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In memory of

Harold W. Chase
1922–1982

teacher, scholar, mentor, publishing partner, friend, and
“the very model of a modern Major-General”

Though all the winds of doctrine were let loose to play upon the earth, so
Truth be in the field, we do injuriously, by licensing and prohibiting, to
misdoubt her strength. Let her and Falsehood grapple; who ever knew the
Truth put to the worse, in a free and open encounter?

—John Milton, AREOPAGITICA
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This is the ninth edition of *Constitutional Interpretation* and its component paperback volumes, subtitled *Powers of Government* (Chapter 1–7) and *Rights of the Individual* (Chapters 8–14). The title of the book was taken from the undergraduate course once taught at Princeton by Edward S. Corwin. As explained by Hal Chase and me in the preface to the first edition, which appeared 33 years ago, we rejected the perennial favorite among casebook titles, “Constitutional Law,” because the purpose of an undergraduate course is not so much to teach discrete rules of law but to examine the principles and methods by which Justices of the United States Supreme Court give meaning to provisions of the Constitution in the context of specific problems and concrete cases. This edition of *Constitutional Interpretation* covers noteworthy decisions through June 2007.

The ninth edition retains the same structure, order of chapters, and appendices as those preceding it, although material has been condensed and updated throughout. Because a casebook that traverses more than two hundred years of constitutional change must make choices about priorities and currency, the section on the Chief Executive’s pardoning power has been eliminated. It has been supplanted by an entirely new section, “George W. Bush and the Concept of the Unilateral Presidency.”

Unlike previous editions in which footnotes penned by the Justices were numbered while those written by me were lettered, all footnotes in the current edition are numbered. Footnotes that are not mine are followed by a bracketed attribution identifying the author. Because the language of law is unique and precise, this edition continues to include a convenient glossary following the appendices. Edited portions of judicial opinions usually include many ellipses (* * *). When an ellipsis is centered on the page or in a column, it indicates that a paragraph or more has been left out; when the sequence of three asterisks appears within a paragraph, it means that part of a sentence or more has been deleted. Letters, words, or punctuation marks appearing in brackets within the text of an opinion or an excerpt have been added by me, either to save space or to clarify meaning.

As with its earlier editions, *Constitutional Interpretation* will be updated by cumulative annual supplements. Starting in August 2008, the supplement will be accessible from the publisher’s website. As in the past, the supplement throughout will be keyed to the main text by insert statements indicating exactly where new material belongs. The cutoff date for each annual supplement will be the date on which the Supreme Court releases its final decision of its most recent complete Term.

While there are many people I have thanked over the years for their helpful suggestions in producing past editions of *Constitutional Interpretation*, there are five individuals in particular to whom I owe special debts of gratitude in the preparation of this edition. My
thanks to Karen Judd and Michael Lepera at Wadsworth Publishing for guiding the production of this book. I am indebted to Patrick Voisine for his patience and forbearance, not just during the year and a half this project took but for the years spent revising many of its predecessors. I also appreciate the valuable assistance of James Tucker, whose eagle eye and sound advice made this a much better book. And I am grateful, most of all, to my transplant donor, whose name I do not know, and who made possible not only this edition but the rest of my life.

CRAIG R. DUCAT
DeKalb, Illinois
January 2008
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IT HAS BECOME a commonplace that, as then-Governor (later Chief Justice) Charles Evans Hughes put it, “We are under a Constitution, but the Constitution is what the judges say it is * * *.”\(^1\) Although this cliché is seriously misleading when it suggests that courts always have the last word on questions of constitutionality and insofar as it implies that judges are free to adopt whatever reading of the Constitution pleases them, it does contain a kernel of truth— even if it is overblown—that courts play an important role in governing America because they play a central role in interpreting the Constitution. This is especially true of the U.S. Supreme Court. The study of constitutional law necessarily begins with an examination of judicial power because the political influence of courts, constitutionally speaking, flows from their power to decide cases.

As Martin Shapiro pointed out many years ago, the study of constitutional law makes both too much and too little of the Supreme Court. Examining the operation of government only through the lens of the Court’s constitutional decisions makes too much of the Court because it appears as the focal point of the American political system and this magnifies its role out of all proportion. Although the Supreme Court has played—and continues to play—a vital role in governing America, studying only what it, as Constitutional Court, has said about itself and other branches and levels of government fosters the distorted impression of a judicial Goliath “marching through American history waving the huge club of judicial review.”\(^2\)

Although the judiciary is a coordinate branch of government, it is an equal branch only in the formal legal sense. While courts have the power, in Chief Justice John Marshall’s words, “to say what the law is,”\(^3\) they cannot make law whenever they please or impose their will when they do. The Supreme Court’s constitutional decisions can be undone by the process of constitutional amendment, its interpretation of federal statutes changed by simple legislation, and its membership colored by the political values of new presidential appointments. In the last analysis, the political power of courts is both subtle and fragile: their principal asset is the capacity to put their seal of approval on things. This power to legitimize the actions of others is the product of

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America’s unique political culture, which is highly legalistic—that is, prone to think a thing is morally all right if it is declared legal. But in terms of raw politics—as distinguished from political symbolism—Alexander Hamilton got it right when he declared in Federalist No. 78:

the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

In terms of sheer political might, it is Congress and the President, not the courts, who are at the center of the political system. It is the legislative and executive branches that exercise the dominant influence over public policy, both foreign and domestic.

To see the Supreme Court as Constitutional Court also makes too little of the Court. To focus on the Supreme Court’s constitutional rulings is to miss the many cases in which it makes policy by interpreting the laws passed by Congress. Constitutional cases have constituted a majority of cases decided by signed opinion in only about a dozen of the Court’s annual Terms (see p. 33) since it acquired control over its docket in 1925. Focusing only on cases in which constitutional issues predominate misses the Court’s more subtle and more frequent role working in the interstices of law—interpreting Congress’s words and thereby giving meaning to environmental law, tax law, immigration law, federal criminal law—in short, regulatory law of all kinds.

Nor have courts been the only agencies of government that have shaped the meaning of the Constitution. What Congress, Presidents, federal and state administrators, scholars, and the media do has also had a significant impact in developing the meaning of the Constitution. And the American people themselves, through elections and protests, have expressed strong preferences that have supported or opposed assertions of power under or in spite of the Constitution. These impacts are naturally greatest where there are significant ambiguities or lacunae (omissions) in the text of the Constitution.

Despite their brilliance, the Framers after all could not possibly have envisioned the technological state of contemporary America. With regard to some matters, they just guessed badly. They failed to provide for political parties because they regarded them as a bane to be avoided (as James Madison contended in Federalist No. 10 and as George Washington admonished in his Farewell Address). Their fear of democracy—reflected in the fact that the people were limited to directly electing only members of the House of Representatives—was overtaken by the inexorable drive to expand popular participation in government, a movement vividly reflected in half a dozen amendments to the Constitution.

Although the Framers intended Congress to be the principal architect of federal policy, this scheme has been badly undercut by events in the twentieth century. Today, we expect the President to do much more than simply execute the laws Congress enacts. Ordinarily, we expect the President to take the initiative—to be a leader, not a clerk. At least since the Great Depression, we have operated on the assumption that the President should propose programs and Congress should respond to them rather than the other way around. Reflecting on the transformation of the Presidency over the course of the last two centuries, Justice Jackson in the Steel Seizure Case “note[d] the gap that exists between the President’s paper powers and his real powers.” He continued, “The Constitution does not disclose the measure of actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blue print of the Government
that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution. Once an exercise of power becomes accepted on the basis of precedent, it can truly be said that such an exercise has become a part of the constitutional system, although one could argue that technically it is not a part of the Constitution. The precedent of actions that go uncontested or are allowed to stand is a powerful argument for legitimation.

The fact remains, however, that the judiciary—particularly the Supreme Court—plays a leading role in constitutional interpretation, primarily because of the uniquely American institution of judicial review. Anyone who wants to learn the meaning of the Constitution must know what the Supreme Court has said about it—as a beginning if not as the final word. At the outset, then, it is necessary to understand how the Court derived this power of interpretation as well as what ground rules circumscribe its exercise.

A. THE SUPREME COURT’S JURISDICTION AND ITS ASSUMPTION OF JUDICIAL REVIEW

Judicial Review

Judicial review is the doctrine according to which courts are entitled to pass upon the constitutionality of an action taken by a coordinate branch of government. The doctrine had its origin in England as early as the seventeenth century. Although the practice was recognized in Dr. Bonham’s Case in 1610, judicial review never became a principle capable of limiting legislative authority in Britain, largely because the notion of judicial supremacy inherent in judicial review conflicted with the principle of parliamentary supremacy. In a parliamentary system, the acts of the legislature share equal legal status with many ancient documents, such as Magna Carta and the other legal milestones that together comprise Britain’s “unwritten Constitution.” Parliamentary supremacy entails the logical consequence that the legislature may alter the constitution by simply passing a law.

Although most of the Framers of the Constitution were familiar with the concept of judicial review and were for it, there is the hard fact that they considered and rejected the idea for a Council of Revision, which would have permitted the Supreme Court to join with the President in vetoing acts of Congress. It seems a fair appraisal of what took place in Philadelphia during that summer of 1787 to suggest that proponents of judicial review, like Hamilton (see Federalist No. 78), decided that it was a good tactical move not to try to resolve that issue in the Convention, but rather to leave the Constitution ambiguous. Two factors point up such an interpretation: First, there were individuals at the Convention who were bitterly opposed to judicial review. Knowing that including judicial review in the Constitution would make

5. Britain’s constitution is “unwritten” only in the sense that no single document fulfills that function. Taken together, written constitutional documents (such as Magna Carta, the Petition of Right, and the Bill of Rights), all acts of Parliament, treaties, and conventions (customary acts that have the force of law but have not been stated formally in a legal document) comprise what might be called “the British constitutional system.” Even the characterized of judicial review as not existing in the British system is increasingly open to question, due to recent acts of devolution (formal grants of legal autonomy by Parliament—what might be called “home rule” in regional matters—to Scotland, Wales, and Northern Ireland) and limitations on the exercise of national authority imposed through legislation adopted by the European Union and decisions handed down by the European High Court. As sovereignty becomes increasingly fragmented because authority has been ceded to governments below and above the national government in London, some institution will have to umpire disputes among these jurisdictions. In short, judicial review is increasingly likely both because Britain is becoming more of a federal system at home and because its membership in the European Union makes it subject to judicially-imposed limitations from abroad. In light of this, the principle of parliamentary supremacy (as traditionally understood, at least) would itself appear headed for an uneasy future.
ratification more difficult, those who favored the practice decided not to press this controversial issue, which they hoped to achieve in other ways. Second, it was not very difficult to predict who would head the new government and who would have the initiative in interpreting the document at the outset—Washington and those in whom he had trust. That group included his former chief of staff, Hamilton. This is not to suggest a “conspiracy theory”; it is simply to suggest that individuals astute in statecraft very shrewdly calculate the costs and benefits of taking a particular stance in a negotiation and include in their calculations whether or not the written agreement will, in the long run, provide the desired results. There is no gainsaying the capacity of Hamilton and other champions of judicial review for shrewd calculation. And it did not take long for Chief Justice John Marshall to demonstrate how shrewd they had been.

Despite its fame, Marbury v. Madison below was not the first case in which the Supreme Court exercised judicial review. In Hylton v. United States, 3 U.S. (3 Dall.) 171, 1 L.Ed. 556 (1796), the Justices assumed its existence when they upheld the validity of a federal tax on carriages. The Court’s acceptance of the concept even predates Hylton, as evidenced by such decisions as Hayburn’s Case, 2 U.S. (2 Dall.) 408, 1 L.Ed. 436 (1792); United States v. Yale Todd, reported in United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53, 14 L.Ed. 40, 47–48 (1851); and Ware v. Hylton, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796). Judicial review was a practice that was also in existence at the state level.

Chief Justice Marshall’s opinion in Marbury, however, was the Supreme Court’s first genuine attempt to justify the practice and surely is its most often cited precedent for it. The occasion for such a discussion was a seeming collision between the Constitution and part of a federal statute, section 13 of the Judiciary Act of 1789. According to Chief Justice Marshall, the effect of the provision was to enlarge the original jurisdiction of the Supreme Court. Chief Justice Marshall asserted that the original jurisdiction of the Court was delineated in Article III of the Constitution and could be neither expanded nor limited by Congress. After concluding that the statutory provision contradicted the Constitution, Chief Justice Marshall set about the task of justifying the judiciary’s acquisition of judicial review. In light of the absence of any mention of judicial review in the Constitution, his argument was of historic importance. He endeavored to demonstrate that the power of judicial review is simply a logical extension of the Court’s exercise of judicial power, that is, its power to decide cases: If the duty of a judge is to apply rules to facts in order to decide a case and he encounters a conflict between the rules to be applied, then must he not decide what the law is before he can apply it? Because the Constitution vests the judicial power of the United States “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and because judicial review is a logical consequence of the exercise of judicial power, the federal judiciary must have the power of judicial review. Given the air of certitude with which he wrote, it is clear that Chief Justice Marshall was not a man much troubled by doubt.

**Marbury v. Madison**

Supreme Court of the United States, 1803
5 U.S. (1 Cranch) 137, 2 L.Ed. 606

**BACKGROUND & FACTS** The election of 1800 proved to be a disaster for the Federalist party. Their candidate for the Presidency, John Adams, was denied reelection, and control of both Houses of Congress fell to the Jeffersonians. In an effort to retain what political advantage they could—for they would never again gain

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6. Until the practice ceased with the beginning of its October 1875 Term, citations of cases decided by the Supreme Court bore the name of the Court’s reporter. The reporter at the time Marbury v. Madison was decided was William Cranch, who held the post until 1815. He succeeded the Court’s first reporter, A. J. Dallas, in 1801.
a national popular mandate—the Federalists sought to entrench themselves in the federal judiciary.

After the election, but before March 4 of the following year, the date on which the Constitution prescribed that Thomas Jefferson would take the oath of office, Oliver Ellsworth, then Chief Justice, conveniently resigned for reasons of ill health, allowing President Adams to name a new Chief Justice. This he did by appointing his Secretary of State, John Marshall, an arch political enemy of Jefferson’s, though a cousin of the President-Elect. Marshall also retained his post in the Adams administration until it went out of office.

The Federalist-controlled “lame duck” Congress also obliged by passing legislation creating some 58 additional judgeships to be filled by the party faithful. On February 3, 1801, it passed a law creating federal circuit courts designed to relieve Supreme Court Justices from the burdensome task of “riding circuit” in their dual capacity as appellate judges. These 16 vacancies were promptly filled by Adams and commissions for them delivered before March 4. The men named to these vacancies are historically referred to as “the midnight judges” because of the late hour at which their commissions were delivered. Two weeks after it had passed the circuit court legislation, Congress passed an act that provided 42 justices of the peace for the District of Columbia. It was this second piece of legislation that gave rise to the controversy in this case.

President Adams sent his nominations for this second wave of judicial appointments to the Senate, and they were confirmed on March 3. The commissions for these judgeships were signed by the President and the Seal of the United States affixed by Marshall as Secretary of State late the same day, but Adams’s term expired before all the commissions could be delivered by John Marshall’s brother, James, who returned four undelivered certificates to the Secretary of State’s office. Upon entering office, James Madison, the new Secretary of State, under instructions from President Jefferson refused to deliver these four remaining commissions, whereupon William Marbury, one of the four designated but uncertified judges, brought suit to recover his commission. Marbury lodged his suit directly with the Supreme Court, asking that it vindicate his right to the commission under section 13 of the Judiciary Act of 1789 (see footnote, p. 9) by issuing a writ of mandamus (a court order commanding that the occupant of a given office fulfill a particular nondiscretionary act within the purview of that office) directing Secretary of State Madison to deliver the certificate.

With a bare quorum of four of the six Justices participating, the Court handed down the following decision two years later. You may wonder, why the delay? The answer lies in the hostile response of the new Congress to these best-laid plans of the Federalists. Chafing under the repressive propensities of a Federalist judiciary already, as typified by the stern application of the Alien and Sedition Acts, and rankled by these preinaugural maneuverings, the Jeffersonian majority voted to repeal the circuit

Over the following years, the Court’s reports bore the names of Wheaton 1816–1827, Peters 1828–1842, Howard 1843–1860, Black 1861–1862, and Wallace 1863–1874. In each case, the name of the reporter, appropriately abbreviated, was preceded by the volume of his reports in which the decision was to be found and followed by the page number on which the report of the case began. Though this basic format holds today, citation of cases is by series rather than reporter. The official series of the Court’s decisions is known as the United States Reports and is abbreviated “U.S.” There are also two commercially published series of the Court’s decisions. The oldest is the Lawyers’ Edition, published by the Lawyers Cooperative Publishing Company, and is abbreviated “L.Ed.” or “L.Ed.2d,” depending on whether it is in the first or second set of volumes. The third series of the Court’s opinions is the Supreme Court Reporter, a unit of the National Reporter System published by West Publishing Group, and is abbreviated “S.Ct.” A complete citation also includes the year in which the case was decided in parentheses at the end. For a general guide to legal citations, see Appendix E.
court legislation and to cancel the Court’s 1802 Term. Consequently, the Court did not meet to hear this case until its session in 1803.

The following opinion of the court was delivered by the Chief Justice [MARSHALL].

In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is—Has the applicant a right to the commission he demands? * * *

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. * * *

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * *

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

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases,
their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire, how it applies to the case under the consideration of the court. The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed, cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner, as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which, a suit has been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that of which the appointment was complete, and evidence, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court: 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2d. That, having this legal title to the office, he has a
consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

3. It remains to be inquired whether he is entitled to the remedy for which he applies. This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

* * *

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will;*** any application to a court *** would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, *** as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are*** excused from the duty of giving judgment that right be done to an injured individual ***.

* * *

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." [See footnote, p. 9.] The secretary of state, being a person holding an office, under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

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

In the distribution of this power, it is declared, that "the supreme court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court, in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.
It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.  

When an instrument organizing, fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.  

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.  

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish,
for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

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

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that
courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject. It is declared, that “no tax or duty shall be laid on articles exported from any state.” Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

***

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

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

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The *** [complaint] must be discharged.

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**NOTE—WHEN SHOULD JUDGES DISQUALIFY THEMSELVES?**

Since he was also the Secretary of State whose responsibility it was to deliver Marbury’s commission, there would appear to be a serious conflict of interest on the part of Chief Justice Marshall. His participation in the Court’s consideration of Marbury v. Madison, not to mention his authorship of the Court’s opinion, violates the expectation we have that judges not sit in cases in which they have either experienced personal involvement or in which they have close personal or professional relationships with the affected parties, witnesses, or counsel. His disregard for this principle concerning the avoidance of impropriety or even the appearance of impropriety is alleviated neither by the fact that a quorum of four Justices was required for the case to be heard (Justices Cushing and Moore were not present for some or all of the proceedings) or by the outcome, which seems at variance with any partisan interests Marshall might be thought to have had.
The customary practice in such circumstances is to postpone hearing the dispute until a fuller complement of judges is available. In view of the absence of any extenuating circumstances, it is difficult to understand why there was any necessity to choose between overlooking Marshall’s involvement and not attaining a quorum. It is also difficult to see how the outcome justifies Marshall’s participation, since, if that were so, it would imply that a participant in his position should prejudge the case. Marshall, however, did not participate in several land title cases, notably Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), where he and his brother were personally involved in the purchase of several large tracts of Virginia real estate.

Since 1792, federal law has required district judges to recuse themselves when they have an interest in a suit or have acted as counsel. In 1911, Congress added recusal for bias in general. The last major revision of the law occurred in 1974, when Congress made the recusal standards applicable to all federal judges, Justices, and magistrates and placed the obligation to identify the existence of circumstances in which his objectivity might reasonably be questioned on the judge himself rather than on one of the parties to the case. The current version of the law, 28 U.S.C.A. § 455, reads as follows:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge’s knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

By these standards, Chief Justice Marshall’s participation in Marbury would have arguably breached (a), (b)(1), (b)(3), and (b)(5)(iv).

Disqualification of Justices Reed, Murphy, and Jackson, who variously held posts as Attorney General or Solicitor General during Franklin Roosevelt’s first two administrations, came close to impairing the operation of the Court during the early 1940s. Later, a heated wrangle over Justice Black’s participation in Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161, 65 S.Ct. 1063 (1945), a case in which counsel for the union happened to be Black’s old law partner, developed when Justice Jackson objected (see his concurring opinion in the Court’s denial of the petition for rehearing, 325 U.S. 897, 65 S.Ct. 1950). That disagreement festered in private until Jackson, breaching the secrecy of the conference room, exposed their feud to public view in a rash cable to the House and Senate Judiciary committees in an attempt to blunt what he thought was a move to promote Justice Black in the aftermath of Chief Justice Stone’s

Controversy flared again when Justice Rehnquist refused to disqualify himself in Laird v. Tatum, 408 U.S. 1, 92 S.Ct. 2318 (1972). In that case, which involved military surveillance of political activities by civilians, the appellees alleged bias, since Justice Rehnquist, as an Assistant U.S. Attorney General prior to his appointment to the Court, had testified before a subcommittee of the Senate Judiciary Committee and had spoken publicly on other occasions in favor of government data collection activities. Justice Rehnquist defended his participation in the Laird case, 409 U.S. 824, 93 S.Ct. 7 (1972), saying, “My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.” See “Justice Rehnquist’s Decision to Participate in Laird v. Tatum,” 73 Columbia Law Review 106 (1973). Laird v. Tatum, like the Jewel Ridge case, was decided by a 5–4 vote.

In much less controversial circumstances two decades before, Justice Frankfurter excused himself from participating in Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952). That case involved a challenge to a District of Columbia transit company policy called “Music as you ride,” according to which Washington’s buses were tuned to a local FM station that broadcast music, news, and weather to passengers as they rode, whether or not they wanted to hear. Certain passengers, alleging that they were a captive audience, protested and challenged the policy as a violation of their right to privacy. Justice Frankfurter, who frequently rode the bus himself, wrote: “My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.”

Most recently, the issue of recusal surfaced with respect to Justice Scalia. He did not participate in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004), because he had expressed an opinion in a speech on the issue before the Court ruled. In a second instance, however, he declined to disqualify himself from participating in Cheney v. United States District Court for District of Columbia, 542 U.S. 367, 124 S.Ct. 2576 (2004). Controversy over his participation in that case erupted when it was reported that the Justice was among a dozen guests who had gone on a private duck-hunting trip with Vice President Dick Cheney. The Sierra Club and others had brought suit to force public disclosure of records pertaining to the operation of the Energy Task Force chaired by the Vice President. Critics alleged that the committee was loaded with oil industry contributors to the 2000 Bush-Cheney campaign and that, in return for their financial support during the presidential race, they had been at the table crafting the Administration’s energy policy. The plaintiffs sought to force the Vice President to turn over a list of who attended the meetings and the minutes of those meetings. Cheney responded by invoking executive privilege (see p. 218). Justice Scalia saw no reason to step aside, explaining that the Court had voted to grant cert. in the case before the hunting trip had taken place, that he was always in the company of others when he was with the Vice President, and that he had never discussed the case with him. He argued that a policy of requiring a Justice to recuse himself in every instance where he had had social interaction with some member of the Washington community named in a legal proceeding before Court was entirely novel, impractical, and institutionally disabling. Justice Scalia’s memorandum explaining his view appears at 541 U.S. 913, 124 S.Ct. 1391 (1004).

Litigants may be permitted to enforce the terms of the statute quoted earlier by a writ of mandamus, or failure to disqualify oneself under the conditions identified would constitute grounds for reversal on appeal. See “Disqualification of Federal Judges and Justices in the Federal Courts,” 86 Harvard Law Review 736, 738 (1973).

As the Justices themselves recently pointed out, however, there are very real consequences to recusal for less than good reason. “Even one unnecessary recusal impairs the functioning of the Court. * * * In this Court, where the absence of one Justice cannot be made up by another, needless recusal
deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even
division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the
petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.”
Recusal Policy, 114 S.Ct. 52, 53.

