment Rights**

In the *Civil Rights Cases*,[1979] the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws which§ 1 forbade the States to adopt. And the Court was quite clear that under its responsibilities of judicial review, it was the body which would determine that a state law was impermissible and that a federal law passed pursuant to § 5 was necessary and proper to enforce § 1.[1980] But in *United States v. Guest*,[1981] Justice Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors," that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In *Katzenbach v. Morgan*,[1982] Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and

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[1977] 383 U.S. at 782.
[1978] 383 U.S. at 777-79, 784.
[1979] 109 U.S. 3, 13–14 (1883).
[1980] *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).
[1981] 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).
[1982] 384 U.S. 641 (1966). Besides the ground of decision discussed here, Morgan also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the equal protection clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the bal-

posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to § 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965 [1983] barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." [1984] Inasmuch as the Court had previously upheld an English literacy requirement under equal protection challenge, [1985] acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress itself might have questioned the justifications put forward by the State in defense of its law and might have concluded that instead of being supported by acceptable reasons the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations which might have led Congress to its conclusion; since Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress' prerogative to weigh" the considerations and the Court would sustain the conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination. [1986]

In dissent, Justice Harlan protested that "[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of§ 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." [1987] Justice Brennan rejected this reasoning. "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these

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lot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the equal protection clause under "necessary and proper" standards. Id. at 652–653. A similar "necessary and proper" approach underlay South Carolina v. Katzenbach, 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause.

[1983] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[1984] 384 U.S. at 648.

[1985] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[1986] Katzenbach v. Morgan, 384 U.S. 641, 653–56 (1966).

[1987] 384 U.S. at 668. Justice Stewart joined this dissent.

guarantees."[1988] Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on *Morgan* in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination;[1989] on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking *Morgan*.[1990]

Congress' power under *Morgan* returned to the Court's consideration when several States challenged congressional legislation[1991] lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that *Morgan*'s vitality was in some considerable doubt, at least with regard to the reach which many observers had previously seen.[1992] Four Justices accepted *Morgan* in full,[1993] while one Justice rejected it totally[1994] and another would have limited it to racial cases.[1995] The other three Justices seemingly restricted *Morgan* to its alternate rationale in passing on the age reduction provision but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[1996]

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[1988] 384 U.S. at 651 n.10. Justice O'Connor for the Court quoted and reiterated Justice Brennan's language in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731–33 (1982).

[1989] 82 Stat. 73, 18 U.S.C. § 245. *See* S. Rep. No. 721, 90th Congress, 1st Sess. 6–7 (1967). *See also* 82 Stat. 81, 42 U.S.C. § 3601 *et seq.*

[1990] Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502. *See* S. Rep. No. 1097, 90th Congress, 2d Sess. 53–63 (1968). The cases which were subjects of the legislation were Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Wade, 388 U.S. 218 (1967), insofar as federal criminal trials were concerned.

[1991] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa–1, 1973bb.

[1992] Oregon v. Mitchell, 400 U.S. 112 (1970).

[1993] 400 U.S. at 229, 278-81 (Justices Brennan, White, and Marshall), id. at 135, 141–44 (Justice Douglas).

[1994] 400 U.S. at 152, 204-09 (Justice Harlan).

[1995] 400 U.S. at 119, 126-31 (Justice Black).

[1996] The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling.'" 400 U.S. at 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and Morgan did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the

More recent decisions read broadly Congress' power to make determinations that appear to be substantive decisions with respect to constitutional violations.[1997] Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[1998] Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to utilize § 5 powers to curtail the rights the Court has derived from the due process clause and other provisions of the Constitution.[1999] The case of *City of Boerne v. Flores*,[2000] however, illustrates that the Court will not always defer to Congress's determination as to what legislation is appropriate to "enforce" the provisions of the Fourteenth Amendment. In *Flores*, the Court held that the Religious Freedom Restoration Act,[2001] which expressly overturned the Court's narrowing of religious protections under *Employment Division v. Smith*,[2002] exceeded congressional power under section 5 of the Fourteenth Amendment. Although the Court allowed that Congress's power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.[2003] Unlike the pervasive suppression of the African American vote in the South which led to the passage of the Voting Rights Act, there was no similar history of

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privilege of taking up residence in another State" without reaching an independent determination of their own that the requirements did in fact have that effect. Id. at 286.

[1997] *See* discussion of City of Rome v. United States, 446 U.S. 156, 173–83 (1980), under the Fifteenth Amendment, infra. *See also* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion by Chief Justice Burger), and id. at 500–02 (Justice Powell concurring).

[1998] The Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973, were designed to overturn City of Mobile v. Bolden, 446 U.S. 55 (1980). A substantial change of direction in Rogers v. Lodge, 458 U.S. 613 (1982), handed down coextensively with congressional enactment, seems to have brought Congress and the Court into essential alignment, thus avoiding a possible constitutional conflict.

[1999] *See* The Human Life Bill: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 97th Congress, lst sess. (1981). An elaborate constitutional analysis of the bill appears in Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation*, 68 VA. L. REV. 333 (1982).

[2000] 521 U.S. 507 (1997).

[2001] Pub. L. 103–141, 107 Stat. 1488, 42 U.S.C. § 2000bb et. seq.

[2002] 494 U.S. 872 (1990).

[2003] 521 U.S. at 533.

religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.[2004]

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in Boerne, as litigants precluded from arguing that a state's sovereign immunity has been abrogated under Article I congressional powers[2005] seek alternative legislative authority in section 5. For instance, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[2006] a bank which had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.[2007]

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in *Kimel v. Florida Board of Regents*.[2008] In determining that the Act did not meet the "congruence and proportionality" test, the Court fo-

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[2004] 521 U.S. at 532-33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id.

[2005] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers may not be used to abrogate a state's Eleventh Amendment immunity, but Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), holding that Congress may abrogate Eleventh Amendment immunity in exercise of Fourteenth Amendment enforcement power, remains good law). See discussion pp. 1533–37.

[2006] 527 U.S. 627 (1999).

[2007] 527 U.S. at 639–46. *See also* College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act amendment to Lanham Act subjecting states to suits for false advertising is not a valid exercise of Fourteenth Amendment power; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a "property" right protected by the Due Process Clause).

[2008] 528 U.S. 62 (2000). Again, the issue of the Congress's power under § 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the commerce clause.

cused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities and characteristics.[2009] Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior."[2010]

Despite what was considered by many to be a better developed legislative record, the Court in *Board of Trustees of the University of Alabama v. Garrett*[2011] also rejected the recovery of money damages against states, this time under the Americans with Disabilities Act of 1990 (ADA).[2012] The ADA prohibits employers, including states, from "discriminating against a qualified individual with a disability"[2013] and requires employers to "make reasonable accommodations [for] . . . physical or mental limitations . . . . unless [to do so]. . . would impose an undue hardship on the . . . business."[2014] Although the Court had previously overturned discriminatory legislative classifications based on disability in *City of Cleburne v. Cleburne Living Center*,[2015] the Court had held that determinations of when states had violated the Equal Protection clause in such cases were to be made under the relatively deferential standard of rational basis review. Thus, failure of an employer to provide the kind "reasonable accommodations" required under the ADA would not generally rise to the level of a violation of the14th Amendment, and instances thereof did not qualify as a "history and pattern of unconstitutional employment discrimination." Thus, according the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states,[2016] but the re-

[2009] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying rational basis test to uphold mandatory retirement age of 70 for state judges).
[2010] 528 U.S. at 86, quoting City of Boerne, 521 U.S. at 532.
[2011] 531 U.S. 356 (2001).
[2012] 42 U.S.C. §§ 12111 - 12117.
[2013] 42 U.S.C. § 12112(a).
[2014] 42 U.S.C. § 12112(b) (5) (A).
[2015] 473 U.S. 432 (1985).
[2016] As Justice Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.

quirements of the ADA would be out of proportion to the alleged offenses.

# FIFTEENTH AMENDMENT

## RIGHT OF CITIZENS TO VOTE

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## RIGHT OF CITIZENS TO VOTE

### FIFTEENTH AMENDMENT

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.

### ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE

#### Adoption and Judicial Enforcement

***Adoption***.—The final decision of Congress not to include anything relating to the right to vote in the Fourteenth Amendment, aside from the provisions of § 2,[1] left the issue of Negro suffrage solely with the States, and Northern States were generally as loath as Southern to grant the ballot to African Americans, both the newly-freed and those who had never been slaves.[2] But in the second session of the 39th Congress, the right to vote was extended to African Americans by statute in the District of Columbia and the territories, and the seceded States as a condition of readmission had to guarantee Negro suffrage.[3] Following the election of President Grant, the "lame duck" third session of the Fortieth Congress sent the proposed Fifteenth Amendment to the States for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Negro suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted or who were willing to settle for an amendment merely

[1] *See* discussion under "Apportionment of Representation," supra. Of course, the equal protection clause has been extensively utilized by the Court to protect the right to vote. *See* "Fundamental Interests: The Political Process," supra.