In his dissenting opinion in *Eakin v. Raub* below, Judge Gibson of the Pennsylvania Supreme
Court argued that a constitutional system without judicial review was, indeed, possible. Nor was
Judge Gibson alone in his views in the early days of our history. Thomas Jefferson wrote in a
letter to Spencer Roane in 1819: “My construction of the Constitution is * * * that each
department is truly independent of the others, and has an equal right to decide for itself what is
the meaning of the Constitution in the cases submitted to its action most especially where it is
to act ultimately and without appeal. * * * Each of the three departments has equally the right
to decide for itself what is its duty under the Constitution, without any regard to what the others
may have decided for themselves under a similar question.”

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**Eakin v. Raub**
Supreme Court of Pennsylvania, 1825
12 S. & R. 330

**BACKGROUND & FACTS** The facts and opinion of the court in this
case have been omitted, since they are of no particular importance to a study of
constitutional law. Suffice it to say that the case, which was an ejectment proceeding,
involved the power of the Pennsylvania Supreme Court to invalidate a state law. Justice
Gibson disagreed with his colleagues on the resolution of this dispute and specifically
took issue with the right of any court to exercise the power of judicial review. Gibson’s
opinion is considered one of the best expositions against the assertion of such judicial
power. As a postscript, it is interesting to note that 20 years later Justice Gibson changed
his mind and retracted the position he took in the opinion excerpted below. Said
Gibson, “I have changed that opinion for two reasons. The late convention [to draft a
constitution for the Commonwealth of Pennsylvania], by their silence, sanctioned the
pretensions of the courts to deal freely with the Acts of the Legislature; and from

GIBSON, J., dissenting. * * *

* * * I am aware, that a right to declare
all unconstitutional acts void * * * is
generally held as a professional dogma * * *.
I admit, that I once embraced the same
document, but without examination, and I
shall, therefore, state the arguments that
impelled me to abandon it, with great respect
for those by whom it is still maintained. * * *
[Although the right in question has all along
been claimed by the judiciary, no judge has
ventured to discuss it, except Chief Justice
MARSHALL * * * and if the argument of a
jurist so distinguished for the strength of his
ratiocinative powers be found inconclusive, it
may fairly be set down to the weakness of the
position which he attempts to defend. * * *
* * * Our judiciary is constructed on the
principles of the common law * * *. Now,
what are the powers of the judiciary, at the
common law? They are those that necessar-

8. Letter to Judge Spencer Roane, Sept. 6, 1819, 10 Writings of Thomas Jefferson, p. 140 (Ford, ed. 1899).
ily arise out of its immediate business; and they are, therefore, commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to anything of a political cast whatever. * * *

The constitution of Pennsylvania contains no express grant of political powers to the judiciary. But to establish a grant by implication, the constitution is said to be a law of superior obligation; and consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way; this is conceded. But it is a fallacy, to suppose, that they can come into collision before the judiciary. What is a constitution? It is an act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts. What is a statute? It is an act of ordinary legislation, by the appropriate organ of the government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them. The constitution, then, contains no practical rules for the administration of distributive justice, with which alone the judiciary has to do; these being furnished in acts of ordinary legislation, by that organ of the government, which, in this respect, is exclusively the representative of the people; and it is generally true, that the provisions of a constitution are to be carried into effect immediately by the legislature, and only mediately, if at all, by the judiciary. * * *

The constitution and the right of the legislature to pass the act, may be in collision; but is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the constitution are we to look for this proud preeminence? Viewing the matter in the opposite direction, what would be thought of an act of assembly in which it should be declared that the supreme court had, in a particular case, put a wrong construction on the constitution of the United States, and that the judgment should therefore be reversed? It would, doubtless, be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void, which has been enacted according to the forms prescribed in the constitution, is not a usurpation of legislative power. It is an act of sovereignty; and sovereignty and legislative power are said by Sir William Blackstone to be convertible terms. It is the business of the judiciary, to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved * * *

* * * If the judiciary will inquire into anything beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend, that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature. * * *

[L]et it be supposed that the power to declare a law unconstitutional has been exercised. What is to be done? The legislature must acquiesce, although it may think the construction of the judiciary wrong. But why must it acquiesce? Only because it is bound to pay that respect to every other organ of the government, which it has a right to exact from each of them in turn. This is the argument. * * * [T]he legislature has an equal right with the judiciary to put a construction on the constitution; * * * neither of them is infallible; * * * neither ought to be required to surrender its judgment to the other. * * *

[I]n theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior
capacity only for those things which peculiarly belong to it * * *. [Since] legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows, that the construction of the constitution * * * belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. * * * Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise. * * *

* * * When the entire sovereignty was separated into its elementary parts, and distributed to the appropriate branches, all things incident to the exercise of its powers were committed to each branch exclusively. The negative which each part of the legislature may exercise, in regard to the acts of the other, was thought sufficient to prevent material infractions of the restraints which were put on the power of the whole; for, had it been intended to interpose the judiciary as an additional barrier, the matter would surely not have been left in doubt. * * * [It] would have been placed on the impregnable ground of an express grant. * * *

* * *

But [it is argued that] the judges are sworn to support the constitution, and are they not bound by it as the law of the land? * * * The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still, it must be understood in reference to supporting the constitution, only as far as that may be involved in his official duty; and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. * * *

But do not the judges do a positive act in violation of the constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas, the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests. * * *

* * *

For these reasons, I am of opinion, that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. * * * It might, perhaps, have been better to vest the power in the judiciary; as it might be expected, that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by * * * the ordinary exercise of the right of suffrage—a mode better calculated to attain the end, without popular excitement. * * * [In the theory of our government, * * * the people are [assumed to be] wise, virtuous, and
competent to manage their own affairs; and if they are not so, in fact, still, every question of this sort must be determined according to the principles of the constitution, as it came from the hands of its framers, and the existence of a defect which was not foreseen, would not justify those who administer the government, in applying a corrective in practice, which can be provided only by a convention.

In Justice Gibson’s view, then, courts exist only to do distributive justice, that is, to apply the rules contained in statutes to the facts of cases, not to apply the “rules” of the Constitution to judge whether the legislature had the authority to make the statute. This view is consistent with the British experience, which holds that courts need only decide cases on the basis of the statutes passed by Parliament. If there is a problem with the statute, that is for Parliament to correct. If ours were such a system, those who consider a law unconstitutional would be required to battle it out in the political arena. In short, the Constitution would still be the supreme law of the land and the foundation of our system, but its primary interpretation would shift from the Court to the explicitly political branches of government.

Insofar as judicial review is essential to a constitutional system, then, Justice Gibson may be right; insofar as the practice is desirable, there may be much more to argue about. Certainly, judicial review is often defended as a valuable check and balance among governmental institutions. Moreover, Justice Gibson may have done us a favor by at least articulating clearly the burden that rests on those of us who favor judicial review when he asserted that, if there is a collision between the Constitution and a statute, courts “must be a peculiar organ” (p.15) to resolve the conflict. In short, he would appear to assert that those who advocate the desirability of judicial review bear the burden of showing that the judiciary is in fact endowed with a unique capacity to do justice that overrides the deference ordinarily due popularly elected governmental institutions in a democracy. This invites discussion of other justifications for judicial review and is considered further in Chapter 2.

In any event, Chief Justice Marshall’s assertion of judicial review ultimately prevailed. Judicial review has become part and parcel of our constitutional system because it has been read into the Constitution, so to speak. It is too late in our history to change that part of our system by judicial interpretation. It would require nothing short of a constitutional amendment to do away with the institution of judicial review now.

Original Jurisdiction

It is important in the study of constitutional interpretation to understand the difference between “judicial power” and “jurisdiction.” Judicial power, as noted earlier, is the power of a court to decide cases. Jurisdiction is the authority of a court to hear a case and, therefore, to exercise judicial power. Marbury involved an exercise of the Supreme Court’s original jurisdiction. Original jurisdiction is the authority of a court to hear a case in the first instance, that is, to function as a trial court. The Supreme Court’s original jurisdiction, as Chief Justice Marshall pointed out in Marbury, is delineated in Article III, section 2, paragraph 2 of the Constitution and extends to “all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a Party.” Federal law, 28 U.S.C.A. § 1251, provides that the Supreme Court shall have both “original and exclusive jurisdiction of all controversies between two or more States”; it shall have “original but not exclusive jurisdiction” (which means a case could be tried in either the U.S. Supreme Court
or a federal district court) in “[a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;” “[a]ll controversies between the United States and a State;” and “[a]ll actions or proceedings by a State against the citizens of another State or against aliens.”

Although the Supreme Court technically acts as a trial court when it exercises its original jurisdiction, cases heard by the Court in the first instance have not been tried to a jury since before 1800. When the parties in a case have stipulated to the facts or where otherwise only questions of law are presented, the Court will hear argument. Where the facts in a case are disputed, the Court’s customary practice has been to appoint a “Special Master,” who functions as a hearing officer. He or she takes testimony, hears argument, sifts evidence, and formulates conclusions as to both the facts and the legal issues involved. The Special Master prepares a report, which is subject to exceptions and objections by the parties. The Court may then order argument on any of the findings or recommendations in dispute. In any case, the Court itself rules on all important motions and directly issues any orders granting or denying the relief sought. Over the last decade, the Court has decided only one or two such cases a Term. Disputes between states over boundary lines and water rights account for practically all of them.

**Supreme Court Review of State Court Decisions**

The Supremacy Clause, Article VI, section 2 of the Constitution, declares, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” It is followed by a requirement in section 3 that national and state legislators, executives, and “judicial Officers * * * shall be bound by Oath or Affirmation, to support this Constitution * * *” (emphasis supplied). In section 25 of the Judiciary Act of 1789, another provision of the same statute that had been before the Court in *Marbury*, Congress provided the mechanism for implementing the principle of federal constitutional supremacy over conflicting state law. It provided for Supreme Court review of a final judgment or decree by the highest court in a state in three categories of cases: (1) where the validity of a federal law or treaty was “drawn in question,” and the decision was against its validity; (2) where a state statute was challenged as “repugnant to the Constitution, treaties or laws of the United States,” and the decision was in favor of its validity; and (3) where the construction of the federal Constitution, treaty, or statute was drawn in question, and the decision was against the title, right, privilege, or exemption claimed. Although the Supreme Court had declared the doctrine of judicial review and with it the attendant precept of judicial supremacy, it had no occasion there to assert these over state actions. With its ruling in *Martin v. Hunter’s Lessee* (p. 19), the Supreme Court asserted its authority to hear civil cases tried in state courts that presented federal constitutional questions. Five years later, in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), the Court confirmed its jurisdiction over criminal cases raising federal constitutional issues as well. Chief Justice Marshall, whose opinions in both cases carried the day for the power of the national government in general and that of the U.S. Supreme Court in particular, rested his holding on Article III, section 2, which provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *” (emphasis supplied).
MARTIN v. HUNTER'S LESSEE
Supreme Court of the United States, 1816
14 U.S. (1 Wheat.) 304, 4 L.Ed. 97

BACKGROUND & FACTS
At the time of his death in 1781, Thomas, Lord Fairfax, a citizen of Virginia, owned a 300,000-acre tract known as the Northern Neck of Virginia. In his will, Fairfax gave the land to his nephew, Denny Martin Fairfax, a British subject living in England. Virginia law prohibited inheritance by an enemy alien, and the state passed a special law after Fairfax's death confiscating the property. In 1789, the state sold some of the land to David Hunter. After nearly two decades of litigation, during which Denny Martin Fairfax died and left the property to his heir, Philip Martin, the Virginia Court of Appeals in 1810 recognized Hunter's title to the land. On a writ of error three years later, the U.S. Supreme Court reversed the judgment of the Virginia Court of Appeals because the Jay Treaty of 1794 specifically safeguarded the property of British subjects from confiscation. In response to this decision by the Supreme Court, the Virginia Court of Appeals declared unconstitutional section 25 of the Judiciary Act of 1789, upon which the Supreme Court had asserted its jurisdiction, and refused to obey the Supreme Court's mandate (i.e., a directive that its judgment be executed) in the case. Philip Martin then sought Supreme Court review of this defiant action. Chief Justice Marshall, who, together with his brother James, had contracted with Denny Martin Fairfax to purchase the bulk of the estate, did not participate in the Court's consideration of this case.

STORY, J., delivered the opinion of the court:

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

***

The third article of the constitution is that which must principally attract our attention. ***

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*** [A]ppellate jurisdiction is given by the constitution to the Supreme Court in all cases, where it has not original jurisdiction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is
not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And * * * there is nothing in the constitution which restrains or limits this power * * *

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, “the judicial power (which includes appellate power) shall extend to all cases,” etc., and “in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.” It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. * * *

* * *

It is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that “this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” It is obvious that this obligation is imperative upon the state judges in their official * * * capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—“the supreme law of the land.”

* * *

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws and
treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments[,] * * * [t]hat the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. * * *

[T]he constitution * * * is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. * * * When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of Congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. * * *

* * * In respect to the powers granted to the United States, [state judges] are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force than for giving it to the acts of the other coordinate departments of state sovereignty.

* * *

It is further argued that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts * * *. The constitution has presumed [however,] *** that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that * * * can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. * * *

[Another] motive[,] *** perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize
them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

The next question which has been argued is, whether the case at bar be within the purview of the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record.

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

It is worth emphasizing that Supreme Court review of state court decisions extends only to federal questions, that is, to controversies involving a claim based on a provision of the U.S. Constitution or a statute passed by Congress. When it comes to construing federal statutes or provisions of the U.S. Constitution, the U.S. Supreme Court is supreme. In the resolution of such matters, the decision of the Supreme Court is final and binding. Where, on the other hand, only a state question is presented, that is, one involving a claim under a provision of a state statute or a state constitution, the decision of the highest court in the state is final, and review by the U.S. Supreme Court is precluded.

The situation becomes a good deal more complex when a case presents both federal and state questions. Although the Supreme Court’s rulings in Martin and Cohens leave no doubt whatever that the federal judiciary has the authority to declare a state law unconstitutional if it conflicts with the U.S. Constitution, a treaty, or a statute passed by Congress, the federal courts may refrain from promptly exercising their jurisdiction if the state law or state
constituton provision is ambiguous. Occasionally, federal courts invoke what is called the "abstention doctrine"—out of respect for state sovereignty—to afford a state supreme court the opportunity to provide a definitive interpretation of the challenged state law that perhaps might obviate the need to decide federal constitutional or statutory questions. In a case where, say, a state criminal prosecution is alleged to infringe the defendant’s First Amendment rights, the choice over which values should prevail—respect for state sovereignty or protection of fundamental civil liberties—can be difficult and controversial.

Appellate Jurisdiction

Martin and Cohens were cases that did not start in the Supreme Court and thus did not fall under its original jurisdiction. Since they were cases initially decided elsewhere that came to the Supreme Court from below, they reached the Supreme Court by way of its appellate jurisdiction. Appellate jurisdiction is the authority of a court to hear a case that has first been decided by a lower court. Like original jurisdiction, appellate jurisdiction is something that can never be changed by a court, but is always defined by some authority external to it, either by a statute or by the Constitution.

Article III, section 2 of the Constitution describes the judicial power of the United States as extending to disputes involving foreign diplomats, admiralty and maritime jurisdiction, and various permutations of controversies between states, between a state and the citizens of another state, between citizens of different states, and where a foreign state is a party. The Constitution vests “judicial power” in the courts; Congress cannot enlarge or diminish it. Nor, as Marbury made clear, may Congress expand or contract the original jurisdiction of the Supreme Court. But Congress is granted considerable power with respect to the Court’s appellate jurisdiction. After describing the relatively few cases in which the Supreme Court has original jurisdiction, Article III, section 2, paragraph 2 provides that “[i]n all other Cases before mentioned the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make” (emphasis supplied). There is no question, then, that Congress has the power to enlarge or diminish the Court’s appellate jurisdiction. In Ex parte McCardle, which follows, Congress withdrew the Court’s appellate jurisdiction over habeas corpus cases after the case had been argued, but before the Court could reach a decision.

EX PARTE MCCARDLE

Supreme Court of the United States, 1869
74 U.S. (7 Wall.) 506, 19 L.Ed. 264

BACKGROUND & FACTS McCardle, a newspaper editor, was under detention by the military government occupying Mississippi for trial before a military commission on charges that he had allowed to be published articles alleged to be “incendiary and libelous.” As a civilian, McCardle asserted that he was being unlawfully restrained and, on appeal, sought a writ of habeas corpus (a court order that is based upon a determination that one in custody is being detained contrary to due process and that commands the custodian of the prisoner to deliver the prisoner up for the court) from the U.S. Supreme Court. The Court heard full arguments in the case, but before it could meet in conference to arrive at a decision, Congress, under the control of the Radical Republicans, passed legislation that repealed the statute of 1867 authorizing the Court to hear appeals in such cases. The repeal, reenacted by the necessary constitutional majorities in both Houses of Congress over President Andrew Johnson’s veto, was typical of the efforts of the Radicals to check
the efforts of both the judicial and the executive branches to mitigate the harshness of post–Civil War reconstruction policy in the South. The usual adversary format is missing in the title to this case; in proceedings such as this where a petition to the court is at the demand and for the benefit of only one party, the action is said to be ex parte, “on the side of” or “on the application of” the party named.

The Chief Justice [CHASE] delivered the opinion of the court.

* * *

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

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

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

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of Dufoisseau v. The United States [10 U.S. (6 Cr.) 312, 3 L.Ed. 232 (1810)] particularly, the whole matter was carefully examined, and the court held, that while “the appellate powers of this court are not given by the judicial act, but are given by the Constitution,” they are, nevertheless, “limited and regulated by that act, and by such other acts as have been passed on the subject.” The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress “of making exceptions to the appellate jurisdiction of the Supreme Court.” “They have described affirmatively,” said the court, “its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it.”

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

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

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. * * *

* * *

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.
In periods when Congress is unhappy with the Court's decisions, efforts are sometimes energized to curtail the appellate jurisdiction of the Court. The decision in *McCardle* illustrates one such successful effort. There have been others—some successful and some not—like the effort made by Congress in the late 1950s (p. 158) in response to what a coalition of Southern Democrats and conservative Republicans saw as certain provocative rulings by the Warren Court. And throughout the 1970s and 1980s, congressional critics of the Court, notably former North Carolina Senator Jesse Helms, introduced dozens of bills to withdraw the Court's authority to hear voluntary school prayer, busing, and abortion cases and included in the proposed legislation provisions that also would have denied federal district courts jurisdiction in matters over which the Supreme Court had no appellate jurisdiction. Very few of these proposals ever made it to the floor, and Congress passed none of them.

However much one might agree that such efforts are unwise, it cannot be contended that they are unconstitutional. If the diminution of appellate jurisdiction amounted to putting the Supreme Court out of business, perhaps a case could be made that Congress went too far, for that portion of Article III, section 2 quoted previously (p. 23) does appear to grant some appellate jurisdiction and speaks of Congress making “exceptions” rather than granting it full control.

Today, the Supreme Court's appellate jurisdiction is not all that different from its description in section 25 of the Judiciary Act of 1789. Cases from the lower federal courts fall within the Supreme Court's appellate jurisdiction because by definition they involve federal questions. Decisions of state supreme courts are reviewable under 28 U.S.C.A. § 1257 “where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”

**Checking the Court**

Reducing the Supreme Court's appellate jurisdiction, however, is only one of several means that the Constitution provides to Congress to check and balance the Court's power. If the Court's decision involves the interpretation of a federal statute and if Congress disagrees with that interpretation, Congress can pass another law achieving its objective, as it does with any legislation. Because the Court's constitutional rulings are final and binding on all institutions of national and state government, however, they cannot be dislodged by simply passing legislation. Congress can, of course, seek to alter the Court's interpretation of the Constitution by proposing a constitutional amendment. This entails passing the proposed amendment by a two-thirds majority in the House and Senate and then submitting it to the states for ratification. On four occasions in American history, amendments overturning Supreme Court rulings have been ratified by the required three-quarters of the states: The Eleventh Amendment (1798), protecting states from being sued without their consent, undid the decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793); the Thirteenth Amendment (1865), ending slavery, overturned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857); the Sixteenth Amendment (1913), permitting the imposition of the progressive income tax, reversed *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 15 S.Ct. 912 (1895); and the Twenty-Sixth Amendment (1971), giving 18-year-olds the vote in state as well as federal elections, cancelled *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970). Constitutional amendments also have been proposed that would overturn the Court's decisions in *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (1962), and *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479 (1985), to permit voluntary prayer in the public schools, and in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989), to permit the punishment of flag desecration.
Congress can also set the number of Justices on the Supreme Court as it pleases. In Chief Justice Marshall's day, there were six Justices. It reached a high point of ten during the Civil War and has stabilized at nine since 1869. Congress can increase the number of Justices on the Court, more commonly known as "packing the Court," in the hope that additional appointments from a cooperative President will change the tenor of its decisions. President Franklin Roosevelt attempted this with his proposed Court-packing plan in 1937 after repeated uses of judicial review by a very conservative Court disabled much of his New Deal legislation in the depths of the Great Depression. FDR's plan to name one additional Justice for every sitting Justice over the age of 70, however, provoked much negative public reaction and never made it out of committee. Congress can also reduce the size of the Court—a sanction aimed at the President, not the Court—if it is at loggerheads with the Chief Executive and wishes to deny him the opportunity to influence the Court. Thus, the Radical Republican Congress by law reduced the Supreme Court from ten to seven Justices in 1866 to thwart any appointments by President Andrew Johnson (although, since sitting Justices could not be forced off the Court by statute, the number never actually fell below eight). Congress then raised the number to nine after Ulysses Grant had been elected in 1868.

Finally, Supreme Court Justices, like any federal officials, can be impeached and removed from office. The Jeffersonians tried this against Justice Samuel Chase in 1804–1805 with the idea that, if they were successful, Chief Justice Marshall would be next. However, it flopped and after a similar effort failed to depose President Andrew Johnson in 1868, enthusiastic use of impeachment for political purposes faded completely.

The Structure of the Judicial System

Before discussing the means by which cases make their way to the Supreme Court under its appellate jurisdiction, it would be useful to understand something of the structure of the federal judicial system and that of the states as well. Exhibit 1.1 on p. 28 presents a simplified diagram of the federal judicial hierarchy and the routes that cases take as they wend their way upward. In the cases that present the vast majority of federal constitutional questions, our focus narrows to three courts: the district courts, the courts of appeals, and the Supreme Court.

The federal district courts, of which there are now 94, are trial courts. As Exhibit 1.2 on p. 29 shows, some states, the District of Columbia, and several U.S. territories comprise single federal districts, and some states have more than one federal district within them, but in no event does the jurisdiction of any federal district court cross a state boundary. There are 11 courts of appeals operating in numbered circuits, one for the District of Columbia, and one for the Federal Circuit. The district courts are single-judge courts, although a single district may be assigned anywhere from 1 judge (Guam) to 28 judges (Southern District of New York). The courts of appeals range in size from 6 judges (1st Circuit) to 28 judges (9th Circuit) per circuit, who normally sit in randomly drawn panels of three to hear cases appealed from the district courts.

9. There have been recurring efforts to expand the number of federal circuits from the current 12 to 14 by splitting the Ninth Circuit in three. The Ninth Circuit has twice as many appellate judges as any other circuit and hears the most appeals by far, over 14,000—more than eight times as many as the First Circuit. The proposed redrawing would leave only California and Hawaii in the new Ninth Circuit, and add a Twelfth Circuit consisting of Arizona, Idaho, Montana, and Nevada, and a Thirteenth Circuit comprised of Alaska, Oregon, and Washington. While there is surface appeal to dividing up a single circuit that now encompasses 20% of the nation's population, the prospect of a raft of new appellate appointments by a Republican administration inspires deep resistance by Democrats. Critics suspect that the proposal is motivated by the fact that the Ninth has a reputation of being the most liberal of the federal circuits. But opponents of carving up the Ninth Circuit are not limited to Democrats; most of the appeals judges in the circuit, even Republicans, are opposed. New York Times, June 19, 2005, p. 12. The last time, the proposal cleared the House by a close vote (overwhelmingly along party lines) but never came to a vote in the Senate. Congressional Quarterly Weekly Report, Oct. 9, 2004, pp. 2375, 2404. The cost of the proposal was pegged at $131 million and would have added 11 new appellate judges and 47 more district judges.
The jurisdiction of the district courts extends, generally speaking, to cases involving more than $75,000 where the parties are citizens of different states and to cases raising a federal question. The jurisdiction of the courts of appeals extends to reviewing decisions of the district courts and the federal independent regulatory commissions and agencies. The latter responsibility falls particularly heavily on the Court of Appeals for the District of Columbia Circuit, because Washington, D.C. is the headquarters of most of those commissions and agencies.

Although the structure of state judicial systems can be varied and complex, it generally—with the exception of 11 less-populated states—follows a triple-tier conception analogous to the federal hierarchy. Recall from the discussion earlier that for a case to move from a state supreme court to the U.S. Supreme Court, it must present a federal question, that is, a question involving interpretation of a provision of the U.S. Constitution or a federal statute. As noted earlier, in all cases involving the interpretation of a state constitutional or statutory provision, where no federal question is implicated, the decision of the highest-ranking court in the state is supreme and is not reviewable by the U.S. Supreme Court.

**The Writ of Certiorari**

Prior to the passage of legislation (102 Stat. 662) by Congress in 1988, a case reached the Supreme Court by one of three principal mechanisms for the exercise of its appellate jurisdiction: by appeal, by certification, and by certiorari. Although appeal still exists for a very limited class of cases that need not detain us here, the 1988 statute all but abolished it and converted the Supreme Court into a virtually all-certiorari tribunal. That legislation was the Court’s final victory in a century-long struggle to gain complete control over its own docket and to decide for itself what cases it would hear, rather than being governed by Congress’s determination of what cases it would hear.

From the earliest days until 1925, in fact, cases falling under its appellate jurisdiction reached the Court only by a writ of error. The writ, which is mentioned in the summary of background and facts for the older cases presented in this book, could be granted only if a case fell within a category of cases prescribed by federal statute for review by the Court. Thus, the decision as to which cases from the lower courts reached the Supreme Court lay entirely with Congress. What moved Congress to pass the Judiciary Act of 1925, creating the writ of certiorari, and allowing the Court control over much of its docket, was the fact that statutory mandates for the Court to hear cases had grown like topsy and the Court was years behind in its workload. In addition to being swamped with cases, many of those Congress identified as must-hear disputes—often in response to the pressure of special interests—could only be described as pretty small potatoes. The 1925 law continued to recognize a route of appellate jurisdiction—known technically as “appeal”—that gave the losing litigant below a statutory right of review by the Supreme Court. To say that the Court was obliged to hear all “appeals” and that it had no discretion in the matter, however,

10. In days gone by, federal law required certain kinds of cases to be tried before three-judge federal district courts with the right of direct appeal to the U.S. Supreme Court, bypassing the courts of appeals. These included reapportionment cases and certain cases under the Civil Rights Act of 1964, the Voting Rights Act, and the Presidential Election Campaign Fund Act of 1971. Although the use of three-judge federal district courts has been extinguished by Congress except in these and one or two other instances, the 1988 legislation preserved the right of appeal in such cases.

11. The sorts of cases formerly subject to appeal were (1) those in which a state court declared a provision of a federal statute or treaty unconstitutional or in which it upheld a state law or state constitutional provision alleged to conflict with the U.S. Constitution, a treaty, or a federal statute; and (2) those in which a U.S. court of appeals declared a federal statute or treaty unconstitutional or in which it declared a state law or state constitutional provision unconstitutional because it conflicted with the U.S. Constitution, a treaty, or a federal statute.
EXHIBIT 1.1 THE FLOW OF CASES TO THE U.S. SUPREME COURT

(Federal Judicial System)

STATE JUDICIAL SYSTEM

(Some courts and routes used less often have been omitted from this chart.)

*The Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR) operate in secret; the dockets, hearings, and decisions of those courts are not open to the public, and declassified opinions have been released on only two occasions. See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 2002 WL 1949262 (F.I.S.Ct. 2002); 2002 WL 1949263 (F.I.S.Ct. 2002). The FISC is comprised of 11 federal district judges, selected by the Chief Justice from seven circuits, who individually hear and rule upon applications for electronic surveillance by the FBI. If the government is dissatisfied with a decision, it may appeal to the FISCR, a three-judge body whose members are selected by the Chief Justice from among federal appeals and district judges, one of whom is designated to preside. See Chapter 9, section D.
would be somewhat inaccurate, since the Court dismissed frivolous appeals. Appeals rarely, if ever, accounted for more than 10% of the cases argued to the Supreme Court in a given Term. Now they account for just a handful of cases. Today, the Court is required to review only cases decided by three-judge federal district courts and suits between states.

Certification is another infrequently used procedure. A federal appeals court may certify a question to the Supreme Court to request an answer to a question essential to deciding a case pending before it and about which the appeals court is in need of guidance. Occasionally, the Supreme Court itself may certify a question to a state supreme court in order to provide the Justices with the definitive interpretation of a state statute that has been challenged as violating the U.S. Constitution.

Almost all the cases that reach the Supreme Court from below get there by a writ of certiorari (“cert.” for short). The factors once identified as triggering an appeal are now simply factors for the Court to consider in granting cert. The writ of certiorari, for which the losing party below must petition, is a Court order directing the lower court to send up the record in a case, and the significance of granting the writ is, of course, that the Supreme Court will hear the case.\(^\text{12}\) On what basis, then, does the Supreme Court grant certiorari?

The Supreme Court does not exist as a court of personal justice; it does not review cases simply to correct errors made by courts below. The overriding criterion for the Supreme Court’s grant of certiorari is whether a case presents a substantial federal question. Rule 10 (of the rules the Justices have written to govern the operation of the Supreme Court) provides several examples of what constitutes “a substantial federal question.”

**RULE 10—CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI**

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

\(^{12}\) It is possible, even after a case has been placed on the argument calendar and the Court has heard oral argument by the parties, that the Court will decline to decide it, in which case the writ of certiorari is “dismissed as improvidently granted” (or “dig” as some have called it). The Court uses this method of disposing of a case when oral argument disclosed that there was less to the constitutional or statutory issue than originally met the Justices’ eye, or that upon further examination the controversy was non-justiciable, or that the Court lacked jurisdiction, or that further developments rendered the dispute moot, so that the Court should not have granted certiorari in the first place. Throughout his tenure on the Court, Justice Frankfurter argued fervently that in such instances it was better to “dig” a case than to decide it, lest the Court unwittingly encourage petitioning from parties with flawed or frivolous claims in the future.
Although speaking only for himself, Justice Stevens aptly summed it up when he wrote, “[I]n allocating the Court’s scarce resources, I consider it entirely appropriate to disfavor complicated cases which turn largely on unique facts.” Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 945, 99 S.Ct. 335, 339 (1978).

The reason for Rule 10 is readily understandable when one looks at the Court’s workload. On average over the last decade, petitioners seeking review in about 7,500 cases each Term have come knocking at the Court’s door. The Court conducts full-dress review in about 75 of these annually—that is, it hears oral argument and then decides each by signed opinion. Even adding to this figure the small number of cases it decides summarily (meaning the Court does not hear oral argument, decides each solely on the basis of the briefs submitted, and only announces its judgment), it can be said that certiorari is granted to less than 2% of the cases on the Court’s docket. But this general measure is deceptive, although it certainly suggests that even getting the Court’s attention is a major achievement.

Cases that come to the Court by way of its appellate jurisdiction are divided into two categories—paid cases and in forma pauperis cases. Paid cases are what the label suggests: the litigants have sufficient financial wherewithal to hire counsel; pay the filing fee; and furnish the required printed briefs, petitions, and record. Cases filed in forma pauperis (in the manner of a pauper) are on behalf of individuals too poor to afford the usual paid advocates and amenities. Most of the paupers petitioning the Court for certiorari are federal or state prisoners who are challenging procedures by which they were convicted, arguing that conditions of their confinement violate the Constitution, or seeking to overturn a death sentence. In forma pauperis petitions constitute about two-thirds of the cases on the Court’s docket. The rate of success in obtaining cert. is usually at least ten times greater in paid cases than in forma pauperis cases. While it is undoubtedly true that those with money have a better shot at legal success than those without, it is also true that most of the in forma pauperis petitions for cert. are frivolous and without any legal merit, at least as measured by the standards used to apply Rule 10. After all, insofar as in forma pauperis petitions for cert. are written by individuals already serving time in prison or awaiting execution, the authors have plenty of time to devote to the project and nothing to lose by the attempt.

Notwithstanding the important and controversial issue raised by the different cert. rates in paid and in forma pauperis cases, the avalanche of cases facing the Court makes it clear that the importance of the legal question raised is the only criterion that can be consistently and, therefore, fairly applied. All parties before the Court are entitled to be treated by the same standards. Granting cert. by mastering the facts in each of 7,500 cases so as to correct every injustice would defy all human ability. In the last analysis, correcting misapplications of the law is the job of the federal appeals courts, state supreme courts, or state intermediate appellate courts.

Since applying Rule 10 to the cases that come before it is a matter of judgment about which reasonable individuals can and do disagree, the Court operates on the understanding that four Justices must vote to grant the writ before it can be issued. The decision to grant review is governed, then, by the Court’s self-imposed “rule of four.”

What may we conclude when the Court denies a petition for a writ of certiorari in a given case? Many people think this means that the Supreme Court agreed with the lower court’s treatment of the merits of the case. This is a badly mistaken impression, as Justice Frankfurter forcefully pointed out in the following excerpt from his statement in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917–919, 70 S.Ct. 252, 254–255 (1950):

[D]enial of a petition for writ of certiorari *** simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter “of sound judicial discretion.” *** A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially
true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question, but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

Since there are these conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the Court indicate its reasons for denial. ** If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable. **

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated. Justice Frankfurter's observations are only reinforced by current figures. The motivations behind denial of a petition for cert. remain a mystery in any case, but the effect of having denied the writ, on the other hand, is clear: The decision of the highest-ranking lower court in the case stands.

At the time Justice Frankfurter made this observation, the Court not only had a slimmer docket (about 1,100–1,200 cases per Term), it decided a different mix of cases than characterized the business of the Burger Court during the 1970s and 1980s. Justice Frankfurter penned his Baltimore Radio Show concurrence in 1950 when the bulk of the Court's business was statutory, not constitutional. Even throughout the years of the Warren Court, famous for its many important constitutional rulings, statutory cases outnumbered constitutional cases. Only in the later years of Chief Justice Warren's tenure did constitutional cases regularly constitute 40–45% of the cases decided by signed opinions. As Exhibit 1.3 (p. 33) shows, it was not until the October 1970 Term that constitutional cases came to constitute a majority of the cases. After that, they predominated during most of the remaining Terms of the Burger Court. And the Burger Court was one of the most productive Courts, as well.14 But,
EXHIBIT 1.3  CONSTITUTIONAL AND NON-CONSTITUTIONAL CASES  
OCTOBER 1926–2004 TERMS

*Cases included were generally only those which identified a specific Justice as the author of the Opinion of the Court or a plurality opinion. Per curiam and memorandum opinions were not counted, unless a per curiam case had been through oral argument and the case is cited in this book. Classification of cases as constitutional or non-constitutional was based on consideration of the case as a whole and specific points of law identified in the headnotes of the decision as published in the Supreme Court Reporter. Cases falling under the Court’s original jurisdiction were, with rare exception, counted as non-constitutional cases. This also applies to Exhibit 2.1 on p. 99.
numerically speaking, the preeminence of constitutional cases declined after William H. Rehnquist’s accession to the Chief Justiceship and the Court thereafter steadily reduced its workload\textsuperscript{15} and lowered its profile as Constitutional Court to a level not seen since Fred Vinson was Chief Justice a half century earlier. It is too soon to tell whether this pattern will continue under Chief Justice John Roberts.

The Process by Which the Supreme Court Decides Cases

The annual Term of the Supreme Court commences the first Monday in October and runs until October of the following year, although the Court recesses for the summer beginning in late June. From October until the end of April, the Court alternates between two weeks of hearing oral argument and two weeks of recess devoted to reading briefs and cert. petitions, legal research, and opinion writing. Two breaks, that between the December and January cycles of argument and that between the January and February cycles, last a month because, by then, opinion-writing homework has piled up. As noted earlier, the Court now hears oral argument in about 75 cases each Term.

From Monday through Wednesday each week it is in session, the Court hears argument in approximately 12 cases in its courtroom. The Justices emerge from behind the dark-red velour curtain at the front of the courtroom and take their seats on the raised, slightly-angled Bench. As they do, the Marshal calls out: “The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez, oyez, oyez. All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting, God save the United States and this Honorable Court.”\textsuperscript{16} The Chief Justice takes the high-backed chair in the center of the Bench and is flanked first to his right and then to his left by the other Justices, alternating in descending order of their seniority on the Court. Usually one hour is allotted each case to be argued, half to each side. Although the attorneys for the opposing parties may begin by presenting their positions, the bulk of their time for oral argument is usually consumed by answering many specific questions asked by the Justices who may interrupt at any time. The questions are often drawn from a bench memorandum prepared by a Justice’s clerk, which summarizes and analyzes the case. In the words of some expert practitioners before the Court, “Oral argument is

\textsuperscript{15} Although the number of cases seeking the Court’s attention has been increasing, the Court’s productivity—at least as measured by those cases decided by signed opinions—decreased appreciably during the Rehnquist Court. Since the Court’s October 1998 Term, the figure has stabilized at about 75. One of the reasons for the decline in the Court’s output, Justice Souter speculated, was the lessening of conflict in lower federal court decisions because of the larger numbers of judicial appointments made by President Reagan and both Presidents Bush who share a common conservative outlook and dominate the federal bench. This dominance was perpetuated during the 1990s because the Republican-controlled Senate Judiciary Committee (after 1994) intentionally dragged its feet in passing on President Clinton’s nominees for federal judgeships and because Republican control of the Senate since 2002 made it much easier for President George W. Bush’s nominees to be confirmed. If conflict among the circuits is generally what flags a question for review by the Supreme Court and there is widespread agreement in values among most federal judges, substantially fewer cases would qualify for review under Rule 10. See David J. Garrow, “The Rehnquist Reins,” New York Times Magazine, Oct. 6, 1996, p. 71.

Judicial scholars have also identified several other possible explanations for the reduced number of Supreme Court decisions: the retirement of more activist Justices who were inclined to grant cert. more frequently and who were inclined to engage in “join-three” voting (providing the necessary fourth vote if three other colleagues indicated a desire to hear a case); and a decline in the number of new statutes passed. See David M. O’Brien, “The Rehnquist Court’s Shrinking Plenary Docket,” 81 Judicature 58–65 (1997).

\textsuperscript{16} Peter Irons and Stephanie Guitton, eds., May It Please the Court (1993), p. xxi. The text accompanies audiocassettes of oral argument in 23 landmark cases decided by the Court since 1955. Other editions of the book have a more specific focus—on oral arguments in First Amendment cases, reproductive rights cases, and cases dealing with the constitutional rights of students and teachers. The Court makes available on its Web site a complete transcript of oral argument shortly after a case has been heard. See www.supremecourtus.gov.
usually a combination of a speech, conversation, and an inquisition. The proportion of each will not be known until the argument is concluded.\textsuperscript{17} Although it differs a little today from that described when he was still an Associate Justice, Chief Justice Rehnquist’s summary of the Court’s routine following the conclusion of oral argument on Wednesdays remains accurate:

As soon as we come off the bench Wednesday afternoon around three o’clock, we go into private “conference” in a room adjoining the chambers of the Chief Justice.\textsuperscript{18} At our Wednesday afternoon meeting we deliberate and vote on the four cases which we heard argued the preceding Monday. The Chief Justice begins the discussion of each case with a summary of the facts, his analysis of the law, and an announcement of his proposed vote (that is, whether to affirm, reverse, modify, etc.). The discussion then passes to the senior Associate Justice * * * who does likewise. It then goes on down the line to the junior Associate Justice. When the discussion of one case is concluded, the discussion of the next one is immediately taken up, until all the argued cases on the agenda for that particular Conference have been disposed of.

On Thursday during a week of oral argument we have neither oral arguments nor Conference scheduled, but on the Friday of that week we begin a Conference at 9:30 in the morning, go until 12:30 in the afternoon, take 45 minutes for lunch, and return to continue our deliberations until the middle or late part of the afternoon. At this Conference we dispose of the eight cases which we heard argued on the preceding Tuesday and Wednesday. We likewise dispose of all of the petitions for certiorari and appeals which are before us that particular week.

At the beginning of the week following the two-week sessions of oral argument, the Chief Justice circulates to the other members of the Court an Assignment List, in which he assigns for the writing of a Court opinion all of the cases in which he voted with the Conference majority. Where the Chief Justice was in the minority, the senior Associate Justice voting with the majority assigns the case.\textsuperscript{19}

In bygone days, voting among the Justices occurred in reverse order from the discussion of cases, with the junior Justice voting first, but there is no separate voting protocol today. Since each Justice’s discussion of the case under consideration normally discloses the direction of his or her vote, the Chief Justice can usually tick off the votes as the discussion proceeds. In their behind-the-scenes look at the Court in operation, Bob Woodward and Scott Armstrong in The Brethren reported that Chief Justice Burger would occasionally “pass” in the course of the conference discussion of a case or change his vote afterward, allegedly so as to be sure of voting on the majority side for the purpose of controlling the opinion assignment.\textsuperscript{20} Other scholars have characterized Chief Justices Marshall and Hughes as individuals of such dominating intellect and personality that they were able to exert leadership over the Court.

In the conference room, a portrait of Chief Justice Marshall looks down on the conference table, at one end of which sits the Chief Justice and at the opposite end of which sits the senior Associate Justice, with three Justices on one side and four on the other. The only individuals permitted in the room while the Court is in conference are the Justices themselves. By tradition, the junior Associate Justice acts as doorkeeper and messenger when materials must be sent for and messages received. One reason for maintaining such secrecy is to prevent the acquisition of any


\textsuperscript{18} Ever since the custom was initiated by Chief Justice Melville Fuller around the turn of the nineteenth century, the conference has always begun with a round of handshakes among the Justices, in the words of Fuller’s biographer, “to prevent rifts from forming.” Bernard Schwartz, Decision: How the Supreme Court Decides Cases (1996), p. 125. It is a gesture designed to reinforce the point that any disagreements are professional, not personal.


\textsuperscript{20} Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (1979), pp. 170–188.
insider knowledge that might be used to advantage, say, to buy or sell stock in a company that is a party to a pending antitrust or other business regulation case. Another reason for maintaining secrecy is simply that, until the decision is announced in court, it is not final, and members of the Court have been known to modify their positions or change their minds.

It is at the Court’s Friday conferences that most of the petitions for certiorari are disposed of. The Court has long used a time-saving mechanism known as the “discuss list,” prepared by the Chief Justice and circulated well in advance of any action by the Justices. It is a list of those cases believed to be sufficiently important to merit discussion before a vote to grant certiorari is taken. Any Justice can have a case added to the discuss list simply by requesting it. The Justices are responsible for familiarizing themselves with the cases on the Court’s docket, whether by supervising the screening of the cert. petitions by his or her own clerks or by relying on memoranda from the “cert. pool,” which draws on the combined resources of eight of the Justices’ law clerks.21 A case on the discuss list that receives at least the minimum four votes for certiorari is ordinarily scheduled for oral argument. Cases that do not make the “discuss list” are automatically put on the “dead list” and—together with those that do not garner the necessary four votes for certiorari after conference discussion—are denied review. In some instances, where the Court believes that oral argument is unnecessary, the Court may dispose of the case by summarily affirming, reversing, or vacating the judgment below without stating any reasons for its decision.

The practice of disposing of cases that have been argued by stating reasons in an Opinion of the Court was a practice established by Chief Justice Marshall, who wrote nearly half the Opinions of the Court during his 34-year tenure. Previously, the Justices disposed of argued cases in seriatim opinions, that is, sequential opinions in which each Justice gave his own views on the case. The idea of formulating a collective opinion for the Court not only was aimed at maximizing the Court’s power by speaking with one voice, but also attempted to minimize the potential for misunderstanding that was bound to result from multiple pronouncements.

Usually several months elapse between the time the Opinion of the Court in a case has been assigned and the day on which the decision is announced in open court. Several kinds of opinions may be written. The assignments Chief Justice Rehnquist referred to, of course, pertain to the Opinion of the Court, that is, an opinion subscribed to by at least a majority of the Justices participating. The reasons it gives for the judgment in the case are regarded as definitive statements of law by the Court. As a draft of the Opinion of the Court is circulated by the Justice assigned to write it, the other Justices have several options. A Justice may join the Opinion with little or no change. A Justice may suggest some modifications, possibly insisting on changes substantial enough to jeopardize the assent of other members of the Court. A Justice who agrees with the majority as to which party should prevail in the case, but who prefers to state different or

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21. In Justice Frankfurter’s day, the Justices screened the petitions for cert. on their own, making whatever use of their clerks they cared to. In those days, however, the Court’s docket was less than a sixth of what it is now and the number of clerks was substantially fewer. During the 1972 Term, Justice Lewis Powell proposed the idea of the cert. pool in which law clerks would go through the petitions, summarize each case, and make a recommendation as to whether the case was “cert. worthy.” A memorandum containing this information was circulated to each of the Justices who chose to participate. In the beginning, five Justices signed on, with the price of admission being that each participating Justice had to contribute one of his clerks to the enterprise. Justices who were on the Court’s political Left (Douglas, Brennan, and Marshall) decided not to join for fear that the evaluations contained in the memoranda might be influenced by the political views of clerks who had been selected by the Court’s conservative Justices. Today, only Justice Stevens continues to opt out. Although the cert. pool was meant to address the heavy and still escalating workload of the Court, it has long been criticized for the undue influence it may give the clerks (even if the Justices rotate their clerks in and out of the cert. pool). Although the Justices, of course, retain the ultimate authority to decide what cases they will decide, the pressure generated by such a large caseload necessarily gives a good deal of power to those making recommendations about which cases to take. For a critique of the cert. pool idea and a provocative discussion of the role of Supreme Court clerks generally (the so-called Junior Supreme Court), see Schwartz, Decision: How the Supreme Court Decides Cases, pp. 48–55.
additional reasons, writes a concurring opinion. A Justice who believes that the judgment should have gone to the other party in the case may pen a dissenting opinion to voice his or her disagreement with both the majority’s conclusion and its reasons. During Chief Justice Taft’s tenure, the Court operated under an unwritten no-dissent-unless-absolutely-necessary rule largely to avoid the very sorts of problems once associated with seriatim opinions.

Although a Justice is perfectly free to write his or her own concurring or dissenting opinion in a case, the senior Justice in the minority usually assigns or writes the principal dissenting opinion. The Court invariably holds the bulk of its important decisions until June, because these usually occasion lengthy opinions of all sorts and decisions are not handed down until all opinions in the case are finished. Opinions today no longer refer to members of the Court, as they did for most of American history, as “Mr. Justice.” Anticipating the appointment of a female Justice a year before it happened, the Court changed the form of address to simply “Justice” in 1980.