[2] W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25–28 (1965).

[3] Id. at 29–31; ch. 6, 14 Stat. 375 (1866) (District of Columbia); ch. 15, 14 Stat. 379 (1867) (territories); ch. 36, 14 Stat. 391 (1867) (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); ch. 153, 14 Stat. 428 (1867) (First Reconstruction Act).

proscribing racial qualifications in determining who could vote under any other standards the States wished to have.[4] The latter group ultimately prevailed.

***The Judicial View of the Amendment***.—In its initial appraisals of this Amendment, the Supreme Court appeared disposed to emphasize only its purely negative aspects. "The Fifteenth Amendment," it announced, did "not confer the right . . . [to vote] upon any one," but merely "invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."[5] But in subsequent cases, the Court, conceding "that this article" has originally been construed as giving "no affirmative right to the colored man to vote" and as having been "designed primarily to prevent discrimination against him," professed to be able "to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word white, and this left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people. . . ."[6]

Although "the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote," the Amendment "is cast in fundamental terms" that transcend that immediate objective, and "grants protection to all persons, not just members of a particular race."[7] Moreover, the Court has construed "race" broadly to comprehend classifications based on ancestry as well as those based on race.[8] "Ancestry can be a proxy for race," the Court explained recently, finding such a proxy in Hawaii's limitation of the right to vote in a statewide election for an office responsible for

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[4] Gillette, supra, at 46–78. The congressional debate is conveniently collected in 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS 372 (1971).

[5] United States v. Reese, 92 U.S. 214, 217–18 (1876); United States v. Cruikshank, 92 U.S. 542, 566 (1876).

[6] Ex parte Yarbrough, 110 U.S. 651, 665 (1884); Guinn v. United States, 238 U.S. 347, 363 (1915). A state constitutional provision limiting the right of suffrage to whites was automatically nullified by ratification of the Fifteenth Amendment. Neal v. Delaware, 103 U.S. 370 (1881).

[7] Rice v. Cayetano, 528 U.S. 495, 512 (2000).

[8] Guinn v. United States, 238 U.S. 347 (1915) (invalidating Oklahoma exception to literacy requirement for any "lineal descendants" of persons entitled to vote in 1866).

administering a trust for the benefit of persons who can trace their ancestry to Hawaiian inhabitants of 1778.[9]

***Grandfather Clauses***.—Until quite recently, the history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various state efforts to disenfranchise African Americans either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory membership practices of political parties. Of several devices which have been voided, one of the first to be held unconstitutional was the "grandfather clause." Beginning in 1895, several States enacted temporary laws whereby persons who had been voters, or descendants of those who had been voters, on January 1, 1867, could be registered notwithstanding their inability to meet any literacy requirement. Unable because of the date to avail themselves of the exemption, African Americans were disabled to vote on grounds of illiteracy or through discriminatory administration of literacy tests, while illiterate whites were permited to register without taking any tests. With the achievement of the intended result, most States permitted their laws to lapse, but Oklahoma's grandfather clause had been enacted as a permanent amendment to the state constitution. A unanimous Court condemned the device as recreating and perpetuating "the very conditions which the [Fifteenth] Amendment was intended to destroy."[10]

The Court did not experience any difficulty in voiding a subsequent Oklahoma statute of 1916 which provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, with some exceptions for sick and absent persons who were given an additional brief period to register, should be perpetually disenfranchised. The Fifteenth Amendment, Justice Frankfurter declared for the Court, nullified "sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[11] The impermissible effect of the statute, said the Court, was automatically to continue as permanent voters, without their being obliged to register again, all white persons who were on registration lists in 1914 by virtue of the previously invalidated grandfather clause, whereas African Americans, prevented

[9] Rice v. Cayetano, 528 U.S. 495, 514 (2000).
[10] Guinn v. United States, 238 U.S. 347 (1915).
[11] Lane v. Wilson, 307 U.S. 268, 275 (1939).

from registering by that clause, had been afforded only a 20-day registration opportunity to avoid permanent disenfranchisement.

***The White Primary***.—Indecision was displayed by the Court, however, when it was called upon to deal with the exclusion of African Americans from participation in primary elections. Prior to its becoming convinced that primary contests were in fact elections to which federal constitutional guarantees applied,[12] the Court had relied upon the equal protection clause to strike down the Texas White Primary Law[13] and a subsequent Texas statute which contributed to a like exclusion by limiting voting in primary elections to members of state political parties as determined by the central committees thereof.[14] When exclusion of African Americans was thereafter perpetuated by political parties not acting in obedience to any statutory command, this discrimination was for a time viewed as not constituting state action and therefore as not prohibited by either the Fourteenth or the Fifteenth Amendments.[15] This holding was reversed nine years later when the Court declared that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a state agency, and hence it may not under the Fifteenth Amendment exclude African Americans from such elections.[16] An effort by South Carolina to escape the effects of this ruling by repealing all statutory provisions regulating primary elections and political organizations conducting them was nullified by a lower federal court with no doctrinal difficulty,[17] but the Supreme Court, although nearly unanimous on the result, was unable to come to a majority agreement with regard to the exclusion of African Americans by the Jaybird Association, a county-wide organization which, independently of state laws and the use of state election machinery or funds, nearly monopolized access to Democratic nomination for local offices. The exclusionary policy was held unconstitutional but there was no opinion of the Court.[18]

***Literacy Tests***.—At an early date the Court held that literacy tests which are drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face and in the absence of proof of discriminatory enforcement could not be

[12] United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944).
[13] Nixon v. Herndon, 273 U.S. 536 (1927).
[14] Nixon v. Condon, 286 U.S. 73 (1932).
[15] Grovey v. Townsend, 295 U.S. 45 (1935).
[16] Smith v. Allwright, 321 U.S. 649 (1944).
[17] Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948); *see also* Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).
[18] Terry v. Adams, 345 U.S. 461 (1953). For analysis of the opinions, *see* "State Action," supra.

said to deny equal protection.[19] But an Alabama constitutional amendment the legislative history of which disclosed that both its object and its intended administration were to disenfranchise African Americans was condemned as violative of the Fifteenth Amendment.[20]

***Racial Gerrymandering***.—The Court's series of decisions interpreting the equal protection clause as requiring the apportionment and districting of state legislatures solely on a population basis[21] had its beginning in *Gomillion v. Lightfoot*,[22] in which the Court found a Fifteenth Amendment violation in the redrawing of a municipal boundary line into a 28-sided figure which excluded from the city all but four or five of 400 African Americans but no whites, and which thereby continued white domination of municipal elections. Subsequent decisions, particularly concerning the validity of multi-member districting and alleged dilution of minority voting power, were decided under the equal protection clause,[23] and in *City of Mobile v. Bolden*,[24] in the course of a considerably divided decision with respect to the requirement of discriminatory motivation in Fifteenth Amendment cases,[25] a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is official denial or abridgment of the right to register and vote, and to exclude indirect dilution claims.[26] Congressional amendment of § 2 of the Voting Rights Act may obviate the further development of constitutional jurisprudence in this area, however.[27]

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[19] Williams v. Mississippi, 170 U.S. 213 (1898); *Cf.* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1960).

[20] Davis v. Schnell, 81 F. Supp. 872 (M.D. Ala. 1949), aff'd 336 U.S. 933 (1949).

[21] *See* "Apportionment and Districting," supra.

[22] 364 U.S. 339 (1960). *See also* Wright v. Rockefeller, 376 U.S. 52 (1964).

[23] *E.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).

[24] 446 U.S. 55 (1980).

[25] On the issue of motivation versus impact under the equal protection clause, *see* discussion of "Testing Facially Neutral Classifications Which Impact on Minorities" in the Fourteenth Amendment, supra. On the plurality's view, *see* 446 U.S. at 61-65. Justice White appears clearly to agree that purposeful discrimination is a necessary component of equal protection clause violation, and may have agreed as well that the same requirement applies under the Fifteenth Amendment. Id. at 94–103. Only Justice Marshall unambiguously adhered to the view that discriminatory effect is sufficient. Id. at 125. *See also* Beer v. United States, 425 U.S. 130, 146–49 & nn.3–5 (1976) (dissenting).