Today, especially in the Court’s civil rights and civil liberties decisions, a unanimous opinion is overwhelmingly the exception, not the rule. Forging an opinion that speaks for a majority of the Court is no easy task and requires considerable adroitness, tact, negotiation, and compromise. Although the portrayal of the Court in The Brethren appears to disparage bargaining among the Justices, it is difficult to see how majorities, which can often be very fragile and yet which are so necessary to the effective operation of the Court, can be secured without political skill.22

Sometimes the Court simply announces its judgment in an unsigned or per curiam opinion. It may do this in cases where the decision appears obvious and seems not to require much explanation. It has also done this in cases such as Furman v. Georgia (see Chapter 8) where the Court was so split over the reasons for its decision that there appeared to be agreement only on the result. In some instances of substantial disagreement among the Justices, the judgment of the Court will be announced in a plurality opinion, that is, an opinion to which fewer than a majority subscribe, with votes crucial to the Court’s decision being supplied by one or more Justices writing separately. Since a plurality opinion is not subscribed to by a majority of the Justices, it does not bind the Court as a statement of policy.

Since all but a very few cases the Court hears come by way of its appellate jurisdiction, the judgment rendered by the Court in a given case is couched in terms of how it compares with that of the highest-ranking court below. Where the Court agrees with the highest-ranking court below as to which of the two parties should win the case, the Supreme Court affirms the judgment. If it believes that the decision should have gone to the other party, the Supreme Court reverses the judgment. If it decides to set aside the determination below, it vacates the judgment. Sometimes the Court may affirm in part and reverse in part. Because some of these actions must often be followed by additional proceedings, the Court will also remand or send

22. As you would expect, since an important factor in selecting cases is the level of disagreement among lower federal and state court judges, the dissent rate of the modern Supreme Court is rather high compared with most other American appellate courts. Before the October 1942 Term, when the proportion of nonunanimous decisions jumped to nearly 43%, in all of the cases decided by the Court—constitutional and statutory combined—disagreement among the Justices rarely crept above 10%, with the notable exception of the 1850s and the 1930s. But the modern debate over judicial self-restraint versus strict scrutiny (see Chapter 2) has generated continuing conflict. It reached an all-time high during the October 1952 Term when there was disagreement over the outcome in nearly 87% of the cases. See Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, The Supreme Court Compendium (1994), pp. 149–153. As the graph in Chapter 2 shows (see p. 99), the dissent rate in constitutional cases decided by signed opinion during the Rehnquist era generally ran 15–20 percentage points higher than in non-constitutional cases. Taking all the cases decided by signed opinion, roughly three cases in five provoked a dissenting vote from at least one member of the Court. Despite the ritual handshakes among the Justices, interpersonal relations can become strained when individuals work closely in such a small group. A clerk’s-eye view of the human dynamics on the Rehnquist Court during the October 1988 Term provides a disturbing account of how the Court’s business gets done. It depicts one battle after another in a never-ending ideological war that is substantially clerk-driven. See Edward Lazarus, Closed Chambers (1988).
the case back to the lower court with instructions to dispose of it in a manner not inconsistent with the Court’s opinion. Speaking generally, the odds are 2-1 that the Justices will vote to reverse or vacate the judgment of the court below rather than to affirm it.

The Court suspends its cycle of oral argument late in April, and cases that have been granted certiorari, but have not yet been argued, are held over for the next Term. During May and June, the Court periodically reconvenes to announce decisions in the cases whose opinions have been finished. Normally, no later than the last week in June the Court recesses until the fall. Although the summer recess leaves the Justices free to write, speak, and travel, it also furnishes time to interview and hire new law clerks and peruse the endless cert. petitions that are always accumulating. Then, on the first Monday in October, the cycle begins again.

In addition to duties as a Supreme Court Justice, each member of the Court functions as Circuit Justice for at least one federal circuit. This second hat that each Justice wears is a relic from the early days when the Supreme Court’s caseload was very light, its terms were short, and the Justices were required by the Judiciary Act of 1789 to “ride circuit,” which means they traveled to far-flung locations to hear appeals as members of circuit courts. In days when transportation was poor, it was punishing work.

As part of the Federalists’ attempt to pack the federal judiciary in the waning days of John Adams’ administration, Congress in 1801 relieved the Justices of riding circuit and provided for the appointment of circuit judges to hear appeals from the district courts. However, the Jeffersonian-controlled Congress so resented this partisan maneuver that a year later it repealed the legislation creating the circuit judgeships. This meant that the Justices were required to get back on their horses and again ride circuit. Circuit judges were not created by Congress until 1869, and the courts of appeals that we have now were not established until 1891. With the creation of the courts of appeals, very little remained of the Justices’ circuit responsibilities.

Today, the role of a Circuit Justice can be fulfilled in chambers. Acting on a petition from a party in a case, a member of the Court, functioning as a Circuit Justice, is empowered to stay the judgment of a lower federal court until the Supreme Court has time to act. Although the petitioner seeking to stay a lower federal court judgment must first go to the Circuit Justice for that circuit, if the stay is denied, the petitioner can request a stay from any Supreme Court Justice. If granted, however, any stay remains in effect only until the Supreme Court has acted.

Judicial Independence

An understanding of the “judicial Power of the United States” would be incomplete without some appreciation for the protection of the independence of federal judges from political pressure. In this regard, it is important to point out the difference between courts that derive their jurisdiction from Article III of the Constitution and those that draw their authority from Article I. Article III vests the judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The federal district courts and courts of appeals clearly fall within its ambit. The protections afforded judges of tribunals deriving their jurisdiction from Article III include life tenure with removability only for misconduct in office and the guarantee that judicial salaries may not be diminished during tenure in office. Judges vested with the judicial power of the United States are also restricted to deciding only real cases and controversies, a subject considered at length in the next section of this chapter.

But all courts created by Congress do not draw their authority from the judicial article of the Constitution. The United States Tax Court, the Court of Federal Claims, and the United States Court of Appeals for the Armed Forces were established by Congress as “necessary and proper” under an appropriate enumerated power contained in Article I. As contrasted with the “constitutional courts” created pursuant to Article III, courts created by the exercise of Congress’s powers in Article I are known as “legislative courts.” Not bound by the requirements of the
judicial article, Article I courts have judges whose term of office is 15 years. Furthermore, they are not restricted to deciding only real cases and controversies and may render advisory opinions or fulfill other functions permitted or directed by Congress. The principle underlying the distinctive characteristics of constitutional courts is the maintenance of an independent federal judiciary. The President’s power to make recess appointments to the federal bench exists in tension with this principle. See the discussion at the end of Chapter 4, section A.

B. INSTITUTIONAL CONSTRAINTS ON THE EXERCISE OF JUDICIAL POWER

An old cartoon from The New Yorker magazine pictures the manager of a baseball team who, engaged in a heated argument, repeatedly pokes the umpire in the chest saying, “I’ll take this all the way up to the Supreme Court.” It caricatures a persistent myth of American life that any issue can ultimately be brought to the Supreme Court for resolution. Yet, as the following cases demonstrate, it is not so easy to get a case before the Supreme Court and, once there, to obtain a definitive decision.

Jurisdiction, as already noted, is an indispensable requirement for Supreme Court consideration of any case. No less important a factor is justiciability, a concept that sums up the appropriateness of the subject matter for judicial consideration. While jurisdiction characterizes the authority of a court to hear a case, justiciability characterizes the structure and form of a legal dispute and denotes its suitability for adjudication. Questions about justiciability ask whether a case is in the proper form; questions about jurisdiction ask whether the case is in the proper forum.

Case and Controversy

The essence of a justiciable dispute, as the Court’s opinion in Muskrat v. United States (p. 41) makes clear, is a real case and controversy. While other elements of justiciability are essentially for the Court itself to define (as contrasted with jurisdiction, which is defined either by the Constitution or by Congress and, therefore, is beyond the Court’s control), the necessity of a real case and controversy is mandated by Article III. The case and controversy requirement focuses on the actuality and adverseness of the interests that are in contention. Exactly what this means as a limitation on the kinds of matters the Supreme Court may hear is succinctly spelled out in the following words of Chief Justice Hughes, speaking for the Court in Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240–242, 57 S.Ct. 461, 464 (1937):

A “controversy” in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

This means the Court is barred from rendering advisory opinions (statements that address the legal validity of a law or order in the absence of any real dispute) and dealing with cases where the interests asserted are hypothetical, abstract, moot, or collusive.23

23. A good example of a collusive suit is Hylton v. United States (1796), mentioned earlier. Recall that the suit there challenged the validity of a federal tax on carriages. Because Secretary of the Treasury Alexander Hamilton was intent upon quickly establishing the validity of the new tax, he directed that his department enter into certain agreements with Hylton. In order to give the federal courts jurisdiction, both parties falsely stipulated that Hylton owned not 1 but 125 carriages, that the exaggerated tax of $2,000 on them could be settled by paying $16, and that the government would pay all of Hylton’s legal costs.
A case that is moot is one that no longer presents a live controversy. Suppose a pregnant, unmarried, female minor sued to obtain an abortion over the objection of her parents, who insisted she have the baby. Suppose further that, before the court could determine whether the young plaintiff was sufficiently mature to make the decision on her own, she suffered a miscarriage. The miscarriage would moot the controversy.

Given the pace at which the judicial process usually operates, it might be anticipated that time would moot many cases. The courts, therefore, recognize an exception for controversies that are described as “capable of repetition yet evading review.” Unless an exception of this sort were recognized, it is unlikely that any abortion cases, for example, would ever be heard, since the baby would be born before the case could be heard and all appeals decided.

Iowa’s requirement of a year’s residency as a prerequisite to filing for divorce in that state was challenged in Sosna v. Iowa (p. 45). Although Sosna had established residency by the time the case was heard and thus residency no longer prevented her from beginning proceedings, the suit was not dismissed on grounds of mootness because she had brought a class action. A class action is a form of legal action in which the plaintiff brings suit not only for herself, but also for all those similarly situated. Someone wishing to bring a class action is entitled to do so if the members of a class would have standing to sue in their own right, there are questions of law or fact common to all the members of the class, the claims or defenses of the representative of the class are typical of those of members of the class, and the party representing the class will fairly and adequately protect the interests of the class. The Federal Rules of Civil Procedure also require that the party representing the class give “the best notice practicable” to members of the class on whose behalf the suit is being brought. “[I]ndividual notice to all members of the class who can be identified through reasonable effort” includes advising each member of the class that the court will exclude him or her from the suit if the member requests it, that the judgment will bind all members of the class who do not exclude themselves, and that any member of the class excluded from the suit has the right to be represented separately through an attorney.24 As Justice White observed in his Sosna dissent, however, if the person bringing the class action no longer has any personal interest in the litigation, it does raise the problem of who will assume responsibility for the suit.

The case and controversy requirement—and the other aspects of justiciability as well—ensures that courts play a passive role. Courts can only decide matters that are brought to them and then, as we will see later, only so much of the matter as is necessary to decide the suit. Unlike legislatures and executives, courts cannot assume the initiative and make policy whenever they think it is necessary or whenever it suits them.

24. Rule 23(c)(2), Federal Rules of Civil Procedure, 28 U.S.C.A. Legislation to rein in class actions by requiring that suits brought by plaintiffs in multiple states be heard in federal, rather than state, court was a long-standing priority of Republicans in Congress and so-called “tort reform” was an issue on which President George W. Bush had campaigned for re-election in 2004. Titled the Class Action Fairness Act of 2005, 119 Stat. 4, the new law moved class actions with more than 100 plaintiffs, with at least one of the plaintiffs and one of the defendants domiciled in different states, and with at least $5 million in total damages at stake, to federal district court. The statute aimed at furthering the goals of making awards among the plaintiffs more equal, giving the successful plaintiffs more meaningful compensation (money, not coupons), eliminating in-state bias by state courts, reducing the economic destabilization of defendant companies, and scaling down attorney fees. But the preeminent motivation behind the law, especially by business interests, was that federal courts were thought to have much higher standards of evidence and were much less generous in their awards than state courts and thus were a venue more favorable to defendant corporations. The legislation passed easily. Congressional Quarterly Weekly Report, Feb. 21, 2005, p. 460; New York Times, Feb. 11, 2005, pp. A1, A16. Previously, the only class actions federal courts could hear were those in which each plaintiff stood to receive a minimum award of $75,000 and in which the defendant and lead-plaintiff were domiciled in different states.
BACKGROUND & FACTS  Congress passed legislation in 1902 allotting some public lands to certain American Indians to have as their own. Amendments to this statute in 1904 and 1906 enlarged the number of Indians entitled to share in the distribution of the lands and extended for a period of 25 years a prohibition on the ability of any of these Indian landholders to sell, dispose of, or encumber the land they had been given. The proceedings in this case arose from a 1907 act that was passed to facilitate a legal determination on the constitutionality of these amendments. The law explicitly authorized the class action suits by Muskrat and others, all Cherokee Indians.

In addition, the act specifically assigned jurisdiction to the Court of Claims and the Supreme Court to hear the cases, awarded the proceedings special priority over the hearing of other cases, and provided that legal expenses incurred by the plaintiffs would be defrayed by funds paid out of the U.S. Treasury in the event of an adverse judgment.

Mr. Justice DAY delivered the opinion of the court:

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The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power, as established by the Constitution of the United States.

Section 1 of article 3 of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish."

Section 2 of the same article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

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[To "elucidate the nature and extent of the judicial power * * * conferred by the Constitution[,]" Justice DAY went on to discuss the facts and holding in Hayburn’s Case, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792). At issue in that case was an act passed by Congress providing for the payment of pensions to widows and orphans of American soldiers disabled in the Revolutionary War. The law made the federal circuit courts serve also as boards of pension commissioners, determining the amount due each applicant. These determinations were then subject to review and modification by the Secretary of War and Congress. The three-judge panel hearing Hayburn’s Case concluded that the statute improperly assigned non-judicial duties to the circuit courts’ decisions reviewable by an officer of the executive branch and then Congress.]

In the note to the report of the case in 2 U.S. (2 Dall.) it appeared that Chief Justice Jay, Mr. Justice Cushing, and District Judge Duane unanimously agreed:
“That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

“That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

“That the duties assigned to the circuit courts by this act are not of that description * * *; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary at War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”

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*** It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation, upon the inferior courts of the United States. “Judicial power,” says Mr. Justice Miller, in his work on the Constitution, “is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.” Miller, Const. 314.

As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to “cases” and “controversies.” Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine “cases” and “controversies.” A “case” was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term “controversy?” That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

“The judicial article of the Constitution mentions cases and controversies. * * * By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.”

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court. This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being Marbury v. Madison * * *.

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Applying the principles thus long settled by the decisions of this court to the act of
Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the court of claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the court of claims, and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the court of claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party, and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond, the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a “case” or “controversy,” to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court
within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

* * *

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

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**NOTE—Mootness: The Padilla and Sosna Cases**

One of the most interesting recent instances in which the Court found a dispute to be moot—that is, the case no longer presented a live issue—came in its denial of cert. in Padilla v. Hanft, 547 U.S. 1062, 126 S. Ct. 1649 (2006). Normally, Justices voting to deny cert. would not find it necessary or appropriate to say why they didn’t want to take a case, but the importance of the question raised presumably triggered the need for some explanation. José Padilla, an American citizen alleged to be implicated in a conspiracy to carry out a terrorist dirty-bomb attack in the United States, was taken into custody at Chicago’s O’Hare Airport in May of 2002 after he stepped off a plane from Pakistan. He was subsequently held as an “enemy combatant” in the Navy brig in Charleston, South Carolina, and sued the Secretary of Defense for a writ of habeas corpus arguing that his continuing incommunicado military detention violated rights guaranteed by the Fourth, Fifth, and Sixth amendments and the clause of the Constitution (Art. I, § 9, cl. 2) governing the suspension of habeas corpus.

The Supreme Court initially declined to hear this case on grounds Padilla had improperly named the Secretary of Defense as the defendant and should have brought his suit instead against the brig’s commander. Rumsfeld v. Padilla, 542 U.S. 426, 124 S. Ct. 2711 (2004). Four members of the Court (Justices Stevens, Souter, Breyer, and Ginsburg) would have decided the question whether an American citizen arrested on American soil could constitutionally be held indefinitely and incommunicado without the filing of legal charges and a trial. Padilla then refiled the suit in federal district court in South Carolina naming Hanft, the brig commander, as the defendant. That court ruled that “[t]he Non Detention Act [see p. 197] expressly forbids the President from holding [Padilla] as an enemy combatant, and *** the AUMF [Authorization for Use of Military Force] does not authorize such detention.” The district court also rejected the argument that the President’s constitutional authority as Commander-in-Chief provided justification. The U.S. Court of Appeals for the Fourth Circuit reversed, and Padilla petitioned the Supreme Court for cert. Before the Supreme Court could act on Padilla’s petition for cert., however, President George W. Bush swiftly ordered that Padilla be released from military custody, transferred to the control of the Attorney General, and then tried in federal district court on charges of providing material aid to terrorists. Critics of the administration saw this quick maneuver as an attempt by the government to evade a possibly adverse ruling by the Supreme Court on the President’s power to detain American citizens in military custody indefinitely. See New York Times, Nov. 23, 2005, pp. Al, A18. (This suspicion was clearly evident when the federal appeals court, having just sustained the President’s power, flatly refused to permit Padilla’s transfer out of military custody until the Supreme Court ruled on Padilla’s cert. petition. Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005).)

In Padilla v. Hanft, 547 U.S. 1062, 126 S.Ct. 1649 (2006), the Supreme Court denied Padilla’s petition for certiorari. Justices Souter, Breyer, and Ginsburg voted to grant cert. Justices Scalia, Thomas, and Alito voted to deny cert. without comment. Justice Kennedy, joined by Chief Justice Roberts and Justice Stevens, also voted to deny cert. but took care to address the concern of administration critics that there was nothing to prevent the government from changing its mind again and returning Padilla to indefinite military custody. Said Justice Kennedy:
Whatever the ultimate merits of the parties’ mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court’s certiorari power. Even if the Court were to rule in Padilla’s favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. **In the course of its supervision over Padilla’s custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants.**

By contrast, in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975), the Court rejected an argument that a dispute had become moot and went on to uphold the constitutionality of a state statute imposing a one-year residency requirement as a prerequisite to initiating divorce proceedings. After being married to Michael Sosna for eight years and residing in Michigan and then New York, Carol Sosna petitioned an Iowa court to dissolve their marriage after only one month’s residency in that state. Her petition was dismissed. Attacking the Iowa residency requirement as a violation of her constitutional right to interstate movement, Mrs. Sosna brought suit in federal district court both on her behalf and on behalf of all those similarly situated. Although by the time this dispute reached the U.S. Supreme Court Carol Sosna had long since met the state’s residency requirement and in fact had since procured a divorce in New York, the Court held that the case was not moot. Speaking for the Court, Justice Rehnquist wrote:

> If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would make this case moot and require dismissal. **But appellant brought this suit as a class action and sought to litigate the constitutionality of the durational residency requirement in a representative capacity. When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. We are of the view that this factor significantly affects the mootness determination.**

Justices Brennan and Marshall also dissented, but on the grounds that the durational residency requirement was unconstitutional.

Ripeness

A suit, however, may entail conflict between parties with substantial and adverse interests but still fail to be heard on the merits for other reasons. It may be that the dispute is not sufficiently ripe for decision in its present posture. The requirement of ripeness exists to screen out disputes in which the facts have not yet crystalized. In the following case a federal appellate court discusses why adhering to the ripeness doctrine led it not to decide whether Congress’s October Resolution authorized President George W. Bush to
conduct a war against Saddam Hussein's regime in Iraq. The appeals court opinion identifies the reasons for the ripeness requirement and explains that, although hearing a dispute between Congress and the President over deploying military forces is conceivable, that day had not arrived. Another example of reliance upon the ripeness doctrine, mentioned below by the appeals court, is Justice Powell's opinion in Goldwater v. Carter (p. 71) in which he argued that, while some day it might be necessary to decide whether President Jimmy Carter had constitutionally terminated diplomatic recognition of Taiwan as the legitimate government of China, it was premature to do so until the Senate actually objected.

Doe v. Bush
United States Court of Appeals, First Circuit, 2003
323 F.3d 133

BACKGROUND & FACTS Active-duty members of the armed forces, parents of military personnel, and several members of the U.S. House of Representatives sought to enjoin President George W. Bush and Secretary of Defense Donald Rumsfeld from attacking Iraq. Plaintiffs argued that the resolution Congress adopted in October 2002 authorizing "[t]he President * * * to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * defend the security of the United States against the continuing threat posed by Iraq" (emphasis supplied), was constitutionally inadequate to permit conducting a war. A federal district court dismissed their complaint, and the plaintiffs appealed.

Before LYNCH, Circuit Judge, CYR and STAHL, Senior Circuit Judges.

LYNCH, Circuit Judge.

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[Pl]aintiffs argue [that] * * * [o]nly the judiciary * * * has the constitutionally assigned role and the institutional competence to police the boundaries of the constitutional mandates given to the other branches: Congress alone has the authority to declare war and the President alone has the authority to make war.

[Pl]aintiffs argue * * * that Congress, the voice of the people, should make this momentous decision, one which will cost lives * * *. They also argue that, absent an attack on this country or our allies, congressional involvement must come prior to war, because once war has started, Congress is in an uncomfortable default position where the use of its appropriations powers to cut short any war is an inadequate remedy.

The defendants are equally eloquent about the impropriety of judicial intrusion into the "extraordinarily delicate foreign affairs and military calculus, one that could be fatally upset by judicial interference." Such intervention would be all the worse here, defendants say, because Congress and the President are in accord as to the threat to the nation and the legitimacy of a military response to that threat.

***

The lack of a fully developed dispute between the two elected branches, and the consequent lack of a clearly defined issue, is exactly the type of concern which causes courts to find a case unripe. In his concurring opinion in Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979), Justice Powell stated that courts should decline, on ripeness grounds, to decide "issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." * * *
Ripeness doctrine involves more than simply the timing of the case. It mixes various mutually reinforcing constitutional and prudential considerations. *** One such consideration is the need “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *** Another is to avoid unnecessary constitutional decisions. *** A third is the recognition that, by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts. *** The case before us raises all three of these concerns.

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* * * Ripeness is dependent on the circumstances of a particular case. * * * Two factors are used to evaluate ripeness: “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” * * * Ordinarily, both factors must be present. * * *

The hardship prong of this test is most likely satisfied here; the current mobilization already imposes difficulties on the plaintiff soldiers and family members, so that they suffer “present injury from a future contemplated event.” * * * Plaintiffs also lack a realistic opportunity to secure comparable relief by bringing the action at a later time. * * *

The fitness inquiry here presents a greater obstacle. * * * The baseline question is whether allowing more time for development of events would “significantly advance our ability to deal with the legal issues presented [or] aid us in their resolution.” * * * These prudential considerations are particularly strong in this case, which presents a politically-charged controversy involving momentous issues, both substantively (war and peace) and constitutionally (the powers of coequal branches). * * *

[Plaintiffs argue that] the October Resolution only permits actions sanctioned by the Security Council. In plaintiffs’ view, the Resolution’s authorization is so narrow that, even with Security Council approval of military force, Congress would need to pass a new resolution before United States participation in an attack on Iraq would be constitutional. At a minimum, according to plaintiffs, the October Resolution authorizes no military action “outside of a United Nations coalition.”

For various reasons, this issue is not fit now for judicial review. * * *

* * * Diplomatic negotiations, in particular, fluctuate daily. The President has emphasized repeatedly that hostilities still may be averted if Iraq takes certain actions. The Security Council is now debating the possibility of passing a new resolution that sets a final deadline for Iraqi compliance. United Nations weapons inspectors continue their investigations inside Iraq. Other countries ranging from Canada to Cameroon have reportedly pursued their own proposals to broker a compromise. As events unfold, it may become clear that diplomacy has either succeeded or failed decisively. The Security Council, now divided on the issue, may reach a consensus. To evaluate this claim now, the court would need to pile one hypothesis on top of another. We would need to assume that the Security Council will not authorize war, and that the President will proceed nonetheless. * * *

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* * * If courts may ever decide whether military action contravenes congressional authority, they surely cannot do so unless and until the available facts make it possible to define the issues with clarity.