[26] 446 U.S. at 65. At least three Justices disagreed with this view and would apply the Fifteenth Amendment to vote dilution claims. Id. at 84 n.3 (Justice Stevens concurring), 102 (Justice White dissenting), 125–35 (Justice Marshall dissenting). The issue was reserved in Rogers v. Lodge, 458 U.S. 613, 619 n.6 (1982).

[27] *See* Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973. The Supreme Court interpreted the 1982 amendments to section 2 in Thornburg v. Gingles, 478 U.S. 30 (1986), determining that Congress

**Congressional Enforcement**

Although the Fifteenth Amendment is "self-executing,"[28] the Court early emphasized that the right granted to be free from racial discrimination "should be kept free and pure by congressional enactment whenever that is necessary."[29] Following ratification of the Fifteenth Amendment in 1870, Congress passed the Enforcement Act of 1870,[30] which had started out as a bill to prohibit state officers from restricting suffrage on racial grounds and providing criminal penalties and ended up as a comprehensive measure aimed as well at private action designed to interfere with the rights guaranteed under the Fourteenth and Fifteenth Amendments. Insofar as this legislation reached private action, it was largely nullified by the Supreme Court and the provisions aimed at official action proved ineffectual and much of it was later repealed.[31] More recent legislation has been much more far-reaching in this respect and has been sustained.

***State Action***.—Like § 1 of the Fourteenth, § 1 of the Fifteenth Amendment prohibits official denial of the rights therein guaranteed, giving rise to the "state action" doctrine.[32] Nevertheless, the Supreme Court in two early cases seemed to be of the opinion that Congress could protect the rights against private deprivation, on the theory that Congress impliedly had power to protect the enjoyment of every right conferred by the Constitution against depriva-

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had effectively overruled the *City of Mobile* intent standard in returning to a "totality of the circumstances" results test.

[28] Guinn v. United States, 238 U.S. 347, 362–63 (1915).

[29] Ex parte Yarbrough, 110 U.S. 651, 665 (1884).

[30] 16 Stat. 140. Debate on the Act is collected in 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS 454 (1971). *See also* The Enforcement Act of 1871, ch. 99, 16 Stat. 433.

[31] Ch. 25, 28 Stat 36 (1894); ch. 321, 35 Stat. 1153 (1909). *See* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 35–55 (1947), for a brief history of the enactment and repeal of the statutes. The surviving statutes of this period are 18 U.S.C. §§ 241–42, and 42 U.S.C. §§ 1971(a), 1983, and 1985(3).

[32] *See* "State Action," under the Fourteenth Amendment, supra. "The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords. The application of the prohibition of the Fifteenth Amendment to 'any State' is translated by legal jargon to read 'State Action.' This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." Terry v. Adams, 345 U.S. 461, 473 (1953) (Justice Frankfurter concurring).

tion from any source.[33] But in *James v. Bowman*[34] the Court held that legislation based on the Fifteenth Amendment which attempted to prohibit private as well as official interference with the right to vote on racial grounds was unconstitutional, and that interpretation was not questioned until 1941.[35] But the Court's interpretation of the "state action" requirement in cases brought under § 1 of the Fifteenth Amendment narrowed the requirement there and opened the possibility, when these decisions are considered with cases decided under the Fourteenth Amendment, that Congress is not limited to legislation directed to official discrimination.[36]

Thus, in *Smith v. Allwright*,[37] the exclusion of African Americans from political parties without the compulsion or sanction of state law was nonetheless held to violate the Fifteenth Amendment because political parties were so regulated otherwise as to be in effect agents of the State and thus subject to the Fifteenth Amendment; additionally, in one passage the Court suggested that the failure of the State to prevent the racial exclusion might be the act implicating the Amendment.[38] Then, in *Terry v. Adams*,[39] the political organization was not regulated by the State at all and selected its candidates for the Democratic primary election by its own processes; all eligible white voters in the jurisdiction were members of the organization but African Americans were excluded. Nevertheless, the Court held that this exclusion violated the Fifteenth Amendment, although no rationale was agreed upon by a majority of the Justices. Four of them thought the case simply indistinguish-

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[33] The idea was fully spelled out in Justice Bradley's opinion on circuit in United States v. Cruikshank, 25 Fed. Cas. 707, 712, 713 (No. 14,897) (C.C.D. La. 1874). The Supreme Court's decision in United States v. Cruikshank, 92 U.S. 542, 555–56 (1876), and United States v. Reese, 92 U.S. 214, 217–18 (1876), may be read to support the contention. Ex parte Yarbrough, 110 U.S. 651 (1884), involved a federal election and the assertion of congressional power to reach private interference with the right to vote in federal elections, but the Court went further to broadly state the power of Congress to protect the citizen in the exercise of rights conferred by the Constitution, among which was the right to be free from discrimination in voting protected by the Fifteenth Amendment. Id. at 665–66.

[34] 190 U.S. 127 (1903), holding unconstitutional Rev. Stat. § 5507, which was § 5 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[35] *E.g.*, United States v. Classic, 313 U.S. 299, 315 (1941); United States v. Williams, 341 U.S. 70, 77 (1951).

[36] *See* "Congressional Definition of Fourteenth Amendment Rights," supra.

[37] 321 U.S. 649 (1944).

[38] "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restrictions by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." 321 U.S. at 664.

[39] 345 U.S. 461 (1953).

able from *Smith v. Allwright* and thus did not deal with the central issue.[40] Justice Frankfurter thought the participation of local elected officials in the processes of the organization was sufficient to implicate state action.[41] Three Justices thought that when a purportedly private organization is permitted by the State to assume the functions normally performed by an agency of the State, then that association is subject to federal constitutional restrictions,[42] but this opinion also, in citing selected passages of *Yarbrough* and *Reese* and Justice Bradley's circuit opinion in *Cruikshank*, appeared to be suggesting that the state action requirement is not indispensable.[43] The 1957 Civil Rights Act[44] included a provision prohibiting private action with intent to intimidate or coerce persons in respect of voting in federal elections and authorized the Attorney General to seek injunctive relief against such private actions regardless of the character of the election. The 1965 Voting Rights Act[45] went further and prohibited and penalized private actions to intimidate voters in federal, state, or local elections. The Supreme Court has yet to consider the constitutionality of these sections.

***Federal Remedial Legislation***.—The history of federal remedial legislation is of modern vintage.[46] The 1957 Civil Rights Act[47] authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens. The 1960 Civil Rights Act[48] expanded on this authorization by permitting the Attorney General to seek a court finding of "pat-

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[40] 345 U.S. at 477 (Justices Clark, Reed, and Jackson, and Chief Justice Vinson).

[41] 345 U.S. at 470.

[42] 345 U.S. at 462, 468–69, 470 (Justices Black, Douglas, and Burton).

[43] 345 U.S. at 466-68. Justice Minton understood Justice Black's opinion to do away with the state action requirement. Id. at 485 (dissenting).

[44] 71 Stat. 637, 42 U.S.C. §§ 1971(b), 1971(c). In a suit to enjoin state officials from violating 42 U.S.C. § 1971(a), derived from Rev. Stat. 2004, applying to all elections, the defendants challenged the constitutionality of the law because it applied to private action as well as state. The Court held that inasmuch as the statute could constitutionally be applied to the defendants it would not hear their contention that as applied to others it would be void. United States v. Raines, 362 U.S. 17 (1960), disapproving the approach of United States v. Reese, 92 U.S. 214 (1876).

[45] Pub. L. No. 89–110, §§ 11–12, 79 Stat. 443, 42 U.S.C. §§ 1973i, 1973j.

[46] The 1871 Act, ch. 99, 16 Stat. 433, provided for a detailed federal supervision of the electoral process, from registration to the certification of returns. It was repealed in 1894. ch. 25, 28 Stat. 36. In Giles v. Harris, 189 U.S. 475 (1903), the Court, in an opinion by Justice Holmes, refused to order the registration of 6,000 African Americans who alleged that they were being wrongly denied the franchise, the Court observing that no judicial order would do them any good in the absence of judicial supervision of the actual voting, which it was not prepared to do, and suggesting that the petitioners apply to Congress or the President for relief.

[47] Pub. L. No. 85–315, 71 Stat. 634. *See* United States v. Raines, 362 U.S. 17 (1960); United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), aff'd, 304 F.2d 583 (5th Cir.), aff'd, 371 U.S. 37 (1962).

[48] Pub. L. No. 86–449, 74 Stat. 86.

tern or practice" of discrimination in any particular jurisdiction and authorizing upon the entering of such a finding the registration of all qualified persons in the jurisdiction of the race discriminated against by court-appointed referees. This authorization moved the vindication of voting rights beyond a case-by-case process. Further amendments were added in 1964.[49] Finally, in the Voting Rights Act of 1965[50] Congress went substantially beyond what it had done before. It provided that if the Attorney General determined that any State or political subdivision maintained on November 1, 1964, any "test or device"[51] and that less than 50 per cent of the voting age population in that jurisdiction was registered on November 1, 1964, or voted in the 1964 presidential election, such tests or devices were to be suspended for five years and no person should be denied the right to vote on the basis of such a test or device. A State could reinstitute such a test or device within the prescribed period only by establishing in a three-judge court in the District of Columbia that the test or device did not have a discriminatory intent or effect and the covered jurisdiction could only change its election laws in that period by obtaining the approval of the Attorney General or a three-judge court in the District of Columbia. The Act also provided for the appointment of federal examiners who could register persons meeting nondiscriminatory state qualifications who then must be permitted to vote.

These laws the Supreme Court upheld and expansively applied. In *United States v. Mississippi*,[52] the Court held that the Attorney General was properly authorized to sue for preventive relief to protect the right of citizens to vote, that the State could be sued,

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[49] Pub. L. No. 88–352, 78 Stat. 241.

[50] Pub. L. No. 89–110, 79 Stat. 437, 42 U.S.C. § 1973 et seq.

[51] The phrase "test or device" was defined as any requirement for (1) demonstrating the ability to read, write, understand, or interpret any matter, (2) demonstrating any educational achievement or knowledge, (3) demonstrating good moral character, (4) proving qualifications by vouching of registered voters. Aimed primarily at literacy tests, South Carolina v. Katzenbach, 383 U.S. 301, 333–34 (1966), the Act was considerably broadened through the Court's interpretation of § 5, 42 U.S.C. § 1973c, which require the approval either of the Attorney General or a three-judge court in the District of Columbia before a State could put into effect any new voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting, to include such changes as apportionment and districting, adoption of at-large instead of district elections, candidate qualification regulations, provisions for assistance of illiterate voters, movement of polling places, adoption of appointive instead of elective positions, annexations, and public employer restrictions upon employees running for elective office. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971); Georgia v. United States, 411 U.S. 526 (1973); Dougherty County Bd. of Educ. v. White, 439 U.S. 32 (1978). *See also* United States v. Board of Comm'rs of Sheffield, 435 U.S. 110 (1978) (pre-coverage provisions apply to all entities having power over any aspect of voting, not just "political subdivisions" as defined in Act).

[52] 380 U.S. 128 (1965).

and that various election officers were defendants and the suit could not be defeated by the resignation of various officers. A lower federal court's judgment voiding an "interpretation test," which required an applicant to interpret a section of the state or federal constitution to the satisfaction of the voting registrar was approved in *Louisiana v. United States*.[53] The test was bad because it vested vast discretion in the registrars to determine qualifications while imposing no definite and objective standards for administration of the tests, a system which the evidence showed had been administered so as to disqualify African Americans and qualify whites. The Court also affirmed the lower court's decree invalidating imposition of a new objective test for new voters unless the State required all present voters to reregister so that all voters were tested by the same standards.

But it was in upholding the constitutionality of the 1965 Act that the Court sketched in the outlines of a broad power in Congress to enforce the Fifteenth Amendment.[54] While § 1 authorized the courts to strike down state statutes and procedures which denied the vote on the basis of race, the Court held, § 2 authorized Congress to go beyond proscribing certain discriminatory statutes and practices to "enforcing" the guarantee by any rational means at its disposal. The standard was the same as that employed under the "necessary and proper" clause supporting other congressional legislation. Congress was therefore justified in deciding that certain areas of the Nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas. Congress chose a rational formula based on the existence of voting tests which could be used to discriminate and based on low registration or voting rates demonstrating the likelihood that the tests had been so used; it could properly suspend for a period all literacy tests in the affected areas upon findings that they had been administered discriminatorily and that illiterate whites had been registered while both literate and illiterate African Americans had not been; it could require the States to seek federal permission to reinstitute old tests or to institute new ones; and it could provide for federal examiners to register qualified voters. The nearly unanimous decision affords Congress a vast amount of discretion to enact measures designed to enforce the Amendment through broad affirmative prescriptions rather than through proscriptions of specific

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[53] 380 U.S. 145 (1965). *See also* United States v. Thomas, 362 U.S. 58 (1960); United States v. Alabama, 362 U.S. 602 (1960); Alabama v. United States, 371 U.S. 37 (1962).

[54] South Carolina v. Katzenbach, 383 U.S. 301 (1966).

practices.[55] Subsequent decisions confirm the reach of this power. In one case, the Court held that evidence of discrimination in the educational opportunities available to black children in the county as compared to that available to white children during the period in which most of the adults who were now potential voters were in school precluded a North Carolina county from reinstituting a literacy test because of the past educational discrimination.[56] And when Congress in 1970[57] suspended for a five-year period literacy tests throughout the Nation, the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.[58]

Moreover, in *City of Rome v. United States*,[59] the Court read even more broadly the scope of Congress' remedial powers under § 2 of the Fifteenth Amendment, paralleling the similar reasoning under § 5 of the Fourteenth. The jurisdiction sought to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory practices within the prescribed period. The lower court had found that the City had engaged in practices without any discriminatory motive, but that its practices had had a discriminatory impact. The City thus argued that, inasmuch as the Fifteenth Amendment reached only purposeful discrimination, the Act's proscription of effect as well as purpose went beyond Congress' power. The Court held, however, that even if discriminatory intent was a prerequisite to finding a violation of § 1 of the Fifteenth Amendment by the courts,[60] Congress had the authority to go beyond that and proscribe electoral devices that had the effect of discriminating. The section, like § 5 of the Fourteenth Amendment, was in effect a "necessary and proper clause" enabling Congress to enact enforcement legislation which was rationally related to the end sought and which was not prohibited by it but was consistent with the letter and spirit of the Constitution, even though the actual practice outlawed or restricted would not be judicially found to violate the Fifteenth Amendment. In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination, or that, because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation. "It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices

[55] Justice Black dissented from that portion of the decision which upheld the requirement that before a State could change its voting laws it must seek approval of the Attorney General or a federal court. 383 U.S. at 355.

[56] Gaston County v. United States, 395 U.S. 285 (1969).

[57] 84 Stat. 315, 42 U.S.C. § 1973aa.

[58] Oregon v. Mitchell, 400 U.S. 112, 131–34, 144–47, 216–17, 231–36, 282–84 (1970).

[59] 446 U.S. 156 (1980).

[60] *Cf.* City of Mobile v. Bolden, 446 U.S. 55 (1980).

that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* . . . . Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."[61]

*City of Rome* is highly significant for the validity of congressional additions to the Voting Rights Act. In 1975 and 1982, the Act was extended and revised to increase its effectiveness,[62] and the 1982 Amendments were addressed to revitalizing § 2 of the Act, which, unlike §§ 4 and 5, which remain limited to a number of jurisdictions, applies nationwide.[63] As enacted in 1965, § 2 largely tracked the language of the Fifteenth Amendment itself. In *City of Mobile v. Bolden*,[64] a majority of the Court agreed that the Fifteenth Amendment and § 2 of the Act were coextensive, but the Justices did not agree on the meaning thus to be ascribed to the

[61] City of Rome v. United States, 446 U.S. 156, 177 (1980). Justices Powell, Rehnquist, and Stewart dissented. Id. at 193, 206. In Lopez v. Monterey County, 525 U.S. 266 (1999), the Court reiterated its prior holdings that Congress may exercise its enforcement power based on discriminatory effects, and without any finding of discriminatory intent.

[62] The 1975 amendments, Pub. L. 94–73, 89 Stat. 400, extended the Act for seven years, expanded it to include those areas having minorities distinguished by their language, i.e., "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," § 207, 42 U.S.C. § 1973 1(c)(3), in which certain statistical tests are met and requiring election materials be provided in the language(s) of the group(s), and enlarged to require bilingual elections if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate. The 1982 amendments, Pub. L. 97–205, 96 Stat. 131, in addition to the § 2 revision, alter after August 5, 1984, the provisions by which a covered jurisdiction may take itself from under the Act by proving to the special court in the District of Columbia that it has complied with the Act for the previous ten years and that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. Moreover, the amendments change the result in Beer v. United States, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice only if the change would lead to a retrogression in the position of racial minorities; even if the change was only a little ameliorative of existing discrimination, the jurisdiction could implement it. The 1982 amendments provide that the change may not be approved if it would "perpetuate voting discrimination," in effect applying the new § 2 results test to preclearance procedures. S. Rep. No. 417, 97th Congress, 2d Sess. 12 (1982); H.R. Rep. No. 227, 97th Congress, 1st Sess. 28 (1981).