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* * * The Constitution explicitly divides the various war powers between the political branches. To the Congress goes the power to “declare war,” * * * to “raise and support armies” through appropriations of up to two years, * * * to “provide and maintain a navy,” * * * and to “make rules for the government and regulation of the land and naval forces” * * *. The President’s role as commander-in-chief is one of the few executive powers enumerated by the Constitution. * * *
Given this “amalgam of powers,” the Constitution overall “envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities.”

In this zone of shared congressional and presidential responsibility, courts should intervene only when the dispute is clearly framed. An extreme case might arise, for example, if Congress gave absolute discretion to the President to start a war at his or her will. Plaintiffs’ objection to the October Resolution does not, of course, involve any such claim. Nor does it involve a situation where the President acts without any apparent congressional authorization, or against congressional opposition.

Nor is there clear evidence of congressional abandonment of the authority to declare war to the President. To the contrary, Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and during periods when each party has controlled Congress. It has enacted several relevant pieces of legislation expressing support for an aggressive posture toward Iraq, including authorization of the prior war against Iraq and of military assistance for groups that would overthrow Saddam Hussein. It has also accepted continued American participation in military activities in and around Iraq, including flight patrols and missile strikes. Finally, the text of the October Resolution itself spells out justifications for a war and frames itself as an “authorization” of such a war.

The appropriate recourse for those who oppose war with Iraq lies with the political branches. Dismissal of the complaint is affirmed.

Standing

A controversy of seemingly adverse and concrete legal interests may also fail to be entertained by a court because the party bringing the suit lacks standing. Standing is the concept that links the interests being asserted in a suit to the person bringing the suit. Simply put, this means that the plaintiff must be the one directly and personally injured by the acts of the defendant. As explained by Justice O’Connor, speaking for the Court in Allen v. Wright, 468 U.S. 737, 104 S.Ct. 3315 (1984):

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from [Article III of] the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.

Standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be “distinct and palpable,” and not “abstract” or “conjectural” or “hypothetical.” The injury must be “fairly” traceable to the challenged action, and relief from the injury must be “likely” to follow from a favorable decision. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

The inquiry [into standing] requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable
ruling too speculative?25 These questions * * * must be answered by reference to the Art. III notion that federal courts may exercise power only “in the last resort, and as a necessity,” * * * and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process” * * *

A controversial example of applying the standing requirement is the Supreme Court’s ruling in City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660 (1983), because there was considerable disagreement among the Justices as to the rigor with which the concept should be applied and, therefore, the justice of its consequences. In that case, a 24-year-old black motorist who had been subjected to a chokehold by an officer of the Los Angeles Police Department (LAPD) sued to recover damages for his crushed larynx and to enjoin the city from the unjustified application of a chokehold in the future. Lyons had been pulled over for a traffic violation in the early-morning hours because of a burned-out taillight. With revolvers drawn, officers said to get out of the vehicle, told him to clasp his hands on top of his head, and completed a pat-down search. One of the officers then slammed Lyons’ hands onto his head. When Lyons complained that it hurt, the officer applied the chokehold. When Lyons regained consciousness, he was lying face down on the ground, gasping for air, and spitting up dirt and blood. The record showed that during the period 1975–1980, LAPD officers applied chokeholds on 975 occasions, which represented more than three-quarters of the altercations between LAPD officers and the public. It was the most frequent form of physical restraint used by police, and the record showed that department policy permitted the application of chokeholds in circumstances where officers faced no threat. During that five-year period, 16 deaths resulted from chokeholds; in three-quarters of these, the victim was an African–American.

At the outset, the Court rejected the city’s contention that Lyons’ claim for injunctive relief was mooted by the city’s self-imposed moratorium on the use of chokeholds because the city had only temporarily suspended the practice. But with regard to standing, the Court held that, while Lyons could sue for damages, he lacked standing to enjoin the department from the unjustified application of a chokehold in the future. The Court held that Lyons failed “to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.” The Court continued: “The * * * allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties. * * * Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens

25. These considerations have been relaxed when the states, as plaintiffs in federal court litigation, seek to protect their citizens from harms originating outside the state, such as pollution and global warming. This is so because the states surrendered some of their powers to the federal government as a condition of joining the Union. Consequently, states “are not normal litigants for the purposes of invoking federal [court] jurisdiction.” In Massachusetts v. Environmental Protection Agency (EPA), 549 U.S. —, 127 S.Ct. 1438 (2007), the Court made it easier for the states to clear these hurdles in a suit to force the EPA to begin regulating the emission of greenhouse gases from new motor vehicles. There was enough persuasive scientific evidence, the Court held, to show that global warming caused “concrete and particularized injury that is either actual or imminent,” that the injury suffered by Massachusetts’ residents is “fairly traceable” to regulatory inaction by the EPA, and that “a favorable decision will redress that injury,” although forcing the agency to act would only partially alleviate the harm of global warming. The Court found that the EPA under President George W. Bush had failed to exercise the regulatory power it had been given by Congress under the Clean Air Act as amended, and that the agency had offered “no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to global climate change.” The EPA’s behavior, therefore, was “‘arbitrary, capricious, . . . or otherwise not in accordance with the law.’”
who no more than assert that certain practices of law enforcement officers are unconstitutional.”

Speaking for the four dissenters, Justice Thurgood Marshall criticized the majority for “fragmenting a single claim into multiple claims for particular relief and requiring a separate showing of standing for each form of relief.” He continued, “Because [Lyons] has a live claim for damages, he need not rely solely on the threat of future injury to establish his personal stake in the outcome of the controversy.” Marshall wrote, “Our cases uniformly state that the touchstone of the Article III standing requirement is the plaintiff’s personal stake in the underlying dispute, not in the particular types of relief sought.” In the dissenters’ view, Lyons had “easily” made the required showing that the injuries he alleged, if proved at trial, could “be remedied or prevented by some sort of judicial relief”—“monetary relief would plainly provide redress for his past injury, and prospective relief would reduce the likelihood of any future injury.” Objecting that “[t]he Court’s decision remove[d] an entire class of constitutional violations from the equitable powers of a federal court[,]” Justice Marshall argued: “Since no one can show that he will be choked in the near future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result.” But the path to all injunctive relief, the majority observed, had not been foreclosed since “the state courts need not impose the same standing requirements that govern federal-court proceedings.” The majority added: “The individual States may permit their courts to oversee the conduct of law enforcement authorities on a continuing basis. But this is not a role of a federal court, absent far more justification than Lyons has proffered in this case.”

As a rule, standing becomes more problematic as the plaintiff’s interest grows more generalized. In other words, the more the interests of the plaintiff become indistinguishable from those shared by all citizens or—as in the following case—all taxpayers, the greater the odds the complaint will be dismissed.

**DAIMLERCHRYSLER CORP. v. CUNO**

Supreme Court of the United States, 2006
547 U.S. — , 126 S.Ct. 1854, 164 L.Ed.2d 589

**BACKGROUND & FACTS** The City of Toledo and State of Ohio sought to encourage DaimlerChrysler, a company making Jeeps, to make new investments in its manufacturing operations by giving the company local and state tax breaks. Charlotte Cuno and other Toledo taxpayers said their local and state taxes were higher because of the tax credits given DaimlerChrysler. They challenged the constitutionality of investment tax credits on grounds they violated the free-trade principle implicit in the Commerce Clause. They argued that the policy of luring business by means of tax breaks was deliberately designed to secure for Ohio an economic advantage over rival states. Although a federal district court dismissed the suit, a federal appellate court agreed with the plaintiff-taxpayers. However, because the appeals court decision squarely contradicted a ruling by the Michigan Supreme Court upholding such tax breaks in a similar case, the Supreme Court granted certiorari to resolve the conflict.

Chief Justice ROBERTS delivered the opinion of the Court.

***We*** begin by addressing plaintiffs’ claims that they have standing as taxpayers to challenge the franchise tax credit.
Chief Justice Marshall, in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), grounded the Federal Judiciary’s authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases. As Marshall explained, “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”

Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society,” Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315 (1984). If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so. "A case in law or equity," Marshall remarked, "[i]s a term . . . of limited signification. It [i]s a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power among the branches of government could exist no longer, and the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984).

"Article III standing . . . enforces the Constitution’s case-or-controversy requirement." Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11, 124 S.Ct. 2301 (2004). The "core component" of the requirement that a litigant have standing to invoke the authority of a federal court "is an essential and unchanging part of the case-or-controversy requirement of Article III." The requisite elements of this "core component derived directly from the Constitution" are familiar: “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” Allen, 468 U.S., at 751, 104 S.Ct., at 3324. That requires plaintiffs, as the parties now asserting federal jurisdiction, to carry the burden of establishing their standing under Article III.

Plaintiffs principally claim standing by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments" and thus "diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on" them. On several occasions, this Court has denied federal taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers.

The animating principle behind these cases was [originally] announced in Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597 (1923). In rejecting a claim that improper federal appropriations would "increase the burden of future taxation and thereby take [the plaintiff’s] property without due process of law," the Court observed that a federal taxpayer’s "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." This logic is equally applicable to taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called "tax expenditures," which reduce amounts available to the treasury by granting tax credits or exemptions. In either case, the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes.
Standing has been rejected in such cases because the alleged injury is not “concrete and particularized” but instead a grievance the taxpayer “suffers in some indefinite way in common with people generally.” In addition, the injury is not “actual or imminent,” but instead “conjectural or hypothetical.” Lujan v. Defenders of Wildlife, 504 U.S., at 560, 112 S.Ct., at 2136. As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn increases government revenues.

Plaintiffs’ alleged injury is also “conjectural or hypothetical” in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff’s tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.

A taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the “broad and legitimate discretion” of lawmakers, which “the courts cannot presume either to control or to predict.”

The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers.

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*** State policymakers, no less than their federal counterparts, retain broad discretion to make “policy decisions” concerning state spending “in different ways . . . depending on their perceptions of wise state fiscal policy and myriad other circumstances.”

Because state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as “virtually continuing monitors of the wisdom and soundness” of state fiscal administration, contrary to the more modest role Article III envisions for federal courts. See Allen, 468 U.S., at 760–761, 104 S.Ct., at 3329.

[Consequently,] we hold that state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.

C

Plaintiffs argue that an exception to the general prohibition on taxpayer standing should exist for Commerce Clause challenges to state tax or spending decisions, analogizing their Commerce Clause claim to the Establishment Clause challenge we permitted in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968). Flast held that because “the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, § 8, [such that]” a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of the Establishment Clause.

*** Flast held out the possibility that “other specific [constitutional] limitations on Art. I, § 8, [such that] “a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of” the Establishment Clause.

*** But as plaintiffs candidly concede, “only the Establishment Clause” has supported federal taxpayer suits since Flast.

Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Art. I, § 8, plaintiffs’ reliance on Flast is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally
unlike the right not to “‘contribute three pence . . . for the support of any one [religious] establishment.’” * * * 392 U.S., at 103, 88 S.Ct., at 1954 (quoting 2 Writings of James Madison 186 (G. Hunt ed. 1901)). * * * [A] broad application of Flast’s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent and Flast’s own promise that it would not transform federal courts into forums for taxpayers’ “generalized grievances.” * * *

Flast is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing. The Flast Court discerned in the history of the Establishment Clause “the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.” * * * The Court therefore understood the “injury” alleged in Establishment Clause challenges to federal spending to be the very “extract[ion] and spend[ding]” of “tax money” in aid of religion alleged by a plaintiff. * * * And an injunction against the spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally. * * *

Plaintiffs thus do not have state taxpayer standing on the ground that their Commerce Clause challenge is just like the Establishment Clause challenge in Flast. * * *

*** Because plaintiffs have no standing to challenge [the tax] credit, the lower courts erred by considering their claims against it on the merits. The judgment of the Sixth Circuit is therefore vacated * * * and the cases are remanded for dismissal of plaintiffs’ challenge to the franchise tax credit.

It is so ordered.

As DaimlerChrysler makes clear, the number of suits brought by a taxpayer that the courts will entertain is negligible: the suit must be one in which (1) a taxpayer is challenging an exercise of the taxing and spending power, and (2) the plaintiff must be able to point to a specific limitation on the taxing and spending power stated in the Constitution. Thus, in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 94 S.Ct. 2925 (1974), which challenged commissions in the military reserves held by various members of Congress as a violation of the Incompatibility Clause (Art. I, § 6, cl. 2, which bars federal legislators from simultaneously holding any other office under the authority of the United States), the suit was dismissed because the law had nothing to do with the taxing and spending power. In United States v. Richardson, 418 U.S. 166, 94 S.Ct. 2940 (1974), decided the same day, the Court also rejected a suit to force public disclosure of the specific monies appropriated for the Central Intelligence Agency because the law providing for CIA secrecy was not an exercise of the taxing and spending power. More controversial, perhaps, was the Court’s decision eight years later in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752 (1982), in which—despite the Establishment Clause—the Court turned aside a taxpayer challenge to a very generous transfer of a parcel of federal property to a religious educational institution on grounds that it was an exercise of Congress’s power under the Property Clause, Art. IV, § 3, cl. 2, rather than the taxing and spending clause of Art. I, § 8.26

26. In the same vein, the Court has ruled that federal taxpayers lack standing to challenge use of federal money to fund conferences to promote President George W. Bush’s “faith-based initiatives.” The plaintiffs argued that the White House conferences constituted propaganda vehicles for religion and were funded by money derived from congressional appropriations (as distinguished from private donations). The Bush Administration argued that a taxpayer cannot ever have standing unless Congress has earmarked the money for the program that is challenged. The conferences were funded from discretionary funds appropriated by Congress for use by the White House. Hein v. Freedom from Religion Foundation, Inc., 551 U.S. —, 127 S.Ct. 2553 (2007).
In addition to Article III standing, the Court—somewhat confusingly, perhaps—has also recognized what it calls “prudential standing.” As distinguished from Article III standing, which enforces the Constitution’s case and controversy requirement, “prudential standing” imposes limits on the exercise of federal jurisdiction that are recognized solely as a matter of the Court’s say-so. An example of the limiting effect of the “prudential standing” doctrine is provided by the Court’s recent decision in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004). In that case, Newdow, an atheist, challenged California’s requirement that teachers begin each school day by leading their students in the Pledge of Allegiance. He argued the phrase “one Nation under God” constituted an establishment of religion in violation of the First Amendment. A majority of the Justices did not reach the merits of the Establishment Clause claim, but instead held that Newdow lacked standing to sue. Speaking for the Court, Justice Stevens pointed out that, under California law, although Newdow and his former wife shared custody of their daughter, the mother “‘makes the final decisions if the two … disagree.’ ” The mother did not share Newdow’s religious views and did not support his constitutional challenge. As Justice Stevens explained, Newdow may have the “right to instruct his daughter in his religious views,” but that was a far cry from the “ambitious” claim made here: “He wishes to forestall his daughter’s exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and [his former wife] disagree.” The interests implicated in this case were “not merely Newdow’s interest in inculcating his child with his views on religion, but also the rights of the child’s mother as a parent generally” and “specifically” because of her state-recognized veto power. Moreover, Justice Stevens wrote, this case “implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.” In light of these interests and the extensiveness of Newdow’s claim, the Court held that he lacked “prudential standing to bring this suit in federal court.” Prudential standing, Justice Stevens declared, “embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction’ ” and he cited the principles articulated by Justice Brandeis in his Ashwander opinion (see, p. 55). “It is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights,” a thicket of legal relationships exclusively under the control of the states. He concluded, “When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”

Political Questions

Cases that pose “political questions” necessarily fail to present justiciable issues and also will not be heard by federal courts. By excluding these sorts of questions from adjudication, the Court is referring to applicability of a particular doctrine, the “political questions” doctrine; it is not implying that disputes properly before the federal courts are somehow apolitical. Obviously, since the Supreme Court—like all courts—is a political institution and since it accepts only cases presenting substantial federal issues, the matters it decides are inescapably political. Alexis de Tocqueville was quite right when he wrote in Democracy in America (1838), “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” By contrast, what the Court has in mind by the term “political questions” is a certain category of cases that federal courts are precluded from hearing. The doctrine is discussed by Justice Brennan in Baker v. Carr (p. 57). His extended discussion concludes that several factors have been associated with previous determinations by the Court that a “political question” is presented (pp. 59–61), although “each has one or more elements which identify it essentially as a function of the separation of powers.”
The characteristics Justice Brennan identified as distinguishing a political question can perhaps be reduced to three general categories: a clear textual commitment of the issue to another branch of government, a lack of judicially manageable standards by which courts could resolve the dispute, or a number of factors that make judicial determination of the matter politically imprudent. The first of these can be illustrated by the dispute presented in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 (1969). In that case, Adam Clayton Powell, Jr., a former Congressman, was excluded from the House of Representatives after having been duly reelected. Although he satisfied all three qualifications for office (age, citizenship, and residency) specified in the Constitution (Art. I, § 2, ¶ 2), the House voted not to seat him because of misconduct as a committee chairman involving committee expenditures during his previous term. Powell argued that, while the House had the power to expel him for his behavior, it had no constitutional power to exclude him from office, even though it voted to exclude him by more than the two-thirds majority required for expulsion. This was not quibbling because House precedents appeared to indicate that no member had ever been expelled for misconduct during a previous term of office. The House, of course, had within its discretion power to judge whether Powell met the constitutionally specified qualifications, it could make its own determinations as to whether he had been duly elected, and it could use its own judgment about whether he had engaged in misconduct so serious that he should be expelled—all political judgments beyond the capacity of the Court to review because they presented “political questions” clearly identified by the text of the Constitution as matters for discretionary action by the House. But, in this instance, the House had added to the three qualifications for office stated in the Constitution by implicitly requiring absence of previous misconduct. The question whether Powell had been unlawfully excluded did not present a political question because it was not something the Constitution had committed to the judgment of the House; instead, it presented the question of whether the House had such a power at all.

The Court’s consideration of the reapportionment issue, presented in Baker v. Carr, turned largely on whether it presented a political question of the second type. This kind of political question is marked by the absence of a definable standard by which the facts can be judged. Sometimes the problem is the absence of any consensus about what the standard should be; sometimes the problem is that there is no workable standard that could be applied. Either way, argument in court is frustrated because the parties don’t have a recognized standard to frame their presentation of the facts in the case. Arguments about whether the boundary lines of legislative districts have been drawn fairly is a classic example of this difficulty.

The judicial process operates effectively only when the component issues in a case are presented in the form of a series of clear, discrete questions that can be argued and resolved separately. If a dispute is understood to pose, say, three questions, a court does not go on to address the second question unless the first question posed in the case had been answered affirmatively, and the third question need not be reached unless the first two questions have been answered affirmatively. Question 1, for example, may be whether the Court has jurisdiction, Question 2 may focus on standing, and Question 3 may go to the merits (the heart and substance) of the dispute. Over a half century ago, Justice Brandeis summarized a set of commandments by which judges should be guided in deciding cases, always being sure to decide no more than really had to be decided. In a concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–348, 56 S.Ct. 466, 482–484 (1937), he wrote:

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions “is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”

2. The Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it.” “It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”

3. The Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

7. “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

These guidelines would make very little sense unless it was first assumed that a case could be reduced to a series of clear, discrete and separable questions. The notion that a case should be decided on the narrowest possible ground logically supposes that the Court can stop addressing the questions presented at any point. If the parties are to have a fair hearing, they must have the opportunity to pitch their arguments and evidence to a legal standard a judge can apply.

Until 1962, the Supreme Court adhered to the view that challenges to malapportionment of legislative seats constituted a “political question.” In Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198 (1946), and other cases, the Court rejected the litigants’ contention that unequal representation violated the provision of Article IV, section 4 of the U.S. Constitution guaranteeing “to every State in this Union a Republican Form of Government.” The Court, however, reversed its position with the ruling in Baker. Speaking for the Court in Baker, Justice Brennan held that the federal district court had jurisdiction, the urban plaintiffs had standing, the issue was justiciable, and nothing more.

The Court had previously rejected the claim that malapportionment violated the Guarantee Clause because judging the constitutionality of distributing legislative seats on that basis presupposed a definition of representative government. No consensus exists on the specific definition of that concept, and, therefore, no authoritative standard existed by which deviations from it could be measured. A variation on this difficulty is provided by Justice Brennan’s discussion in Baker of the nineteenth century case, Luther v. Borden. In
that case, the Court was asked to decide which of two contending factions constituted the
legitimate government of Rhode Island. Simply stated, the problem is that everybody
believes representative government means more representation for his or her interests. In
the context of legislative apportionment, more representation is what is wanted. Deciding
how much representation (how many seats) urban residents (like Baker) deserve depends
upon how much representation (how many seats) other groups (farmers, suburbanites,
minorities, etc.) should also be given. No standard, agreed to by all of the affected groups,
exists that would solve the problem, and asserting that “representative government” is the
principle to be applied doesn’t furnish much of a clue. The distribution of representatives is
usually accomplished by simultaneous bargaining among legislators as they draw district
boundaries on a map, but it presented a problem that defied judicial solution under the
Guarantee Clause.

It was the fact that the Court had provided no standard by which the federal district court
could judge Tennessee’s legislative apportionment when the case was remanded that so
nettled Justice Frankfurter. To Justice Stewart, it was the fact that the distribution of seats in
the Tennessee legislature was so outdated that made it irrational. Although Stewart and
perhaps others (such as Justice Douglas) had the impression when Baker was decided that the
test of whether a legislative apportionment could survive constitutional challenge was
whether it was “rational” or “reasonable,” posing the question whether a given legislative
apportionment reflected a rational or reasonable accommodation of relevant political
interests was simply “a Guarantee Clause claim masquerading under a different label.” And it
was the Court’s hesitancy in announcing the “one person, one vote” standard (which it later
did because that standard is implicit in “equal protection of the laws”) that evoked an
admonition from Frankfurter: If the Court couldn’t stand the heat, it should get out of the
kitchen.

**Baker v. Carr**

Supreme Court of the United States, 1962
369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663

**BACKGROUND & FACTS** In 1901, the Tennessee General Assembly
enacted legislation apportioning its two houses and provided for subsequent
reapportionment every ten years on the basis of the number of qualified voters
resident in each of the state’s counties as reported in the census. For more than 60
years, however, proposals to redistribute the legislative seats had failed to pass, while a
large share of the state’s population continued to drift into urban areas. Baker and
others, citizens and qualified voters of the state, sued under the federal civil rights
statutes, charging that as urban residents they were being denied equal protection of
the laws contrary to the Fourteenth Amendment by virtue of the fact that their votes
had been devalued. In the suit they named Tennessee’s secretary of state, attorney
general, and state election officials as respondents and asked the court to declare the
1901 apportionment act unconstitutional and to order state officials to either hold the
election of state legislators at large without regard to counties or districts or hold an
election at which legislators would be selected from constituencies in accordance with
the federal census of 1950. The U.S. District Court for the Middle District of
Tennessee dismissed the suit on the ground that, while the abridgment of civil rights
was clear, remedy did not lie with the courts.
Mr. Justice BRENNAN delivered the opinion of the Court.

** Jurisdiction of the Subject Matter **

* * * * * The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. * * * * * Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. * * * * *

** Standing **

* * *

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, * * * or by a refusal to count votes from arbitrarily selected precincts, * * * or by a stuffing of the ballot box * * *.

* * * If such impairment does produce a legally cognizable injury, they are among those who have sustained it. * * * They are entitled to a hearing and to the District Court's decision on their claims. * * *

** Justiciability **

In holding that the subject matter of this suit was not justiciable, the District Court relied on Colegrove v. Green [328 U.S. 549, 66 S.Ct. 1198 (1946)] and subsequent per curiam cases. * * * * We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. * * *

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." * * * * Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted Colegrove v. Green and other decisions of this Court on which it relied. * * * * To show why we reject the argument based on the Guaranty Clause, * * * we * * * first * * * consider the contours of the "political question" doctrine.
B. Institutional Constraints on the Exercise of Judicial Power

That review reveals that in the Guaranty Clause cases and in the other “political question” cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the “political question.”

To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations: There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question “governmental action *** must be regarded as of controlling importance,” if there has been no conclusive “governmental action” then a court can construe a treaty and may find it provides the answer. *** Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. ***

While recognition of foreign governments so strongly defies judicial treatment that *** the judiciary ordinarily follows

the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. *** Still again, though it is the executive that determines a person’s status as representative of a foreign government, *** the executive’s statements will be construed where necessary to determine the court’s jurisdiction. ***

Dates of duration of hostilities: *** Here too analysis reveals insoluble reasons for the presence of political questions, underlying this Court’s refusal to review the political departments’ determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency’s nature demands “A prompt and unhesitating obedience,” Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827) (calling up of militia). Moreover, “the cessation of hostilities does not necessarily end the war power. It was stated in Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146, 161, 40 S.Ct. 106, 110 (1919), that the war power includes the power ‘to remedy the evils which have arisen from its rise and progress’ and continues during that emergency.” *** But deference rests on reason, not habit. *** Even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments’ determination of dates of hostilities’ beginning and ending.

(1939)], this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. * * *

* * *

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. * * *

Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: [In] Luther v. Borden, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849), * * * [t]he defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842," * * * and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government. The plaintiff's right to recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or "charter" government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.

Chief Justice Taney's opinion for the Court reasoned as follows: (1) If a court were to hold the defendants' acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government's actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect; and that "the officers who carried their decisions into operation [were] answerable as trespassers, if not in some cases as criminals." * * * A decision for the plaintiff would inevitably have produced * * * [a] measure of chaos * * *.
(2) No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority. Indeed, the courts of Rhode Island had in several cases held that “it rested with the political power to decide whether the charter government had been displaced or not,” and that that department had acknowledged no change.

(3) Since “[t]he question relates, altogether, to the constitution and laws of [the] *** State,” the courts of the United States had to follow the state courts’ decisions unless there was a federal constitutional ground for overturning them.

(4) * * * [There were] textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary. * * * [For example, Art. I, § 5, ¶ 1 of the Constitution explicitly commits to the discretion of the respective Houses of Congress whom to seat as a state’s legitimate representatives and senators. Moreover, a statute passed by Congress in 1795, enacted pursuant to the Guaranty Clause, authorized the President, upon the request of the state legislature or governor, to call out the militia in the event of an insurrection or rebellion. Here, the President had in fact responded to a call from the incumbent governor of the state to call up the militia.]

Clearly, several factors were thought by the Court in Luther to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.

But the only significance that Luther could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. * * *

* * *

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

* * *

We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

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

Reversed and remanded.

Mr. Justice WHITTAKER did not participate in the decision of this case.
Mr. Justice DOUGLAS, concurring.

[T]he question is the extent to which a State may weight one person’s vote more heavily than it does another’s.

* * *

Race, color, or previous condition of servitude is an impermissible standard by reason of the Fifteenth Amendment. * * *

Sex is another impermissible standard by reason of the Nineteenth Amendment.

There is a third barrier to a State’s freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made “an invidious discrimination,” as it does when it selects “a particular race or nationality for oppressive treatment.” See Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942). Universal equality is not the test; there is room for weighting. As we stated in Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955), “The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”

I agree with my Brother CLARK that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County. The opportunity to prove that an “invidious discrimination” exists should therefore be given the appellants.

* * *

Mr. Justice CLARK, concurring.

***

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no “practical opportunities for exerting their political weight at the polls” to correct the existing “invidious discrimination.” Tennessee has no initiative and referendum. I have searched diligently for other “practical opportunities” present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative straight jacket. Tennessee has an “informed, civicly militant electorate” and “an aroused popular conscience,” but it does not sear “the conscience of the people’s representatives.” This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result and Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government. * * *

***

Mr. Justice STEWART, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today’s decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: “(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon
which appellants would be entitled to appropriate relief; and (c) * * * that the appellants have standing to challenge the Tennessee apportionment statutes.” * * *

Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN joins, dissenting.

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

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today’s umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. * * * [I]t conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this tumabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. * * * Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. * * *

Recent legislation, creating a district appropriately described as “an atrocity of ingenuity,” is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts. Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there’s the rub. In effect, today’s
decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to en throne the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make \textit{in terrorem} pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

\* \* \*

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same—unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation.\* \* \* \*\* Where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another. \* \* \* \*\*

\* \* \*

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

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. \* \* \* Appellants \* \* \* seek to make equal weight \[of\] every voter's vote \* \* \*[the] standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. \* \* \*
The third kind of political question the Court has sought to avoid involves considerations of what might be called “prudence.” Such controversies present the real prospect of dragging the Court into highly controversial situations, the resolution of which would openly implicate the Justices in calculations of a directly political—and, at worst, partisan—nature. Although the Court chose to resolve the following dispute in Bush v. Gore on the ground that it involved the denial of an important constitutional right, the right to vote and to have one’s vote counted equally, Justice Breyer’s dissent (p. 69) makes it abundantly clear why this controversy might well be considered a classic example of the third type of political question. The political fallout from the Court’s decision, many observers thought, confirmed the wisdom of Justice Frankfurter’s admonition in Baker that the Court avoid propelling itself into “th[e] political thicket.” Acutely conscious that the Court’s power “ultimately rests on sustained public confidence in its moral sanction,” he argued that such esteem “must be nourished by the Court’s complete detachment, in fact and appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.” The Court’s bare-majority decision in the dispute over the disposition of Florida’s electoral votes, which proved decisive in determining the winner of the 2000 presidential election, gave Justice Frankfurter’s warning fresh relevance and led some to say that George W. Bush had not been “elected” but “selected” President.

**Bush v. Gore**

Supreme Court of the United States, 2000  
531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388

**BACKGROUND & FACTS** Although Vice President Al Gore out-polled Governor George Bush by 540,000 popular votes nationally, the presidential election of 2000 was decided by Bush’s majority in the Electoral College of 271 votes to Gore’s 266. Florida’s 25 electoral votes—the decisive factor in Bush’s selection as President—eventually went to the governor by a margin of 537 popular votes. Because Bush’s initial margin of victory was 1,784—less than half a percent of the total vote cast—an automatic machine recount was required under Florida election law. After this recount showed Bush still leading but by a markedly reduced margin, Gore sought a hand-recount in four Florida counties. A dispute then arose about the deadline for local county canvassing boards to submit returns to the Florida Secretary of State so that a winner of Florida’s electoral votes could be certified. After the Secretary of State, a Republican, refused to extend the deadline imposed by statute, the Gore forces won an extension from the Florida Supreme Court. The U.S. Supreme Court vacated the extension in Bush v. Palm Beach County Canvassing Board, 531 U.S. 70, 121 S.Ct. 471 (2000), saying that it did not understand on what grounds it had been granted, and remanded the case. On remand, the state supreme court reinstated the extended deadline. On that day, the Florida Elections Canvassing Commission subsequently certified the results of the election and named Bush the winner of the state’s 25 electoral votes.

The next day, Gore filed a complaint under a provision of Florida election law that specified “receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election” would be grounds for a contest. In the meantime, manual recounts of ballots proceeded in several counties, which showed net gains for Gore. Hand examination of ballots during this recount
unearthed a host of problems with the punch-card ballot system: some ballots showed punches for more than one presidential candidate; some ballots showed a choice of one candidate had been made, but the part to be punched-out (the chad) was still hanging from the card; and still other punch cards showed an indentation, but the punch had not removed the chad at all. In all these instances, the tabulating machines had not recorded any vote for President. The first of these circumstances constituted what were called “overvotes”; the second and third of these situations resulted in what were termed “undervotes.”

A state circuit court denied Gore relief, but this judgment was overturned by a 4–3 vote of the Florida Supreme Court. Although the state supreme court rejected Gore’s challenge to votes from two counties, it upheld his challenge to a decision by election officials in Miami-Dade County refusing to manually count 9,000 votes there on which the machines had failed to detect a vote for President. The supreme court directed that they count every “legal vote,” defined as “one in which there is a ‘clear indication of the intent of the voter.’” The state supreme court went on to so direct all other counties that had not yet manually counted and tabulated “undervotes.” Finally, the court directed that additional votes from manual recounts in two counties be included in the state totals, to the benefit of Gore. Bush then petitioned the U.S. Supreme Court for certiorari.

PER CURIAM.

***

[W]e find a violation of the Equal Protection Clause.

***

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. *** The state legislature may, if it chooses, select the electors itself *** [or provide that its] citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote *** is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. ***

*** Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. ***

*** The question before us*** is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card—a chad—is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. *** The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida’s basic command for the count of legally cast votes is to consider the “intent of the voter.” *** The problem *** [is] the absence of specific standards to ensure its equal application. ***

[T]he question is *** how to interpret the marks or holes or scratches on *** a piece of cardboard or paper which *** might not have registered as a vote during
the machine count. * * * The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. * * * [T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

* * * Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these * * * counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates in a way discernable by the machine will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

* * * When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

* * *

It is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption * * * of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. * * *

The Supreme Court of Florida has said that the legislature intended the State's electors to "participate fully in the federal electoral process," as provided in 3 U.S.C. § 5. * * * That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring.

* * * Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

* * * 3 U.S.C. § 5 * * * provides that the State's selection of electors "shall be
conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. * * * If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5.

* * *

This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

* * *

* * * [I]n light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the per curiam, we would reverse.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

* * *

In the interest of finality, * * * the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. * * * But * * * those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. * * * They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. * * * Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." * * *

* * *

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

Justice SOUTER, with whom Justice BREYER joins and with whom Justice STEVENS and Justice GINSBURG join with regard to * * * [part], dissenting.

* * *

[N]o State is required to conform to § 5 if it cannot do that (for whatever reason); the
sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its “safe harbor.” And even that determination is to be made, if made anywhere, in the Congress.

***

*** I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18, *** To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

***

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join *** and with whom Justice SOUTER joins as to Part I, dissenting.

***

II

Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by state courts. See 3 U.S.C. § 5 (providing that, where a “State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of . . . electors . . . by judicial or other methods,” the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes
(through “judicial” or other means), Congress is the body primarily authorized to resolve remaining disputes. * * *

***

There is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. * * *

The decision by both the Constitution’s Framers and the 1886 Congress to minimize this Court’s role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about. * * * Congress was fully aware of the danger that would arise should it ask judges, unarmcd with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was filled by Supreme Court Justice Joseph P. Bradley [a Republican].

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. * * *

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the “strangeness of the issue,” its “intractability to principled resolution,” its “sheer momentousness, . . . which tends to unbalance judicial judgment,” and “the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.” Bickel, [The Least Dangerous Branch (1962)] at 184. Those characteristics mark this case.

***

The perception that a majority of the Justices had engaged in a partisan act resulted in an erosion of public respect for the Court. The New York Times reported that only a slim majority (54%) of the public thought the Court made the right decision. A CBS News Poll released December 17, 2000, reported that only 48% of the public had “a great deal” or “quite a lot” of confidence in the Court, while 52% said they had only “some” or “very little” confidence in it. As for the outcome of the presidential election, the New York Times
reported that 50% of the respondents were satisfied and 45% were not, with Bush and Gore supporters dividing 90% of the time exactly as expected. (New York Times, Dec. 18, 2000, p. A21.)

Another setting in which political prudence counsels judicial avoidance, for reasons the Court identified in *Baker*, is the conduct of foreign affairs. Generally, dominance over this area of policy making (as Chapter 4, section C explains), has been ceded to the Executive for both constitutional and practical reasons. But occasionally challenges to an administration’s foreign policy have been raised because the prerogatives of Congress are implicated, especially those of the Senate. An excellent example is provided in the note on *Goldwater v. Carter*, which follows. That case dealt with a senator’s challenge to the termination of a treaty as a critical aspect of exercising the President’s constitutional power to normalize relations with a foreign country, in this instance the People’s Republic of China.

**NOTE—GOLDWATER V. CARTER**

A precondition to the normalization of diplomatic relations with the People’s Republic of China was the cessation of all diplomatic and official relations with Taiwan and the withdrawal of American military units there. On December 23, 1978, pursuant to a presidential directive, the State Department formally notified Taiwan that its Mutual Defense Treaty with the United States would end on January 1, 1980, under a provision of the pact allowing either of the signatories to terminate the agreement upon one year’s notice to the other party. President Carter acted on his own initiative in this matter and did not submit the notice of termination to either the Senate or Congress for approval. Eight senators, a former senator, and sixteen congressmen brought suit for declaratory and injunctive relief, challenging the President’s unilateral action.

The U.S. District Court for the District of Columbia, at 481 F.Supp. 949 (1979), held that the President acted unconstitutionally. The district court ruled that either of two procedures, absent here, were required—consent of two-thirds of the Senate or approval by a majority of Congress. The court held that unilateral action by the President could not displace some form of legislative concurrence because the termination of a treaty impacts upon the substantial role of Congress in foreign affairs. It rejected the proposition that the conduct of foreign affairs was a plenary power of the executive branch and observed that “[t]he same separation of powers principles that dictate presidential independence and control within the executive establishment preclude the President from exerting an overriding influence in the sphere of constitutional powers that is shared with the legislative branch.” Nor, reasoned the court, could the Executive’s action be regarded as merely ancillary to recognizing a foreign government. Alternatively, the court concluded that termination of the treaty amounted to a repeal of the “law of the land” and might then be thought to implicate congressional, as distinguished from just senatorial, action.

The U.S. Court of Appeals for the District of Columbia, at 617 F.2d 697 (1979), sitting en banc reversed the judgment of the district court and upheld the President’s unilateral action terminating the treaty. The court acknowledged the plaintiff legislators’ standing to sue on the theory that they had been completely disenfranchised by the President’s failure to submit the notice of termination for their approval. The appellate court, however, rejected the conclusions reached by the court below. As to the notion that the Senate’s power to ratify treaties implies a power to consent to their termination, the court pointed out that such an inferred power is clearly absent in other circumstances, as when a President terminates the services of an American ambassador. The court also rejected the proposition that the Supremacy Clause, with its reference to treaties as part of “the supreme Law of the Land,” had any bearing on this case, since the Constitution is silent on the matter of treaty termination and the clause in Article VI is addressed to assuring supremacy over state
law. In support of its ruling upholding the President’s action, the appellate court noted that, while the powers conferred on Congress in Article I are quite specific, those conferred on the President in Article II are general and do not speak to limitations on the conduct of foreign affairs. Observing that the President is the constitutional representative of the United States in foreign affairs, the court pointed out that he is given the constitutional power to enter into a treaty; and even after a treaty has obtained Senate approval, it is up to the President to decide to ratify it and to put it into effect. Article II, the court reasoned, makes it clear that the initiative in the treaty process rests with the President, not Congress. In the court’s view, the President’s authority is at its greatest when the Senate has consented to a treaty that expressly provides that it can be terminated on one year’s notice. The President’s action, concluded the court, gave that notice.

In its disposition of this case, Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979), the Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court with instructions to dismiss the complaint. Justice Rehnquist, speaking for Chief Justice Burger and Justices Stewart and Stevens, explained in an opinion concurring in the judgment that he was of the view that this case presented a “political question,” given that it involved foreign policy decisionmaking, in light of the fact that the Constitution is silent on the termination of treaties and the Senate’s role in the abrogation of treaties and since “different termination procedures may be appropriate for different treaties.”

Justice Powell rejected the proposition that this case presented a “political question,” but instead was of the view that this controversy was not ripe for review since “a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.” He added, “If Congress, by appropriate formal action, had challenged the President’s authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.” Justice Marshall concurred in the result. Justices White and Blackmun dissented in part, voting to set the case for argument.

Justice Brennan dissented, voting to affirm the judgment of the appellate court. He rejected the idea that the question was “political,” since, as he viewed it, the Court was asked to rule not on a foreign policy decision, but rather on the justiciable question “whether a particular branch has been constitutionally designated as the repository of political decision-making power.” Reaching the merits of the question, he concluded: “Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking government, because the defense treaty was predicated on the now-abandoned view that the Taiwan government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. * * * That mandate being clear, our judicial inquiry into the treaty rupture can go no further.”

In a closely related matter, a federal appeals court, in Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001), cert. denied, 534 U.S. 1039, 122 S.Ct. 613 (2001), refused to decide when an international agreement is a “treaty” within the meaning of the Treaty Clause of the Constitution. Several unions and a nonprofit group promoting the purchase of American-made products brought suit urging that the North American Free Trade Agreement (NAFTA) be declared unconstitutional on the grounds that it was never approved by a two-thirds majority of the United States Senate as required by the constitutional provision (Art. I, § 2, ¶ 2) governing treaty ratification. President Clinton had conducted the negotiations leading up to NAFTA under the so-called “fast-track” authority delegated to him by Congress in the Omnibus Trade and Competitiveness Act of 1988. Congress subsequently approved NAFTA on a majority vote in both houses without amendment and then passed implementing legislation. The reason for passing the trade
agreement as ordinary legislation was that NAFTA supporters could muster majority support, but not super-majority support, for the trade agreement in the Senate. Finding Goldwater “instructive, if not controlling,” the appeals court concluded that “[J]ust as the Treaty Clause fails to outline the Senate’s role in the abrogation of treaties, we find that the Treaty Clause also fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements.” In short, “the constitutional provision at issue does not provide an identifiable textual limit on the authority granted by the Constitution.”

The Debate over Justiciability

The Court’s concern with justiciability may appear dry and technical, but, in fact, it entails a controversy over judicial involvement as important as that surrounding the exercise of judicial review on the merits of constitutional questions. It may appear odd at first glance that the Court should concern itself at all with the form in which suits are cast. But, upon further reflection, the necessity of its insistence on dealing only with justiciable matters becomes apparent. If suits were not in the proper form, the integrity of the judicial process itself would be threatened. Unless the circumstances of a dispute appear in bold relief, the Court will not be able to scrupulously observe the wise canon of adjudication that admonishes it to decide only what it has to in order to dispose of the matter. The more precise the definition of the problem at hand, the greater the Court’s ability to see the law in relation to the dispute. The more remote or conjectural the controversy, the greater the Court’s lack of confidence in speaking about the law; the more likely, too, that it will either overshoot the bounds of its proper holding (thus forcing the Court later to retract an overbroad or misleading ruling) or err entirely in disposing of a case. Indeed—to use Professor Lon Fuller’s words—insofar as the judicial process is defined “by the peculiar form of participation it accords the affected party, that of presenting proofs and arguments for a decision in his favor,” the lack of a sharply defined issue may seriously jeopardize the due process guarantee that the parties shall have their “day in court.”27

Restricting the exercise of judicial power to only the most justiciable matters clearly serves the cause of judicial self-restraint, as is apparent in the following excerpt from Chief Justice Burger’s opinion for the Court in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222, 94 S.Ct. 2925, 2932–2933 (1974): “To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’” But tighter definitions of the elements of justiciability shrink—and perhaps close off entirely—the availability of the judicial process to disadvantaged individuals and groups in society. Wealthier plaintiffs can often wait until tangible and costly injury occurs to make their complaints justiciable, but, for plaintiffs of more modest means, the price of admission to the judicial process may be to risk a jail term or the loss of a job. It is the bias of this differential in what one has to put on the line to get to court that moves the judicial activist to loosen up on the requirements of case and controversy, ripeness, and standing.

The dilemma is that there are human costs in tightening the elements that make a case justiciable. The danger is that such costs may go unappreciated because they go unacknowledged. Opposition to the exercise of judicial power on the grounds that a dispute is not justiciable may sometimes mask judicial antipathy to the substantive issues raised and

thus be used—in the words of Justice Brennan—to “slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.” Barlow v. Collins, 397 U.S. 159, 178, 90 S.Ct. 832, 844 (1970).

Discretionary and Ministerial Acts

Finally, it is important to recall another important constraint on the exercise of judicial power. As Chief Justice Marshall held in Marbury, discretionary acts of government officials are not examinable by the judiciary. Court orders compelling or enjoining the performance of an act by an officer of the government are applicable only to ministerial duties. A ministerial duty is one that does not set policy. Thus, when Congress writes a law that gives Social Security recipients certain benefits, it makes policy, and, in doing so, Congress is entitled to be free of judicial direction. But the Secretary of Health and Human Resources and other employees of that federal department who merely use the formula contained in the statute to cut the checks are engaged in a ministerial duty, and the government can be held liable if it does not pay individuals what Congress says they are entitled to receive. A government employee engaged in the performance of a ministerial duty is one who can say with a straight face, “I don’t make policy, I just work here.”

As defined by the Court in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867), “[a] ministerial duty ** is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.” Delivery of a judge’s commission, the issue in Marbury, was, therefore, a ministerial act involving the Secretary of State. However, as the Court held in Mississippi v. Johnson, the President’s execution of a law passed by Congress—in that case, the Reconstruction Acts—was a discretionary act and thus not susceptible to an injunction directed at the Chief Executive. The reason was simply that the constitutional charge that the President “shall take care that the laws be faithfully executed” empowers wide latitude of political judgment, a judgment for which he (or she) is politically accountable either through the electoral process or through the process of impeachment and removal from office. Similarly, other discretionary acts, such as the President’s decision to veto a bill or not to prosecute an alleged violation of law—like Congress’s decision whether to appropriate funds—are beyond review by the courts.
Chapter 2

The Modes of Constitutional Interpretation

Judicial Review is the power of courts to pass upon the constitutionality of actions taken by any of the coordinate branches of government. Constitutional interpretation is concerned with the justification, standards, and methods by which courts exercise the power of judicial review. The exercise of judicial review is said to create a serious dilemma for the American system, which the alternative theories of constitutional interpretation—with varying degrees of success—strive to resolve. The nature of the apparent dilemma has been succinctly summarized by former federal appellate judge Robert Bork as follows:

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Over time it has come to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—is primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority’s legitimate right to govern. How can that be done?

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This is a greatly revised and expanded version of my “Constitutional Interpretation” originally published in Encyclopedia of the American Judicial System (1987), Ed. Robert J. Janosik, Vol. 3, pp. 972–986. To read more about the particular cases cited in this chapter, see the Table of Cases at the back of this volume.
This problem is compounded by the fact that federal judges are appointed, not elected, and that they enjoy life tenure. In a nation that emphasizes the responsiveness of officeholders to the wishes of the people as expressed through the ballot box, by what authority, then, do appointed, life-tenured judges sit in judgment on the validity of policies enacted by democratically elected officeholders?

Concern over judicial review’s inconsistency with democratic institutions deepens with the recollection that nowhere does the Constitution explicitly authorize the federal judiciary to engage in any sort of constitutional review. When the Supreme Court laid claim to legitimacy of judicial review in Marbury v. Madison, 5 U.S. (1 Cr.) 137, 2 L.Ed. 60 (1803), the reasons it offered had to go beyond the text of the Constitution. Although British, colonial, and state courts had occasionally asserted the power of judicial review and the Supreme Court itself apparently had assumed such a power to lie within its grasp even before 1803, the Court’s disposition of Marbury is regarded as both its first and its most authoritative statement justifying this seemingly extraconstitutional practice. Because the traditional argument in support of judicial review, as presented in Marbury and as supplemented by the writings of later proponents, has long been thought to be fatally defective in certain important respects, the controversy surrounding judicial review continues unabated.

The various modes of constitutional interpretation are concerned not only with addressing how the practice of judicial review is to be harmonized with democratic institutions, but also with the standard courts should use to determine whether a given legislative, executive, administrative, or judicial action contravenes the Constitution. The debate over constitutional interpretation, in short, is carried on through several alternative modes of judicial review that address the logical interconnection among three elements: the justification for the review power, the standard of constitutionality to be applied by the courts, and the method by which judges support the conclusion that a given governmental action does or does not violate the Constitution.

**The Traditional Theory of Judicial Review:**

**Constitutional Absolutism or Interpretivism**

It makes sense to begin consideration of constitutional interpretation with the theory articulated by Chief Justice Marshall in Marbury, not only because it is the oldest mode of interpretation but also because it is the view many, if not most, Americans hold. In the discussion that follows, strands of arguments advanced by Justice Hugo Black—surely the member of the Court in modern times to embrace most completely all aspects of this approach—are woven together with those of Marshall to lend clarity and coherence to its presentation.