[63] Private parties may bring suit to challenge electoral practices under § 2. It provided, before the 1982 amendments, that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

[64] 446 U.S. 55 (1980). *See* id. at 60–61 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger), and id. at 105 n.2 (Justice Marshall dissenting).

statute. A plurality did believe that because the constitutional provision reached only purposeful discrimination, § 2 was similarly limited. It was one major purpose of Congress in 1982 to set aside this possible interpretation and provide that any electoral practice "which results in a denial or abridgement" of the right to vote on account of race or color will violate the Act.[65] The subsequent Court adoption, or re-adoption, of the standards by which it can be determined when a practice denies or abridges the right to vote, though couched in terms of proving intent or motivation, may well bring the constitutional and statutory standards into such close agreement that the constitutional question will not arise.[66]

[65] In § 3 of the 1982 amendments, § 2 of the Act was amended by the insertion of the quoted phrase and the addition of a section setting out a nonexclusive list of factors making up a totality of circumstances test by which a violation of § 2 would be determined. 96 Stat. 134, amending 42 U.S. § 1973. Without any discussion of the Fifteenth Amendment, the Court in Thornburg v. Gingles, 478 U.S. 30 (1986), interpreted and applied the "totality of the circumstances" test in the context of multimember districting.

[66] *See* Rogers v. Lodge, 458 U.S. 613 (1982).

## POPULAR ELECTION OF SENATORS

### SEVENTEENTH AMENDMENT

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of each 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.

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.

### POPULAR ELECTION OF SENATORS

The ratification of the Seventeenth Amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators. As the franchise became exercisable by greater numbers of people, the belief became widespread that Senators ought to be popularly elected in the same manner as Representatives. Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining unfilled for substantial intervals, the influencing of legislative selection by corrupt political organizations and special interest groups through purchase of legislative seats, and the neglect of other duties by legislators as a consequence of protracted electoral contests.

Prior to ratification, however, many States had perfected arrangements calculated to afford the voters more effective control

over the selection of Senators. State laws were amended so as to enable voters participating in primary elections to designate their preference for one of several party candidates for a senatorial seat, and nominations unofficially effected thereby were transmitted to the legislature. Although their action rested upon no stronger foundation than common understanding, the legislatures generally elected the winning candidate of the majority, and, indeed, in two States, candidates for legislative seats were required to promise to support, without regard to party ties, the senatorial candidate polling the most votes. As a result of such developments, at least 29 States by 1912, one year before ratification, were nominating Senators on a popular basis, and, as a consequence, the constitutional discretion of the legislatures had been reduced to little more than that retained by presidential electors. [1]

Very shortly after ratification it was established that if a person possessed the qualifications requisite for voting for a Senator, his right to vote for such an officer was not derived merely from the constitution and laws of the State in which they are chosen but had its foundation in the Constitution of the United States. [2] Consistent with this view, federal courts declared that when local party authorities, acting pursuant to regulations prescribed by a party's state executive committee, refused to permit an African American, on account of his race, to vote in a primary to select candidates for the office of U.S. Senator, they deprived him of a right secured to him by the Constitution and laws, in violation of this Amendment. [3] An Illinois statute, on the other hand, which required that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 voters from at least 50 counties was held not to impair any right under the Seventeenth Amendment, notwithstanding that 52 percent of the State's voters were residents of one county, 87 percent were residents of 49 counties, and only 13 percent resided in the 53 least populous counties. [4]

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[1] 1 G. HAYNES, THE SENATE OF THE UNITED STATES 79–117 (1938).

[2] United States v. Aczel, 219 F. 917 (D. Ind. 1915) (citing *Ex Parte* Yarbrough, 110 U.S. 651 (1884)).

[3] Chapman v. King, 154 F.2d 460 (5th Cir. 1946), *cert. denied*, 327 U.S. 800 (1946).

[4] MacDougall v. Green, 355 U.S. 281 (1948), overruled on equal protection grounds in Moore v. Ogilvie, 394 U.S. 814 (1969). *See* Forssenius v. Harman, 235 F. Supp. 66 (E.D.Va. 1964) *aff'd on other grounds*, 380 U.S. 529 (1965), where a three-judge District Court held that the certificate of residence requirement established by the Virginia legislature as an alternative to payment of a poll tax in federal elections was an additional qualification to voting in violation of the Seventeenth Amendment and Art. I, § 2.

## PROHIBITION OF INTOXICATING LIQUORS

### EIGHTEENTH AMENDMENT

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.

### PROHIBITION

**Validity of Adoption**

Cases relating to this question are presented and discussed under Article V.

**Enforcement**

Cases produced by enforcement and arising under the Fourth and Fifth Amendments are considered in the discussion appearing under the those Amendments.

**Repeal**

The Eighteenth Amendment was repealed by the Twenty-first Amendment, and titles I and II of the National Prohibition Act [1] were subsequently specifically repealed by the act of August 27, 1935, [2] federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia—April 5,

[1] Ch. 85, 41 Stat. 305.
[2] Ch. 740, 49 Stat. 872.

1933, and January 24, 1934;[3] Puerto Rico and Virgin Islands—March 2, 1934;[4] Hawaii—March 26, 1934;[5] and Panama Canal Zone—June 19, 1934.[6]

Taking judicial notice of the fact that ratification of the Twenty-first Amendment was consummated on December 5, 1933, the Supreme Court held that the National Prohibition Act, insofar as it rested upon a grant of authority to Congress by the Eighteenth Amendment, thereupon become inoperative, with the result that prosecutions for violations of the National Prohibition Act, including proceedings on appeal, pending on, or begun after, the date of repeal, had to be dismissed for want of jurisdiction. Only final judgments of conviction rendered while the National Prohibition Act was in force remained unaffected.[7] Likewise a heavy "special excise tax," insofar as it could be construed as part of the machinery for enforcing the Eighteenth Amendment, was deemed to have become inapplicable automatically upon the Amendment's repeal.[8] However, liability on a bond conditioned upon the return on the day of trial of a vessel seized for illegal transportation of liquor was held not to have been extinguished by repeal when the facts disclosed that the trial took place in 1931 and had resulted in conviction of

[3] Ch. 19, 48 Stat. 25; ch. 4, 48 Stat. 319.
[4] Ch. 37, 48 Stat. 361.
[5] Ch. 88, 48 Stat. 467.
[6] Ch. 657, 48 Stat. 1116.
[7] United States v. Chambers, 291 U.S. 217, 222-26 (1934). *See also* Ellerbee v. Aderhold, 5 F. Supp. 1022 (N.D. Ga. 1934); United States ex rel. Randall v. United States Marshal, 143 F.2d 830 (2d Cir. 1944). The Twenty-first Amendment containing "no saving clause as to prosecutions for offenses therefore committed," these holdings were rendered unavoidable by virtue of the well-established principle that after "the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force. . . ." The General Pinkney, 9 U.S. (5 Cr.) 281, 283 (1809), *quoted in* United States v. Chambers, 291 U.S. at 223.
[8] United States v. Constantine, 296 U.S. 287 (1935). The Court also took the position that even if the statute embodying this "tax" had not been "adopted to penalize violations of the Amendment," but merely to obtain a penalty for violations of State liquor laws, "it ceased to be enforceable at the date of repeal," for with the lapse of the unusual enforcement powers contained in the Eighteenth Amendment, Congress could not, without infringing upon powers reserved to the States by the Tenth Amendment, "impose cumulative penalties above and beyond those specified by State law for infractions of . . . [a] State's criminal code by its own citizens." Justice Cardozo, with whom Justices Brandeis and Stone were associated, dissented on the ground that, on its face, the statute levying this "tax" was "an appropriate instrument of . . . fiscal policy. . . . Classification by Congress according to the nature of the calling affected by a tax . . . does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state." Id. at 294, 296, 297-98. In earlier cases it was nevertheless recognized that Congress also may tax what it forbids and that the basic tax on distilled spirits remained valid and enforceable during as well as after the life of the Amendment. *See* United States v. Yuginovich, 256 U.S. 450, 462 (1921); United States v. Stafoff, 260 U.S. 477 (1923); United States v. Rizzo, 297 U.S. 530 (1936).

the crew. The liability became complete upon occurrence of the breach of the express contractual condition and a civil action for recovery was viewed as unaffected by the loss of penal sanctions. [9]

[9] United States v. Mack, 295 U.S. 480 (1935).

## WOMEN'S SUFFRAGE RIGHTS

### NINETEENTH AMENDMENT

SECTION 1. The right of the 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.

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

### WOMEN'S SUFFRAGE

The Nineteenth Amendment was adopted after a long campaign by its advocates who had largely despaired of attaining their goal through modification of individual state laws. Agitation in behalf of women's suffrage was recorded as early as the Jackson Administration, but the initial results were meager. Beginning in 1838, Kentucky authorized women to vote in school elections and its action was later copied by a number of other States. Kansas in 1887 granted women unlimited rights to vote in municipal elections. Not until 1869, however, when the Wyoming Territory accorded women suffrage rights on an equal basis with men and continued the practice following admission to statehood, did these advocates register a notable victory. Progress continued to be discouraging, only ten additional States having joined Wyoming by 1914, and judicial efforts having failed.[1] A vigorous campaign brought congressional passage of a proposed Amendment in 1919 and the necessary state ratifications in 1920.[2]

Following the Supreme Court's interpretation of the Fifteenth Amendment, the state courts that passed on the effect of the Amendment ruled that it did not confer upon women the right to vote but only the right not to be discriminated against on the basis of their sex in the setting of voting qualifications,[3] a formalistic distinction to be sure but one which has restrained the possible applications of the Amendment. In only one case has the Supreme

[1] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875), a challenge under the privileges of immunities clause of the Fourteenth Amendment.

[2] E. FLEXNER, CENTURY OF STRUGGLE—THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959).

[3] State v. Mittle, 120 S.C. 526 (1922), writ of error dismissed, 260 U.S. 705 (1922); Graves v. Eubank, 205 Ala. 174 (1921); In re Cavelier, 287 N.Y.S. 739 (1936).

Court itself dealt with the Amendment's effect, holding that a Georgia poll tax statute that exempted from payment women who did not register to vote did not discriminate in any manner against the right of men to vote, although it did note that the Amendment "applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or State." [4]

[4] Breedlove v. Suttles, 302 U.S. 227, 283-84 (1937).

## COMMENCEMENT OF THE TERMS OF OFFICE

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### TWENTIETH AMENDMENT

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

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.

**PURPOSE OF THE AMENDMENT**

The Senate Committee on the Judiciary in its report suggested several reasons for the proposed Twentieth Amendment. It said in part:

"[W]hen our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. . . . Under present conditions [of communication and transportation] the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country. . . ."

"Another effect of the amendment would be to abolish the so-called short session of Congress. . . . Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. . . . Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation for the reason that it requires practically all of the time to dispose of the regular appropriation bills. . . . The result is a congested condition that brings about either no legislation or illy considered legislation. . . ."

"If it should happen that in the general election in November in presidential years no candidate for President had received a majority of all the electoral votes, the election of a President would then be thrown into the House of Representatives and the memberships of the House of Representatives called upon to elect a President would be the old Congress and not the new one just elected by the people. It might easily happen that the Members of the House of Representative, upon whom devolved the solemn duty of electing a Chief Magistrate for 4 years, had themselves been repu-

diated at the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next 4 years. It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should through the Representatives then selected, be able to select the President for the ensuing term. . . ."

"The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided 'that the first Wednesday in March next to be the time for commencing proceedings under the Constitution.' It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress began on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions." [1]

As thus stated, the exact term of the President and Vice President was fixed by the Constitution, Art. II, § 1, cl. 1, at 4 years, and became actually effective, by resolution of the Continental Congress, on the 4th of March 1789. Since this amendment was declared adopted on February 6, 1933, § 1 in effect shortened, by the interval between January 20 and March 4, 1937, the terms of the President and Vice President elected in 1932.

Similarly, it shortened, by the intervals between January 3 and March 4, the terms of Senators elected for terms ending March 4, 1935, 1937, and 1939; and thus temporarily modified the Seventeenth Amendment, fixing the terms of Senators at 6 years. It also

[1] S. Rep. No. 26, 72d Cong., 1st Sess., 2, 4, 5, 6 (1932).

shortened the terms of Representatives elected to the Seventy-third Congress, by the interval between January 3 and March 4, 1935, and temporarily modified Article I, § 2, clause 1, fixing the terms of Representatives at 2 years.

Section 1 further modifies the Twelfth Amendment in its reference to March 4 as the date by which the House must exercise its choice of a President.

Section 2 supersedes clause 2 of § 4 of Article I. The setting of an exact hour for meeting constitutes a recognition of the long practice of Congress, which in 1867 was for the first time enacted into permanent law,[2] only to be repealed in 1871.[3]

When the 3d of January fell on Sunday (in 1937), Congress did by law appoint a different day for its assemblage.[4]

Pursuant to the authority conferred upon it by § 3 of this amendment, Congress shaped the Presidential Succession Act of 1948[5] to meet the situation which would arise from the failure of both President elect and Vice President elect to qualify on or before the time fixed for the beginning of the new Presidential term.

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[2] Ch. 10, 14 Stat. 378.

[3] Ch. 21, § 30, 17 Stat. 12. *See* 1 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 11 (1907).

[4] Ch. 713, 49 Stat. 1826.

[5] Ch. 644, 62 Stat. 672, as amended, 3 U.S.C. § 19. *See also* the discussion of "Presidential Succession" under the Twenty-fifth Amendment, infra

# TWENTY-FIRST AMENDMENT

## REPEAL OF THE EIGHTEENTH AMENDMENT

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## REPEAL OF THE EIGHTEENTH AMENDMENT

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### TWENTY-FIRST AMENDMENT

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.

### REPEAL OF THE EIGHTEENTH AMENDMENT

#### Effect of Repeal

The operative effect of section 1, repealing the Eighteenth Amendment, is considered in the commentary dealing with that Amendment.

#### Scope of Regulatory Power Conferred upon the States

***Discrimination Between Domestic and Imported Products***.—In a series of interpretive decisions rendered shortly after ratification of the Twenty-first Amendment, the Court established the proposition that States are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the commerce clause of Article I nor the equal protection and due process clauses of the Fourteenth Amendment. Thus, in *State Board of Equalization v. Young's Market Co.*,[1] a California statute was upheld which exacted a $500 annual license fee for the privilege of importing beer from other States and a $750 fee for the privilege

[1] 299 U.S. 59 (1936).

of manufacturing beer; and in *Mahoney v. Triner Corp.*,[2] a Minnesota statute was sustained which prohibited a licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25 percent alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office. Also validated in *Brewing Co. v. Liquor Comm'n*[3] and *Finch & Co. v. McKittrick*[4] were retaliation laws enacted by Michigan and Missouri, respectively, by the terms of which sales in each of these States of beer manufactured in a State already discriminating against beer produced in Michigan or Missouri were rendered unlawful.

Conceding, in *State Board of Equalization v. Young's Market Co.*,[5] that "prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for . . . the privilege of importation . . . even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this Amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Inasmuch as the Amendment was viewed as conferring on states an unconditioned authority to prohibit totally the importation of intoxicating beverages, it logically followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. As to the contention that the unequal treatment of imported beer would contravene the equal protection clause, the Court succinctly observed that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[6]

In *Seagram & Sons v. Hostetter*[7] the Court upheld a state statute regulating the price of intoxicating liquors, asserting that the Twenty-first Amendment bestowed upon the States broad regulatory power over the liquor sales within their territories.[8] It was also noted that States are not totally bound by traditional commerce clause limitations when they restrict the importation of toxi-

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[2] 304 U.S. 401 (1938).
[3] 305 U.S. 391 (1939).
[4] 305 U.S. 395 (1939).
[5] 299 U.S. 59, 62 (1936).
[6] 299 U.S. at 63-64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the due process clause was summarily rejected in Brewing Co. v. Liquor Comm'n, 305 U.S. 391, 394 (1939).
[7] 384 U.S. 35 (1966).
[8] 384 U.S. at 42. *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945) and Nippert v. Richmond, 327 U.S. 416, 425 (1946).

cants destined for use, distribution, or consumption within their borders.[9] In such a situation the Twenty-first Amendment demands wide latitude for regulation by the State.[10] The Court added that there was nothing in the Twenty-first Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.[11]

Recent cases have undercut the expansive interpretation of state powers in the *Young's Market* and *Triner Corp.* cases. Twenty-first Amendment and Commerce Clause principles are to be harmonized where possible. The Court now phrases the question in terms of "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[12] "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'"[13] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment."[14]

***Regulation of Transportation and "Through" Shipments***.—When passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to by-pass the Twenty-first Amendment and to resolve the issue exclusively in terms of the commerce clause

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[9] 384 U.S. at 35. *See, e.g.*, Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964) and State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[10] 384 U.S. at 35. The Court went on to assert that it was not deciding then whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the commerce clause. Id. at 42–43.

[11] 384 U.S. at 47.

[12] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984).