Interpretivism or constitutional absolutism rests on the premise that there is no necessary inconsistency between the practice of judicial review and the principles of democratic government because the American system is a constitutional system, not a parliamentary system. A parliamentary system, such as Great Britain’s, is one in which the acts passed by the national legislature occupy an equal footing with the other documents that comprise Britain’s unwritten constitution. The legal equivalency shared by acts of Parliament and ancient documents like Magna Carta (1215) and the Bill of Rights (1689) make Parliament supreme, since the legislature can change the constitution at will. Judicial review would be out of place in such a system because it would contradict the deference that is constitutionally due Parliament. Ours, however, is a constitutional system, which means that the Constitution, not the legislature, is supreme. The Constitution limits all officers in all branches at all levels of government. The Supremacy Clause (Art. VI, ¶ 2) says so.

The connection between constitutional supremacy and judicial review requires two important arguments and several key assumptions. The first critical assumption is that the Constitution is a

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2. See his collected lectures, A Constitutional Faith (1968); see also Tinsley E. Yarbrough, Mr. Justice Black and His Critics (1988).
collection of rules. The assertion that ours is a constitutional system merely makes the point that the rules contained in the Constitution are to be regarded as supreme. When Congress passes a bill and that bill is duly approved by the President (or his veto of it is overridden), the law that results also contains rules. In a constitutional system, it is imperative that we distinguish between these two sets of rules. The rules contained in the Constitution are superior; the rules embodied in legislation are inferior. In the event that legislation passed by Congress conflicts with the Constitution, the inferior rules must give way to the superior ones. The provisions of the Constitution must prevail over legislation enacted by Congress because “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.” But this simply establishes that there must be some kind of constitutional review, not that there must be judicial review.

Chief Justice Marshall’s second line of argument in Marbury seeks to address why this constitutional determination is the function of courts, particularly the Supreme Court. This argument is drawn from Article III’s vesting of the judicial power of the United States in the federal courts. Judicial power is the power to decide real cases and controversies, which requires that judges apply rules to facts in order to decide cases. Where the facts of a case call into play two contradictory rules, the judge must first decide which is the valid rule before he or she can apply it. Thus, to use Marshall’s words in Marbury, “It is emphatically, the province of the judicial department, to say what the law is.” As the Supremacy Clause also makes undeniably clear, when a collision occurs between a constitutional rule and a statutory one, judges are duty-bound to respect the Constitution. Judicial review is, therefore, made to appear simply as the logical consequence of exercising judicial power. This line of argument appears to effectively sidestep the serious problem posed at the outset by adopting the position that the democratic quality of the American system is limited by its constitutional character.

In order for the Constitution itself to be supreme, the traditional theory of constitutional interpretation requires some additional stipulations. The most important of these assumptions characterizes the relationship of judges to the constitutional rule that they are applying. It is the relevant text of the Constitution that provides the standards for evaluating rules laid down by Congress and the President or others. The standard for assessing constitutionality, in other words, must be the text of the Constitution, not what the judges would prefer the Constitution to mean. Constitutional supremacy necessarily assumes that a superior rule is what the Constitution says it is, not what the judges prefer it to be. For constitutional absolutists, judicial review must be something akin to a ministerial, not a discretionary, act.

How, then, can an objective meaning of constitutional provisions be ascertained? The answer lies in two tools of constitutional interpretation: the “plain meaning” rule and the “intention of the Framers.” The former embodies the notion that the words of the Constitution are to be taken at face value and are to be given their “ordinary,” “accepted” meaning; the latter requires fidelity to what those who wrote or adopted the Constitution intended its provisions to mean. By relying upon these two tools, advocates of the traditional theory of constitutional interpretation seek to constrain judges to act only as faithful extensions of the document and thus give effect to constitutional supremacy.

Although Marshall’s decisions largely stressed the broad interpretation of constitutional provisions, the traditional approach to constitutional interpretation is typified by what is commonly called “strict construction.” The term “strict construction” means reading constitutional provisions literally so that government is permitted to do nothing more than what is explicitly stated in the document. Application of constitutional provisions in a literal fashion conveys the impression that constitutional interpretation is essentially a mechanical, uncreative enterprise. During the 1930s, when various Justices employed this mode of constitutional interpretation, critics caricatured it as “mechanical jurisprudence.” It is now immortalized in the following passage from Justice Roberts’s opinion for the Court in United States v. Butler, 297 U.S. 1, 62–63, 56 S.Ct. 312, 318 (1936):
There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

This posture of judicial detachment conveys a cut-and-dried, black-or-white impression about the existence of legal powers, rights, and duties. Seemingly, judges "don't make policy"; they "just work here."

This theory of constitutional interpretation is not without serious flaws. In the first place, the contention that provisions of the Constitution are capable of objective definition is dubious at best. Research by many political scientists (the classic works of Glendon Schubert and Harold Spaeth are illustrative) has amassed overwhelming evidence that demonstrates that the different political attitudes and values of judges are closely related to their voting behavior in cases where they disagree. That judicial decisions are correlated with political attitudes can be readily confirmed by observing as you read the cases in this volume how judicial creation or application of a constitutional doctrine changes with the political composition of the Court. Such evidence clearly supports the conclusion that judges do not decide controversial cases "objectively" and effectively refutes the pretension that adjudication is a mechanical enterprise.

Nor is it very likely that the interpretive tools of absolutism can assure objectivity. The plain meaning rule falls short because many words have more than one meaning, because reading is more than stringing together the standard meanings of words that make up a sentence, because the manner in which something is said may be much more important in conveying its meaning than the substance of what is said, and because the meaning of a word or phrase may only become apparent when considered in light of a paragraph, a whole page, or an entire document.

As a surefire guide, the intention of the Framers does not fare much better. The Framers, of course, were distinct individuals, who doubtless had strong opinions on many things and who quite often were probably forced to settle for less than they wanted. It is, therefore, highly unlikely that any of the products of their constitutional compromises could accurately be attributed to some single-minded purpose. It is also not obvious just

who should be counted as a Framer. Should the term include everyone involved in the process of adopting the Constitution, just those who actually voted on ratification plus those who proposed the Constitution, or just those actually at the Constitutional Convention? The larger the group defined as Framers, the spottier the body of historical evidence. And what about those who spoke or wrote little? Should we assume they agreed with others who left a more extensive record of their intentions behind?

Relying upon the intention of the Framers also affords scant protection against judges who settle upon a desired result in a case and then rummage through history until they find a Framer who agrees with them. There is, in other words, no insurance against judges who play the game of “pick your Framer.”

The attractiveness of the Framers’ intentions as an interpretive tool is often based on the tacit premise that fashioning a constitution is a truly historic event in the life of any political system—a unique opportunity to achieve justice by adopting rules that have the greatest prospect of being fair to all because they were agreed to before the game began and thus before anyone could know exactly how their interests would ultimately fare in the political process. So, it is argued, the intentions of those who wrote the rules are due special respect. However, since so many groups and interests were omitted from the framing of the Constitution—minorities, women, and the working class come readily to mind—what special claims to fairness do the rules adopted by an all-white, all-male, all-comfortable group of Framers, now long dead, have upon us? These are questions for which answers are sorely needed.

As Ronald Dworkin has shown, the assumption that law is a system of rules—some superior, some inferior—is also inaccurate. The depiction of constitutional provisions as superior rules was critical to the characterization of the judicial process as simply the application of rules to facts in deciding cases. But not all constitutional provisions can be accurately described as rules. While some provisions are rules, such as that specifying that a representative’s term shall be two years, or that each state shall have two senators, or that the President shall be at least 35 years old; other provisions of the Constitution are not, and they are the ones we argue about. The constitutional guarantees—that no person shall be deprived of life, liberty, or property without due process of law, or that no person shall be subjected to cruel or unusual punishment, or that private property shall not be taken for public use without just compensation—are principles, not rules.

The difference between principles and rules, as Dworkin has pointed out, is significant and has important consequences for the arguments of the constitutional absolutists. A rule has one of two conceivable relationships to a set of facts: Either the facts fall within the rule, in which case the consequence specified by the rule must be accepted, or the facts have no relationship to the rule, in which case the rule is irrelevant. Thus, Dworkin concludes, rules have an absolute, black-or-white, either-or quality.

Principles, on the other hand, are distinguished both by their generality and by the fact that they apply on a more-or-less basis, not an either-or basis. This is because principles embody concepts. They are ambiguous with respect to a set of facts unless the concept is more particularly defined. We cannot move from the generality of a concept to its consequences for a set of facts without some intervening standard. This want is supplied by adopting a particular conception of the idea stated by a constitutional principle. To ask whether the death penalty violates the Eighth Amendment’s prohibition on cruel and unusual punishments requires a specific conception of what is meant by cruelty. Does the proscription on inflicting cruelty ban the imposition of certain punishments per se or the manner in which any given punishment is to be carried out (requiring that suffering be

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minimized, perhaps), or does it require that a sense of proportion be maintained between the offense and its legal consequence so that “the punishment should fit the crime”? Does the Eighth Amendment require only one or some combination of these? Likewise, when the Fourteenth Amendment guarantees “equal protection of the laws,” which conception of equality must be adhered to: equality of opportunity, equality of result, or some other version? If due process is defined as the completion of certain procedural steps before a person can be deprived of life, liberty, or property by government, how many and which steps are required? Would all the requisites of a trial-type hearing be required in every instance where a deprivation is imposed: suspension or expulsion from a public school, revocation of a driver’s license, denial of an application for food stamps? If the principle underlying due process is fairness, would the same conception of fairness be appropriate in every instance?

Principles, therefore, are distinguished by the degree of their relevance in a case, and it is the particular conceptions of these principles that judges adopt that are used to measure the facts in a given case. Principles afford judges far greater latitude in interpretation because the question is one of how much process is due or what degree of equality the Constitution requires. The doctrines created by judges embody the specific conceptions that are necessary to give meaning to the principles in constitutional provisions. The clear-and-present-danger test, the original-package rule, the doctrine of separate-but-equal are but a few of the thousands of doctrines that together make up constitutional law. Those doctrines cannot be found in the Constitution; they are created by judges. So, the study of constitutional law is essentially the study of doctrines created by the Court because the Justices must construct doctrines to give specific meaning to the otherwise general principles contained in the Constitution. This is what Chief Justice Hughes was referring to when he declared that “the Constitution is what the judges say it is.” Recognizing that the Constitution contains principles as well as rules, therefore, means that the reality of interpretive freedom must be accepted and addressed. Absolutism does not accept this or appears to accept it only insofar as judges adopt the Framers’ conceptions or those of the common law. But this does little but return us to the difficulties just identified in dealing with the Framers’ intentions.

The cumulative impact of these criticisms is lethal for constitutional absolutism, at least in anything like its traditional form, since the cornerstone of the theory is the unstated, but crucial, assumption that judges do not exercise discretion. It was the implicit denial that judges have important matters of choice in interpretation that permitted the absolutists to assert that the Constitution itself was supreme—that the judges are merely a conduit through which the document speaks. But the constitution is an inanimate object and cannot speak, the instruments for divining its “objective” meaning have now largely been discredited, and the most important provisions of the Constitution declare principles, not rules. Although Dworkin would deny that this entitles judges to exercise discretion in applying the principles of the Constitution, that is, practically speaking, exactly what empirical research in political science suggests. That principles necessarily require interpretive discretion and that the exercise of discretion is substantially influenced by political values are things Presidents have intuitively understood when they have selected their nominees for seats on the federal courts, particularly the Supreme Court, or else why

7. A view strongly to the contrary is explained and vigorously defended in Antonin Scalia, A Matter of Interpretation (1997). Justice Scalia mounts a strong defense of textualism (that is, relying on the words of the Constitution) but is very critical of those who invoke the intentions of the Constitution’s Framers. His essay is published together with the reactions of four scholars (two of whom are tough critics) and Justice Scalia’s response.

go to the trouble—as Ronald Reagan and others did—to ask prospective nominees to disclose their position on abortion and other issues?

It is, therefore, quite inaccurate to imply, as Chief Justice Marshall did in Marbury, that the power of judicial review is justified because the judge confronts an immutable collision between an inferior rule and a superior one. In light of these criticisms, the fact is surely otherwise. The collision that Chief Justice Marshall portrayed is by no means inevitable. The truth is that a law is unconstitutional not because it conflicts with the Constitution, but because it conflicts with a doctrine created by the Justices to interpret the Constitution. Collisions between statutes and the Constitution are not inevitable; they are judge-made.

**The Balancing of Interests or Judicial Self-Restraint**

The failure of constitutional absolutism to recognize and address the reality of judicial discretion makes it highly vulnerable. Rather than evade the dilemma, the other modes of interpretation have attempted to deal with it directly. Although the two remaining frameworks of constitutional interpretation differ significantly in their enthusiasm for judicial review, they share a candid acknowledgment that courts are political institutions—that judges, like other government officials, have a wide range of choice in the decisions they make, and, in making such choices, their values and attitudes have a substantial influence. This concession activates the asserted dilemma, for if the Justices can be said to have the last word on the constitutionality of policy and if that judgment is substantially influenced by their political values, then—to use Justice Gibson's words—"the judiciary must be a peculiar institution." To adequately justify the power of constitutional review, appointed, life-tenured judges must be shown to possess a unique quality—one so paramount that it transcends the importance of democratic accountability. Justice is probably the only such value. Insofar, then, as courts actively exercise the power of judicial review, they must be shown to possess a unique capacity to do justice. Failing this, the exercise of constitutional review by judges is defenseless against the simple and devastating retort, "Who elected you?"

It is an undeniable fact of life to interest balancers that courts are political institutions. Although the quaint trappings and peculiar format of the judicial process make it appear unique, in fact the act of judging is really very much like the act of legislating. Every case requires a choice between competing social interests. Even an apparently uncomplicated personal injury case in which a pedestrian sues an automobile driver involves a form of policymaking. While the litigants obviously must have a personal interest in the dispute, they also personify the competing social interests of pedestrians and drivers. To decide, as the judge might, that the defendant must compensate the injured plaintiff is to hold that pedestrians and drivers have respective rights and obligations. When applied as precedent to decide similar cases in the future, such a holding distributes benefits and burdens and, therefore, constitutes public policy. Every case, then, calls upon a judge to weigh conflicting social claims and to allocate gains and losses. This process of balancing competing social interests, influenced as it is by the values of the decision maker, demonstrates the essential similarity between judges and other government officials. In accordance with the basic tenets of democracy, judges should strive to satisfy as many of these claims as is possible, since the happiness of the many is to be preferred over the satisfaction of the few.

This interest-balancing perspective readily translates into judicial self-restraint. When the constitutionality of a law is called into question, judges in a democratic society, it is argued, are duty-bound to respect the balance among interests struck by the statute for the
logical reason that, having been passed by a majority of legislators, it presumably satisfies more rather than fewer interests. It stands to reason, then, that statutes should be assumed to be constitutional.

Does this mean that judges should renounce judicial review? If not, on what basis could judicial review be justified? The uneasy answer is to hold judicial review to the minimum. According to Justice Frankfurter, who was as great an apostle of judicial self-restraint as Justice Black was of absolutism, the Due Process Clauses of the Fifth and Fourteenth Amendments furnished the only possible justification for judicial review and provided the only relevant standard for its use. The guarantee of due process supplied a justification for the exercise of judicial review because due process, by definition, refers to the assurance of procedural fairness. The restraintists’ test of constitutionality follows directly from this, since procedural fairness in this context is a guarantee only that the statute be a rational response to the problem it seeks to address. If a statute is presumed to be constitutional, the burden of proving that a law is unconstitutional rests with the party challenging it, and that burden can be met only by showing the law in question is unreasonable—that it is arbitrary, capricious, or patently discriminatory. This constitutional standard is known as the test of reasonableness.

A judgment of reasonableness is not to be confused with an opinion about the wisdom or desirability of a law. In no sense is it a question of whether the legislative branch enacted the best policy. If one visualizes the enactment of a law as the legislature’s response to a public problem, it is usually the case that the policy selected was just one option among many. In applying the test of reasonableness, the restraintists assert, a judge must focus on the policy selected by the legislature and answer the following straightforward question: Could this policy have been selected as a reasonable response to the problem? Under no circumstances is a judge entitled to compare the policy selected by the legislature with others it might have chosen, for this would be a test not of whether the policy enacted was reasonable, but of whether it was the best policy. In a democracy, the choice as to which is the best policy is reserved for popularly elected officeholders. When the Justices engage in comparative assessments to see whether the legislative branch enacted the best policy, the Court in effect substitutes its judgment about the wisdom of policy for that of the people’s elected representatives and assumes the role of a “super-legislature.”

This description of the method used by restraintists or interest balancers in constitutional cases would not be complete without two additional observations. First, all interests are to be treated equally. Since the Fifth and Fourteenth Amendments place life, liberty, and property on the same footing—that is, none is to be denied without due process of law—the test of reasonableness is to be applied to all statutes regardless of the different kinds of interests they touch. Second, the effect of applying the lenient test of reasonableness will be to sustain the validity of virtually all statutes subjected to constitutional challenge. This result is not surprising, since lessening the mortality rate of statutes was one of the principal aims of this mode of constitutional interpretation in the first place.

Although the perpetual claim of deference to majority rule dominates the case to be made for judicial self-restraint, other grounds contribute to the persuasiveness of this theory of constitutional interpretation. For the sake of clarity, these points can be summarized under three major headings: the functioning of the democratic system, the institutional capacity of the judiciary, and political prudence. The lines of argument that follow are drawn principally, but by no means exclusively, from the writings of two celebrated proponents of self-restraint, Justice Frankfurter and Alexander Bickel, late Yale law professor and former Frankfurter law clerk. Justice Frankfurter penned two famous dissenting opinions that are widely acclaimed as particularly insightful and eloquent statements of judicial self-restraint, those in West Virginia State Board of Education v.

To be sure, the insistence on respect for majority rule—and the assertion that anything less is tantamount to sanctioning minority rule—constitutes the flagship argument of judicial self-restraint. This is bolstered, however, by a related contention about the detrimental impact that the active use of judicial review has on the capacity of the democratic system to function effectively. Large-scale reliance upon the courts for the resolution of public problems, restraintists argue, will lead in the long run to the atrophy of institutions of popular government. Political parties and legislative institutions may not actually fall into disuse and completely fade away, but there is the distinct possibility that minorities, long subjected to discrimination, may—by taking their political demands to the courts rather than to parties and legislatures—consign political parties to perpetual domination by narrow, special interests. This would have the effect of collapsing the broad-based political coalitions and popular accountability that are the lifeblood of the democratic system.9

Advocates of judicial restraint also argue that many issues are simply beyond the institutional capacity of courts to resolve. Because the adversary system limits the sort of information that is presented and because cases are decided through reasoning by analogy from precedents, the institutional attributes of courts limit the kinds of things courts can do well or even do at all. As Bickel put it:

The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.10

It may be that the limited problem-solving capacity of courts is best illustrated by their inability to resolve what is called a “polycentric problem”—a tangle of interconnected issues that cannot be separated so the issues can be argued about by the affected parties one at a time within the framework of the adversary system.11 The distinctive feature of polycentric problems is that the questions comprising them can only be dealt with by addressing all of them simultaneously. The parts of our society—and particularly the sectors of our economy—have grown so interdependent that problems have increasingly assumed a polycentric form. This development does not bode well for greater reliance upon courts to solve our problems in the future.12 Furthermore, the institutional limitations of courts make them very unsuited to monitoring and supervising government policy in order to ensure long-run compliance with judicial decisions.13 And the judicial process is notoriously conservative. The most prominent characteristics of its dispute resolution—not deciding something unless it is absolutely necessary, resolving disputes on the narrowest ground,

closely adhering to precedent—work to minimize change, so that when minorities take their demands for large-scale change to courts, any victory they gain is likely to produce much less change than they could have achieved through the application of pressure in the democratic process. It can be argued that, in the last analysis, racial desegregation came to the Old South not because courts ordered it, but because citizens initiated marches, lunch counter sit-ins, boycotts, demonstrations, and other forms of militant nonviolence.

Even if these arguments can somehow be surmounted, important considerations of political prudence remain. If the judiciary is, to use Alexander Hamilton’s phrase in *Federalist* No. 78, “the least dangerous” branch, it is because it is the weakest. Strictly speaking, Justice Roberts was right when he described the power of the Supreme Court as “only * * * the power of judgment.” Courts may decide things, but the power to enforce them always lies in the hands of the executive branch. Although it is likely he never actually said it, there is more than a grain of truth about the Court’s vulnerability in the angry retort attributed to Andrew Jackson, an old Indian fighter, after the decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) upholding the land claims of the Cherokees, that “John Marshall has made his decision, now let him enforce it.” It was just such an awareness of the Court’s vulnerability when it comes to compliance with its decisions that moved Justice Frankfurter, during oral argument in the school desegregation cases, to observe, “Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.”

Justice Frankfurter’s point is simple, but effective: The Court should select occasions for exercising its power with care because the effectiveness of its decisions depends upon cooperation from the executive branch and whether people will accept its judgment. Above all, the Court should avoid putting itself in the humiliating position of announcing an important ruling and then having its command ignored.

The restraintists also counsel prudence because of the damage to the Court’s power and prestige that can result when Congress engages in political retaliation out of disagreement with the Court’s decisions. The weapons that stock Congress’s arsenal—proposing constitutional amendments, packing the Court, withdrawing some of the Court’s appellate jurisdiction, and initiating impeachment proceedings—ensure that in any war with Congress the Court will surely come out the loser. If so, then due regard for the vulnerability of its political position should lead the Justices to choose their battles wisely and conduct them carefully. Justice Frankfurter summed it up best in *Baker* when he warned: “The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”

Despite the strength of these arguments, interest-balancing itself has been weighed and found wanting. A major source of difficulty lies in the restraintists’ misreading of both democratic theory and practice. To begin with, it requires either an astonishing or a willful ignorance of the workings of Congress to contend that it so superbly measures up to the majority rule criterion as to warrant all the deference the restraintists claim in the name of democracy. Many features of Congress, such as the committee system, seniority, the filibuster, plurality election and low voter turnout, and the dominance of the trustee model of representation, regularly frustrate what might uncritically be called “the popular will.”

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which—while perhaps justifiable on other grounds—nevertheless flunk the restraintists’ own test of representativeness cold and “prevent the full play of the democratic process”—to use the words of Justice Frankfurter’s Barnette dissent.

But the real fallacy in the restraintists’ indictment of the Court stems from a badly flawed definition of democracy. Characterizing the Court as undemocratic because its members are not elected and, therefore, are not responsive to the popular will assumes that democracy can be defined simply as majority rule, but this is a grossly inadequate definition. Surely any concept of democracy must include recognition of those rights that make it possible for minorities to become majorities. In short, the restraintists have forgotten that minority rights are just as important a component of the democratic equation as majority rule is. Whether it is an undemocratic institution depends upon what the Court does. If the Court uses the power of judicial review to guarantee rights fundamental to the democratic process (freedoms of speech, press, and association, and the right to vote, for example) so that citizens can form political coalitions and influence the making of public policy, then why isn’t the Court just as “democratic” as Congress is?

Democracy is a term that describes a process by which citizens compete for the power to turn their preferences into law. It is a game of numbers that makes several important assumptions: that all votes are equal; that citizens have an equal right to participate; that the resources necessary to political competition are relatively evenly spread; and that wins and losses in the political process will be more or less evenly distributed over the populace. Different political majorities, it was expected, would rise and fall from one issue to another. Above all, the Founders supposed this to be a system that would avoid the specter of perpetual winners who make policy at the expense of perpetual losers; that is the definition of tyranny. It is a political truth too obvious to require demonstration here that women and various racial and ethnic minorities have been victimized by such pervasive discrimination that they have not enjoyed “equal” opportunity to participate in the political process. Since judicial self-restraint converts the Court into a virtual rubber stamp of Congress, chronic deference to policymaking by the legislative branch amounts to judicial complicity in exploitation. The fine impartiality with which the restraintists insist that abridgments of free speech, press, and association and other basic constitutional rights be given the same deference as is accorded legislation affecting property rights is likely to do little else than maintain the effective suppression of political grievances.