[13] 467 U.S. at 715 (quoting California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

[14] Bacchus Imports, Ltd., v. Dias, 468 U.S. 263, 276 (1984). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (attempt to regulate prices of out-of-state sales); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (state's limited interest in banning wine commercials carried on cable TV while permitting various other forms of liquor advertisement is outweighed by federal interest in promoting access to cable TV); and 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (retail price maintenance in violation of Sherman Act).

and state power. This trend toward devaluation of the Twenty-first Amendment was set in motion by *Ziffrin, Inc. v. Reeves* [15] wherein a Kentucky statute, forbidding the transportation of intoxicating liquors by carriers other than licensed common carriers, was enforced as to an Indiana corporation, engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause," [16] the Court then proceeded to found its ruling largely upon decisions antedating the Amendment which sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In the light of the contemporaneous cases enumerated in the preceding topic construing the Twenty-first Amendment as according a plenary power to the States, such extended emphasis on the police power and the commerce clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-first Amendment was recorded in *Duckworth v. Arkansas* [17] and *Carter v. Virginia*, [18] wherein, without even considering that Amendment, a majority of the Court upheld, as not contravening the commerce clause, statutes regulating the transport through the State of liquor cargoes originating and ending outside the regulating State's boundaries. [19]

***Regulation of Imports Destined for a Federal Area***.—Importation of alcoholic beverages into a State for ultimate delivery at a National Park located therein but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation . . . into [a] State for delivery and use therein" within the meaning of § 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the State retained no jurisdiction, the increased powers which the State acquired from the Twenty-first Amendment were declared to be inapplicable. California therefore could not extend

[15] 308 U.S. 132 (1939).

[16] 308 U.S. at 138.

[17] 314 U.S. 390 (1941).

[18] 321 U.S. 131 (1944). *See also* Cartlidge v. Raincey, 168 F.2d 841 (5th Cir. 1948), cert. denied, 335 U.S. 885 (1948).

[19] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park.[20] On the other hand, a state may apply nondiscriminatory liquor regulations to sales at federal enclaves under concurrent federal and state jurisdiction, and may require that liquor sold at such federal enclaves be labelled as being restricted for use only within the enclave.[21]

***Foreign Imports, Exports; Taxation, Regulation***.—The Twenty-first Amendment did not repeal the export-import clause, Art. I, § 10, cl. 2, nor obliterate the commerce clause, Art. I, § 8, cl. 3. Accordingly, a State cannot tax imported Scotch whiskey while it remains "in unbroken packages in the hands of the original importer and prior to [his] resale or use" thereof.[22] Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired "tax-free liquors for export" from out-of-state sources for resale exclusively to airline passengers, with delivery deferred until the latter arrive at foreign destinations.[23] Similarly, a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce. "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State."[24]

***Effect of Section 2 upon Other Constitutional Provisions***.—Nothwithstanding the 1936 assertion that "[a] classification recognized by the Twenty-first Amendment cannot be deemed

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[20] Collins v. Yosemite Park Co., 304 U.S. 518, 537–38 (1938). The principle was reaffirmed in United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. "Absent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction." Id. at 375. Nor may states tax importation of liquor for sale at bases over which the United States exercises concurrent jurisdiction only. United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975).

[21] North Dakota v. United States, 495 U.S. 423 (1990) (also upholding application to federal enclaves of a uniform requirement that shipments into the state be reported to state officials).

[22] Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964). The Court distinguished Gordon v. Texas, 355 U.S. 369 (1958) and De Bary v. Louisiana, 227 U.S. 108 (1913).

[23] Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964).

[24] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 585 (1986) (citation omitted). *Accord*, Healy v. Beer Institute, 491 U.S. 324 (1989).

forbidden by the Fourteenth,"[25] the Court has now in a series of cases acknowledged that § 2 of the Twenty-first Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-first, save for the severe cabining of commerce clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig v. Boren*,[26] the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the equal protection clause. To the State's Twenty-first Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. "'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'"[27] The square holding on this point is "that the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case."[28] Other decisions reach the same result but without discussing the application of the Amendment.[29] Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment."[30]

The Court departed from this line of reasoning in *California v. LaRue*.[31] There, the Court sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attack-

[25] State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936). In Craig v. Boren, 429 U.S. 190, 206–07 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a State, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from commerce clause purview, *see* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655–74 (1981).

[26] 429 U.S. 190 (1976).

[27] 429 U.S. at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING—CASES AND MATERIALS 258 (1975).

[28] 429 U.S. at 209-210.

[29] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–97 (1972) (invalidating a state liquor regulation as an equal protection denial in a racial context); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (invalidating a state law authorizing the posting of someone as an "excessive drinker" and thus barring him from buying liquor, as reconstrued in Paul v. Davis, 424 U.S. 693, 707–09 (1976)).

[30] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982).

[31] 409 U.S. 109 (1972).

ing the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material adduced at the public hearings which resulted in the rules demonstrating the anti-social consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards,[32] but the Court thought that the constitutional protection of conduct that partakes "more of gross sexuality than of communication" was outweighed by the State's interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-first Amendment gave an "added presumption in favor of the validity" of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.[33]

A much broader ruling was forthcoming when the Court considered the constitutionality of a state regulation banning topless dancing in bars. "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."[34] This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,[35] would if it were broadly applied give the States in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

In *44 Liquormart, Inc. v. Rhode Island*,[36] the Court disavowed *LaRue* and *Bellanca*, and reaffirmed that, "although the Twenty-

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[32] *Cf.* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (ban on live nude dancing in Borough); Doran v. Salem Inn, 422 U.S. 922 (1975) (ban on nude dancing in "any public place" applied to topless dancing in bars).

[33] 409 U.S. at 114-19. In Doran v. Salem Inn, 422 U.S. 922, 932–33 (1975), the Court described its holding in *LaRue* more broadly, saying that "we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program."

[34] New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981).

[35] For a rejection of the argument in another context, contemporaneously with *Bellanca*, *see* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 657–68 (1981). And for utilization of the argument in the commercial speech context, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986). *But see* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-first Amendment, by federal policies promoting access to cable TV).

[36] 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-first Amendment).

first Amendment limits the effect of the dormant Commerce Clause on a state's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,'" [37] and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (e.g., those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-first Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate "grossly sexual exhibitions in premises licensed to serve alcoholic beverages." "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." [38]

**Effect on Federal Regulation**

The Twenty-first Amendment does not oust all federal regulatory power affecting transportation or sale of alcoholic beverages. Thus, the Court held, the Amendment does not bar a prosecution under the Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado. [39] In a concurring opinion, supported by Justice Roberts, Justice Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Since] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment." [40]

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Al-

[37] 517 U.S. at 516 (quoting Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691, 712 (1984)).

[38] 517 U.S. at 515.

[39] United States v. Frankfort Distilleries, 324 U.S. 293, 297–99 (1945).

[40] 324 U.S. at 301-02. For application of federal laws, *see* William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); Burke v. Ford, 389 U.S. 320 (1967).

though States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'"[41] Invalidating under the Sherman Act a state fair trade scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Since the state courts had found the policy under attack promoted neither interest signficantly, the Supreme Court experienced no difficulty in concluding that the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

Congress may condition receipt of federal highway funds on a state's agreeing to raise the minimum drinking age to 21, the Twenty-first Amendment not constituting an "independent constitutional bar" to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.[42]

[41] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 110 (1980).

[42] South Dakota v. Dole, 483 U.S. 203, 210 (1987).

## PRESIDENTIAL TENURE

### TWENTY-SECOND AMENDMENT

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by 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.

#### LIMITATION OF PRESIDENTIAL TERMS

"By reason of the lack of a positive expression upon the subject of the tenure of the office of President, and by reason of a well-defined custom which has risen in the past that no President should have more than two terms in that office, much discussion has resulted upon this subject. Hence it is the purpose of this . . . [proposal] . . . to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may . . . thereby set at rest this problem." [1] This characterization of the issue, of course, followed soon after the people had expressed their views by electing

[1] H.R. Rep. No. 17, 80th Cong., 1st Sess. at 2 (1947).

Franklin D. Roosevelt to unprecedented third and fourth terms of office, in 1940 and 1944, respectively.

The Twenty-Second Amendment has yet to be tested or applied. Commentary suggests, however, that a number of issues could be raised as to the Amendment's meaning and application, especially in relation to the Twelfth Amendment. By its terms, the Twenty-Second Amendment bars only the election of two-term Presidents, and this prohibition would not prevent someone who had twice been elected President from succeeding to the office after having been elected or appointed Vice-President. Broader language providing that no such person "shall be chosen or serve as President . . . or be eligible to hold the office" was rejected in favor of the Amendment's ban merely on election.[2] Whether a two-term President could be elected or appointed Vice President depends upon the meaning of the Twelfth Amendment, which provides that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President." Is someone prohibited by the Twenty-Second Amendment from being "elected" to the office of President thereby "constitutionally ineligible to the office"? Note also that neither Amendment addresses the eligibility of a former two-term President to serve as Speaker of the House or as one of the other officers who could serve as President through operation of the Succession Act.[3]

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[2] H.J. Res. 27, 80th Cong., 1st Sess. (1947) (as introduced). As the House Judiciary Committee reported the measure, it would have made the covered category of former presidents "ineligible to hold the office of President." H.R. Rep. No. 17, 80th Cong., 1st Sess. at 1 (1947).

[3] 3 U.S.C. § 19. For analysis of the Twenty-Second Amendment and its applicability to the various scenarios under which a person can succeed to the office, see Bruce G. Peabody and Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565 (1999).

## PRESIDENTIAL ELECTORS FOR D. C.

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### TWENTY-THIRD AMENDMENT

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 twelth article of amendment.

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

#### ENFRANCHISEMENT OF RESIDENTS OF DISTRICT OF COLUMBIA

"The purpose of this. . . constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President."

"The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional

anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional amendment. . .”

“[This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.” [1]

[1] H.R. Rep. No. 1698. 86th Cong. 2d Sess. 1, 2 (1960).

## ABOLITION OF THE POLL TAX

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### TWENTY-FOURTH AMENDMENT

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.

### EXPANSION OF THE RIGHT TO VOTE

Ratification of the Twenty-fourth Amendment in 1964 marked the culmination of an endeavor begun in Congress in 1939 to effect elimination of the poll tax as a qualification for voting in federal elections. Property qualifications extend back to colonial days, but the poll tax itself as a qualification was instituted in eleven States of the South following the end of Reconstruction, although at the time of the ratification of this Amendment only five States still retained it.[1] Congress viewed the qualification as "an obstacle to the proper exercise of a citizen's franchise" and expected its removal to "provide a more direct approach to participation by more of the people in their government." Congress similarly thought a constitutional amendment necessary,[2] inasmuch as the qualifications had previously escaped constitutional challenge on several grounds.[3]

Not long after ratification of the Amendment – applicable only to federal elections – Congress by statute authorized the Attorney General to seek injunctive relief against use of the poll tax as a means of racial discrimination in state elections,[4] and the Supreme

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[1] Harman v. Forssenius, 380 U.S. 528, 538–40, 543–44 (1965); United States v. Texas, 252 F. Supp. 234, 238–45 (W.D. Tex.) (three-judge court), aff'd on other grounds, 384 U.S. 155 (1966).

[2] H.R. Rep. No. 1821, 87th Cong., 2d Sess. 3, 5 (1962).

[3] Breedlove v. Suttles, 302 U.S. 277 (1937); Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946); Butler v. Thompson, 97 F. Supp. 17 (E.D. Va), *aff'd*, 341 U.S. 937 (1951).

[4] Voting Rights Act of 1965, § 10, 79 Stat. 442, 42 U.S.C. § 1973h. For the results of actions instituted by the Attorney General under direction of this section, *see* United States v. Texas, 252 F. Supp. 234 (W.D. Tex.) (three-judge court). aff'd

Court held that the poll tax discriminated on the basis of wealth in violation of the equal protection clause.[5]

In *Harman v. Forssenius*,[6] the Court struck down a Virginia statute which eliminated the poll tax as an absolute qualification for voting in federal elections and gave federal voters the choice either of paying the tax or of filing a certificate of residence six months before the election. Viewing the latter requirement as imposing upon voters in federal elections an onerous procedural requirement which was not imposed on those who continued to pay the tax, the Court unanimously held the law to conflict with the new Amendment by penalizing those who chose to exercise a right guaranteed them by the Amendment.

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on other grounds, 384 U.S. 155 (1966); United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court).

[5] Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalid discrimination based on wealth).

[6] 380 U.S. 528 (1965).

## PRESIDENTIAL VACANCY AND DISABILITY

### TWENTY-FIFTH AMENDMENT

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 principle officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**PRESIDENTIAL SUCCESSION**

The Twenty-fifth Amendment was an effort to resolve some of the continuing issues revolving about the office of the President; that is, what happens upon the death, removal, or resignation of the President and what is the course to follow if for some reason the President becomes disabled to such a degree that he cannot fulfill his responsibilities. The practice had been well established that the Vice President became President upon the death of the President, as had happened eight times in our history. Presumably, the Vice President would become President upon the removal of the President from office. Whether the Vice President would become acting President when the President became unable to carry on and whether the President could resume his office upon his recovering his ability were two questions that had divided scholars and experts. Also, seven Vice Presidents had died in office and one had resigned, so that for some twenty per cent of United States history there had been no Vice President to step up. But the seemingly most insoluable problem was that of presidential inability—Garfield lying in a coma for eighty days before succumbing to the ef-

fects of an assassin's bullet, Wilson an invalid for the last eighteen months of his term, the result of a stroke—with its unanswered questions: who was to determine the existence of an inability, how was the matter to be handled if the President sought to continue, in what manner should the Vice President act, would he be acting President or President, what was to happen if the President recovered. Congress finally proposed this Amendment to the States in the aftermath of President Kennedy's assassination, with the Vice Presidency vacant and a President who had previously had a heart attack.

This Amendment saw multiple use during the 1970s and resulted for the first time in our history in the accession to the Presidency and Vice-Presidency of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Nixon nominated Gerald R. Ford to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Richard M. Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following § 2 of the Amendment, President Ford nominated Nelson A. Rockefeller to be Vice President; on August 20, 1974, hearings were held in both Houses, confirmation voted and Mr. Rockefeller took the oath of office December 19, 1974. [1]

[1] For the legislative history, *see* S. Rep. No. 66, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 564, 89th Cong., 1st Sess. (1965). For an account of the history of the succession problem, *see* R. SILVA, PRESIDENTIAL SUCCESSION (1951).

## REDUCTION OF VOTING AGE

### TWENTY-SIXTH AMENDMENT

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.

#### THE EIGHTEEN-YEAR-OLD VOTE

In extending the Voting Rights Act of 1965 in 1970 [1] Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to 18. [2] In a divided decision, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power. [3] Confronted thus with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum age qualification at 18 for all elections, and ratified it promptly. [4]

[1] 79 Stat. 437, as extended and amended by 84 Stat. 314, 42 U.S.C. § 1971 et seq.

[2] Title 3, 84 Stat. 318, 42 U.S.C. § 1973bb.

[3] Oregon v. Mitchell, 400 U.S. 112 (1970).

[4] S. Rep. No. 26, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 37, 92d Cong., 1st Sess. (1971).

## CONGRESSIONAL PAY LIMITATION

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### TWENTY-SEVENTH AMENDMENT

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

#### REGULATING CONGRESSIONAL PAY

Referred to the state legislatures at the same time as those proposals that eventually became the Bill of Rights, the congressional pay amendment had long been assumed to be dead.[1] This provision had its genesis, as did several others of the first amendments, in the petitions of the States ratifying the constitution.[2] It, however, was ratified by only six States (out of the eleven needed), and it was rejected by five States. Aside from the idiosyncratic action of the Ohio legislature in 1873, which ratified the proposal in protest of a controversial pay increase adopted by Congress, the pay limitation provision lay dormant until the 1980s. Then, an aide to a Texas legislator discovered the proposal and began a crusade that culminated some ten years later in its proclaimed ratification.[3]

Now that the provision is apparently a part of the Constitution,[4] it will likely play a minor role. What it commands was already statutorily prescribed, and, at most, it may have implications

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[1] Indeed, in Dillon v. Gloss, 256 U.S. 368, 375 (1921), the Court, albeit in dictum, observed that, unless the inference was drawn that ratification must occur within some reasonable time of proposal, "four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, *and in our opinion it is quite untenable*." (Emphasis supplied).

[2] A comprehensive, scholarly treatment of the background, development, failure, and subsequent success of this mendment is Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORD. L. REV. 497 (1992). A briefer account is *The Congressional Pay Amendment*, 16 Ops. of the Office of Legal Counsel, U.S. Dept. of Justice 102, App. at 127-136 (1992) (prelim. pr.).

[3] The ratification issues are considered supra in the discussion of Article V.

[4] In the only case to date brought under the Amendment, the parties did not raise the question of the validity of its ratification; the court refused to consider the issue raised by an *amicus*. Boehner v. Anderson, 809 F.Supp. 138, 139 (D.D.C. 1992). It is not at all clear the issue is justiciable.

for automatic cost-of-living increases in pay for Members of Congress. [5]

[5] *See* discussion of "Congressional Pay," supra.