The institutional and prudential arguments that judicial self-restraint invokes are not beyond criticism either. Portraying the Court rather like a patient in delicate condition, the restraintists, rather in the manner of constitutional physicians, prescribe plenty of bed rest. But is the Court so weak? The fragile state of the Court’s political health may be more imagined than real. Restraintists never tire of asserting that the Court is a weak institution, but their endless repetition of this makes it so. Instead of husbanding judicial resources for a rare exertion, building the Court’s political muscle may depend on a regimen of more frequent exercise.17

And criticizing the Court for failure to deliver on public policy all by itself doesn’t ring true. That the Court should not involve itself with the larger problems of the day because it cannot solve them all alone is defeatist and fatalistic. The Court cannot solve problems all by itself because no institution of American government can. A system founded on principles such as the separation of powers and checks and balances necessarily requires cooperation among governing institutions; it does not permit unilateral policymaking. In such a system, the Court has a useful—indeed, indispensable—role as the legitimator of political rights and as a catalyst for those aggrieved to join together and assert their claims

in the democratic process. Furthermore, to the extent that the Court forswears its use of judicial review, it also fails to maintain an essential element in the system of checks and balances.

**Strict Scrutiny or the Preferred Freedoms Approach**

It was especially the problem of permanent minorities that gave rise to the brand of judicial activism with which we are familiar today. In its modern garb of strict scrutiny (known originally as the preferred freedoms approach), the active use of judicial review casts the Court as the institutional defender of the politically disadvantaged. It was not always so with judicial activism. Until the triumph of New Deal liberalism over the staunch conservatism of the Old Court in the late 1930s, the Supreme Court maintained an almost unblemished record throughout American history as the defender of the rich and powerful, something President Franklin Roosevelt’s political lieutenants never tired of pointing out. There was complete agreement among FDR’s appointees, who soon swarmed onto the Court, about pursuing a restraintist posture when it came to reviewing laws imposing business and economic regulation, but they broke into warring factions over whether similar deference was due legislation that directly infringed the constitutional guarantees of the First Amendment.

Because the wording of the Fifth and Fourteenth Amendments seemed to accord the interests of life, liberty, and property equal weight, as noted earlier, Justice Frankfurter and others asserted that all legislation must be judged by the same due process standard. Justices such as William O. Douglas, Frank Murphy, and Wiley Rutledge, however, argued that all constitutional rights were not equal. Embracing the premise that minority rights were absolutely essential to the democratic enterprise, these modern-day activists enthusiastically carried the implications of the argument to their natural constitutional conclusion: Since First Amendment rights and other freedoms are fundamental to the democratic process, legislation affecting their exercise is entitled to much less deference than that accorded to statutes regulating property rights and economic liberties. A democracy could still function without the vigilant protection of economic rights associated with capitalism but not without those communicative and associational freedoms that make it possible for political coalitions to form. The rights of speech, press, association, assembly, and other liberties necessary to the democratic process, they argued, constituted “preferred freedoms.”

The essential link between protecting these fundamental rights and ending the problem of permanent minorities was first alluded to by Justice Harlan Stone in his now-famous footnote 4 to an otherwise undistinguished opinion disposing of a perfectly anonymous business regulation case, United States v. Carolene Products Corp., 304 U.S. 144, 152–153, 58 S.Ct. 778, 783–784 (1938). Justice Stone mused:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. * * *

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. * * *

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *** or national, *** or racial minorities *** whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. * * *
Although tentatively expressed, the connection is readily apparent. Precisely because the Court is not a majoritarian institution, it has a constitutional responsibility to carefully scrutinize majority-passed legislation that directly limits the exercise of those rights by which minorities could express their political demands. Given the social isolation and prejudice encountered by easily identifiable minorities, without the guarantee of these fundamental rights their participation in the political process would be effectively muted, and conditions of exploitation would be perpetuated.

Although judicial practitioners of strict scrutiny agree with the restraintists that, in the area of economic policy and other laws regulating nonfundamental rights, the standard of mere reasonableness is justified, legislation directly abridging liberties fundamental to a democratic system must clear a higher hurdle. While the Justices employing this mode of constitutional interpretation do not always proceed in this neat and orderly way, it may provide clarity to set out the standard they apply as the following tripartite test (although somewhat different words have been used from time to time):

1. Where legislation directly abridges a preferred freedom, the usual presumption of constitutionality is reversed; that is, the statute or other enactment is assumed to be unconstitutional, and this presumption can be overcome only when the government has successfully discharged its burden of proof.

2. The government must show that the exercise of the fundamental right in question constitutes “a clear and present danger”18 or advances “a compelling interest.”

3. The legislation must be drawn in such a way as to present a precisely tailored response to the problem and not burden basic liberties by its overbreadth; that means, the policy adopted by the government must constitute the least restrictive alternative.

As compared with the test of reasonableness, this constitutional standard in a sense does demand that governmental policy be the best—not merely a rational—alternative. If the “best” policy is defined as that which is limited to addressing the problem while maximizing the freedom remaining, it is clear that only the “best” policy can be constitutional.

Strict scrutiny also can be contrasted with judicial self-restraint in another important sense. It is readily apparent that problems of conflict between governmental power and civil liberties cannot be resolved by somehow merely maximizing satisfaction of the competing interests. To the extent that strict scrutiny can be said to “maximize” satisfactions, it does so in a much more sophisticated way than does interest-balancing. If some rights occupy a preferred position, it stands to reason that everyone is entitled to those rights before claims to nonfundamental liberties can be granted. In any conflict, then, between persons attempting to have their claims to basic rights satisfied and other citizens seeking to have less important rights extended (for example, a property owner’s right to do with his property as he wishes), the claims of the former must prevail over the claims of the latter, even if the number of individuals in the first group is significantly smaller than that in the second.

The logic of Justice Stone’s Carolene Products footnote, however, carries the activists beyond the concept of preferred freedoms. The problem of permanent minorities requires more than just applying strict scrutiny to legislation directly limiting the means by which citizen demands are conveyed to policy makers; it also sometimes requires similar

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18. Early applications of strict scrutiny refer to the requirement that government demonstrate the existence of a “clear and present danger” rather than a compelling interest. That is because this mode of interpretation got its start in free speech cases during the 1940s where the battle lines were drawn between those who sought to toughen the “clear and present danger” test that had been put forward by Justices Holmes and Brandeis and those who argued that abridgments of free speech should be judged, as limitations on other rights were judged, by the test of reasonableness. See the discussion in Chapter 11, section A.
constitutional scrutiny of the outputs of the political process. All legislation creates categories according to which rights and obligations are distributed. All legislation, therefore, necessarily discriminates. Guaranteeing equal protection of the laws means only that government may not *invidiously* discriminate. This does not mean that government is forbidden to make any distinctions in the way it treats people, but it does require that categories in law not be drawn along lines of social prejudice to the detriment of “discrete and insular minorities”—to use Justice Stone’s phrase. Legal categories drawn on the basis of race or alienage, for example, are said to constitute “suspect classifications.”

The justification for strictly scrutinizing legislation that inflicts deprivations or imposes burdens on individuals on the basis of suspect classifications can be traced directly to the problem of permanent minorities. If “discrete and insular minorities” have been denied fundamental rights and are, therefore, excluded from the democratic process, the chances of their being victimized by “unfriendly” legislation are increased, if not ensured. Until obstacles to equal access have been removed from the political process, the Court owes an equal obligation to permanent minorities to carefully scrutinize legislation that imposes burdens that single them out.

In applying strict scrutiny to legislation containing a suspect classification, the judicial activists use the same three-part constitutional standard used to judge laws infringing a preferred freedom. A statute that explicitly discriminates on the basis of race, for example, is presumed to be unconstitutional. Government bears the burden of demonstrating that it has a compelling interest for distinguishing among citizens on that basis. Finally, it must also show that no other basis for categorization in the law could serve that compelling interest as effectively.

Impressive as these arguments drawn from democratic theory and practice may be, strict scrutiny exhibits several serious shortcomings. Some of these result from the democratic process-based justification offered for judicial review. In the first place, recent judicial activists such as Justices William Brennan and Thurgood Marshall, like original advocates of preferred freedoms such as Justice Douglas, labeled “fundamental” rights that have little connection to the functioning of the democratic process. When freedoms such as the right to interstate travel and the right to privacy are also acclaimed as fundamental, the class of freedoms placed in the preferred position has outstripped the democratic-process criterion. It is, therefore, incumbent upon the activists to reformulate their justification for determining which rights are fundamental and which are not. Without adequate justification, labeling some freedoms as “preferred” smacks of subjectivity and arbitrariness, and the determination of which rights are in and which are out becomes rudderless.

The process-based justification of strict scrutiny rooted in democratic theory is not only insufficient, but also potentially objectionable. For example, to argue that the right to free speech depends upon the importance of speech to the democratic process appears to put the cart before the horse. Human happiness is the end, and democracy is a method for attaining that end, not vice versa. This misconception of democracy as an end in itself, rather than as a means to an end, has important consequences for the exercise of free speech and other important rights. Fundamental rights, after all, are rights possessed by individuals. Justifying a liberty in terms of its contribution to democracy implies that the extent to which it can be exercised depends upon its utility to others. Thus, the Court has said repeatedly that impermissible speech (such as “fighting words,” obscenity, and libel) is distinguishable from permissible speech because the former lacks “redeeming social importance” (Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957)). This appears to accept the proposition that, to justify its sufferance by the state, what you say must have some utility to the community. The notion that your right to speak depends on whether your neighbors find it useful is repressive in roughly the same sense that majoritarian interest-balancing is thought to be
repressive. It contradicts our belief that a free society is one where individuals are ends in themselves and not merely means to an end. Citizens are entitled to constitutional rights for the simple reason that they are persons, not that they are members of a social group.

Strict scrutiny also does not take account of two important practical difficulties. One of these asks what we are to do when two fundamental liberties collide, as when someone’s free speech conflicts with another’s right to privacy or when freedom of the press seems incompatible with guaranteeing the fair trial of a criminal defendant. Strict scrutiny can guide our judgment when it is a matter of governmental regulatory power versus the exercise of civil liberties, but what are we to do when a dispute pits one preferred freedom against another? Nor is this a difficulty peculiar to strict scrutiny; it is one that also plagues constitutional absolutism, since the collision of two absolute rights also requires some rule of choice—something the text of the Constitution does not provide.

Finally, there remains the fact that the Court is politically vulnerable. Repeatedly invoking strict scrutiny will necessarily turn the Court into the representer of society’s underdogs. This invites efforts by a majoritarian Congress to curb the Court. Even if it is conceded that there are a number of permanent minorities, it does not follow that gathering all of them together will produce a viable political base from which the Court can hope to withstand the attack. The permanent minorities, after all, are “discrete and insular” principally in relationship to white, middle-class society. Permanent minorities often share overlapping characteristics: African-Americans and Hispanics, for example, count very heavily among another minority, the poor. So when one combines minorities, the increment gained by adding another group is offset by the fact that many of those individuals have already been counted. Then, too, there is the obvious point that, even if adding the minorities together does create a majority, they are politically disadvantaged and powerless, which is why the judicial activists involved the Court on their behalf in the first place. And the appearance of showing perpetual favoritism to the permanent minorities may well jeopardize broad-based public respect for the Court as an even-handed and principled institution. Injudicious and unrestrained applications of strict scrutiny invite political campaigns against the Court from politicians anxious to curry favor with the middle of American society.

The Court in American History:
Judicial Values and Constitutional Interpretation

Because the modes of constitutional interpretation can only be discerned from the opinions the Justices write, at best they are but frameworks for the justification of decisions. Opinions, of course, cannot explain how a decision was reached, much less account for all the factors that influenced it, such as the interaction with other Justices, the indirect effect of public opinion, the impact of current events, and subtle pressures indirectly exerted by the President and members of Congress. But by far the most important factor in explaining judicial decisions, as political science research has demonstrated over and over again, is a judge’s political attitudes and values. This was what Charles Evans Hughes was implicitly referring to when he asserted that “the Constitution is what the judges say it is.” The modes of interpretation essentially embody statements about the role of a judge, but what role a particular Justice selects depends substantially upon his attitudes and values not only with respect to specific public policies but also certain conceptions of justice. These factors interact to produce decisions at particular points in time, so historical context is relevant to forming any impressions about how Justices as individuals behave and how the Court as an institution operates.
This is not surprising, since many Justices have had previous experience in public office and it would be difficult to hold office without developing opinions on the political issues of the day. The fact that the office seeks the individual, rather than the other way around, underscores the accuracy of Hughes’ characterization. Indeed, appreciating that their appointments to the Court are a legacy that may endure for decades to come, most Presidents take care to choose judges that reflect their values. By and large, most Presidents are reasonably successful in the judicial legacy they intend to leave (and when they fail, it is most conspicuously in their first or only appointment to the Court). Because appointments to the federal judiciary are inescapably a product of politics, it would be naive indeed to expect any Justice to escape the influence of values and attitudes merely by donning a robe.

The invalidation of federal statutes by judicial review has not been a random occurrence in American history. Political forces both cause it and cure it. The negative impact of judicial review rises dramatically when the prevailing majority on the Court is of a different ideology than that controlling the Congress. In American history, this usually, but not always, occurs because there has just been a critical election that has reflected the impact of a major crisis (such as the outbreak of the Civil War or the onset of the Great Depression). In such an election—sometimes referred to as a realigning election—key groups in the electorate have shifted their political allegiance with the effect of handing the reins of government to the leaders of a new political coalition, usually the former minority party. Since members of Congress and the President are elected, the political complexion of those institutions (especially the House of Representatives) will register the change far sooner than will the Court, which lags behind by about a decade. The institutional disharmony between the political values of past and present usually provokes a Court-curbing confrontation leading to threatened or actual deployment of sanctions against the Court and, ultimately, to judicial retreat. This pattern has cycled through American history, creating several clearly recognizable Court eras.

Despite the appearance of Supreme Court Justices as being somehow above it all and the fact that the modes of interpretation deal with the Court’s activism and restraint in the abstract, the role of the Supreme Court in American history is probably best understood when the Court is seen in the context of what Samuel Lubell once called “the sun and moon theory” of American politics. Although the American party system has always been described as two-party-competitive, there is no denying that during long stretches of American history, one of the two major parties has dominated: The majority party, that is the party usually controlling the Congress and the Presidency, has been the center of the political system, setting the agenda and adopting the policies that have governed the Nation. It is within the majority party that the great issues of the day have been fought out. The minority party, occasionally electing a President (often a military hero) and sometimes controlling one house of Congress, has enjoyed only intermittent political influence. The political values that color an era of American history are painted by the majority party. The minority party, basking in the light radiated by the majority coalition, usually reflects a paler hue and normally assumes a me-too posture in campaigns, customarily arguing, not that the values and policies are wrong, but that it could do the job better. Thus, the

19. The best example is Franklin Roosevelt’s appointment of Justice William O. Douglas in 1939. Roosevelt died six years later, but Douglas served for 30 years beyond that.
20. It is reasonable to say that the Supreme Court lags a decade behind the elected branches of the government because the practical effect of giving federal judges life tenure has meant that the average Justice has served 16 years. Presidents average two appointments to the Court during a single four-year term.
Democratic Party dominated the American political system from 1801 to 1861, the Republicans from 1861 to 1933, and the Democrats again from 1933 to 1969. Since 1969, the country has been marked by a remarkable stretch of divided government, and this, like the earlier political watersheds that have marked the American party system, has had an effect on the Supreme Court as an institution and its relationships with the other branches of government.

From Jefferson to the Civil War

As explained in the background to *Marbury v. Madison* in Chapter 1, the election of 1800 was a watershed event. The defeat of John Adams by Thomas Jefferson converted the Federalists into a minority party, a status from which they never recovered (they were gone entirely by the early 1820s). The Democratic-Republicans under Jefferson and his successors held sway until Andrew Jackson emerged as a national political force in the mid-1820s and renamed the party Democratic to distinguish his followers from the National Republicans led by John Quincy Adams and Henry Clay. By 1840, the National Republicans were taken over by the Whigs who constituted the opposition to the majority-party Democrats until the Civil War. The era is usually broken into two separate periods, before and after the Era of Good Feelings that marked the administration of James Monroe. For purposes of discussing the Supreme Court, it makes more sense to break it into the periods of its two Chief Justices: John Marshall (1801–1835) and Roger B. Taney (1835–1864). Nevertheless, throughout the period, political control of the Presidency and both houses of Congress was nearly always in the hands of the Democratic-Republicans or the Democrats. For 52 of the 60 years between 1801 and 1861, unified government prevailed, that is the same party simultaneously controlled the Presidency, the Senate, and the House of Representatives.

Marshall and Taney were Justices with different visions of the country, largely reflecting the respective Presidents who appointed them, John Adams and Andrew Jackson. The constitutional doctrines employed by the Marshall Court reflected a vision of American society most famously articulated, perhaps, by Marshall’s fellow Federalist, Alexander Hamilton. America, in their imagination, was to be a commercial republic with a high standard of living that resulted from the sort of economic growth produced by financial and industrial capitalism and a society whose dynamism emanated from its cities. This stood in stark contrast to Jefferson’s preference for a rural society comprised mainly and, he thought, virtuously of yeoman farmers. Since the Federalists had permanently lost control of the elected branches of the federal government, advancement of the Federalist agenda fell to the Marshall Court, which devised many constitutional doctrines instrumental to furthering its vision of America.

23. Usually when the Supreme Court is referred to by its Chief Justice, this is done purely as a handy chronological cue and is not meant to connote that the particular Chief Justice exercised political control over the Court’s decisions. The Marshall Court, however, was distinctive not only for its outlook on constitutional interpretation, but for the unusual persuasive power possessed by the Chief Justice himself. It was Marshall who originated the notion of an Opinion of the Court, which replaced the existing convention that each of the Justices should write separate opinions (what were called seriatim opinions; that is, opinions delivered “one after another”). Of the nearly 1,100 Opinions of the Court delivered during his 34 years as Chief Justice, Marshall wrote nearly half; during his first decade on the Court, he wrote more than four out of five. Although Federalists ceased to be appointed to the Court after 1801, Marshall converted on-coming Jeffersonian Justices to his views and maintained an intellectual hold over them until his final years. The 15 Justices who served between 1801 and 1835 cast an astonishing total of only 104 dissents; Marshall himself accounted for just eight (the fewest of all in proportion to length of service). And, for the most part, the handful of cases disposed of by seriatim opinions while Marshall was on the Court were cases in which he did not participate.
The intertwined strands in the constitutional fabric woven by the Marshall Court are each discussed elsewhere in this book. The Marshall Court did much to develop and legitimate judicial review in *Marbury v. Madison*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), and Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), because judges from the bygone Adams Administration were the only Federalists still left in power, and judicial review was the only political means available to achieve their policy goals. Doctrines of the Marshall Court favored the national government over the states because the national government was thought to provide greater stability and uniformity of policy than could the states, and these conditions were essential to the growth of commercial enterprise and economic development (see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824)). The Marshall Court also vigorously enforced the Contract Clause (see Chapter 7, section A) to vindicate creditors' rights, because investors would not put their money in business enterprises and fuel economic development if debtors could wriggle out of financial obligations. Since anti-elitist forces—politicians more sympathetic to debtor interests—were in control of many state legislatures, this only reinforced the pro-national government bias of the Marshall Court, fueled its antipathy to lenient bankruptcy laws, and led it to expand the application of the Contract Clause to prevent the states from escaping bad business deals they themselves had made with investors.

Andrew Jackson's appointment of Roger B. Taney to succeed Marshall as Chief Justice signaled the dawn of a new era. The Taney Court tended toward a much looser view of the federal system and the Marshall Court's nationalist tone was replaced by a greater tolerance of state interests and local control (see Mayor of City of New York v. Miln, 36 U.S. (11 Pet.) 102, 9 L.Ed. 648 (1837)). It also permitted a greater state role in the regulation of interstate commerce (Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852)), a view broadly reflective of the democratic values of the Jacksonian Age: a commitment to greater popular rule and a firm belief that governmental policies should serve the broader interests of the community. A loosening of the joints in the federal system was accompanied by a receptiveness to maintaining competition in a world of small business capitalism, there being no giant corporations yet. The democratic capitalist values evident in Andrew Jackson's hostility to the National Bank, his deep distrust of the concentration of economic power in the hands of an economic elite—typified by the Bank's president, Nicholas Biddle—and his refusal to sign off on rechartering the Bank were paralleled by the Taney Court's decision in Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837). In clear disagreement with the defense of vested rights that Marshall would have mounted, the Taney Court ruled that, in the absence of an explicit statement, a contract would not be read so as to give a state-chartered corporation a monopoly.

The same Taney Court that tolerated a good deal of decentralization in the American political system when it came to economics also tolerated slavery. In what probably is still regarded as the most infamous decision in American history, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), the Taney Court held that slaves were not "citizens" within the meaning of the Constitution and thus could not claim any of the rights secured to citizens of the United States. Nor could the national government regulate, much less prohibit, slavery in the territories since the right to own slaves was a local property right. The *Dred Scott* decision effectively invalidated the Missouri Compromise, reopened the argument over the expansion of slavery into the territories, fueled the rise of the Republican Party, and lit the fuse that touched off the Civil War.
The Era of Republican Dominance: From the Civil War to the Great Depression

The election of Abraham Lincoln as President in the critical election of 1860 began an era of Republican dominance that lasted seven decades. Talking of this time-span as a whole conceals some real differences, however, and the period therefore is best broken in two at the mid-1890s.

What emerged from the war was a renewed sense of nationhood—“an indestructible Union of indestructible States”—rather than a confederation. Both literally and figuratively, reference to “the United States” changed from that of a plural noun to a singular one. People no longer said “the United States are”; instead they said “the United States is.” Unfortunately, during and in the immediate aftermath of the Civil War, the Supreme Court found the political going particularly tough. The time lag that so severely marks the institution had its effect: Holdover Democratic Justices, in combination with some of Lincoln’s moderate appointees, locked horns with the Radical Republicans in Congress. The Radicals were bent on imposing punitive policies on the South and were deaf to many claims about the violation of civil liberties during the war and after. The consequence was a full-blown version of the Court-curbing phenomenon in which Congress sawed off part of the Court’s appellate jurisdiction. The wrath of the Radicals was even more fiercely aimed at Lincoln’s successor, Andrew Johnson. Johnson was impeached for violating the Tenure of Office Act (which required Senate approval of the President’s decision to fire a department head, legislation the Court gratuitously invalidated in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21 (1926)), but the President survived removal from office by a one-vote margin in the Senate. Johnson, never the diplomat and always the moderate, was also stripped of the power to make any appointments to the Court when Congress legislated a reduction in the Court’s size from 10 to eight. This meant that the next two vacancies on the Court would go unfilled. Moderation, although in short supply on Capitol Hill, was much more abundant among the electorate, who showed this at the polls by making control of Congress really competitive.

What emerged in the 1870s and 1880s was a renewed Whig version of Republicanism that promoted expansion of the country across the continent by policies that encouraged settlement and economic development and emphasized internal improvements. Governmental policies, particularly at the state level, constrained the greedier and more destructive aspects of capitalism. The Granger Laws, for example, which sought to prevent gouging by grain elevator operators and other businessmen farmers dealt with, were easily sustained (see Munn v. Illinois, 94 U.S. (4 Otto) 113, 24 L.Ed. 77 (1877); and see also The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873)).

The regulation of business, which the Court generally viewed with constitutional approval before the 1890s, provoked increasingly fierce judicial opposition after that because the attitudes and values of a majority of Supreme Court Justices shifted substantially to the political right. In what Mark Twain dubbed “The Gilded Age,” the turn-of-the-century Court came to be dominated by corporation lawyers partial to the interests of business and the wealthy.\(^\text{24}\) The result was a Court that used judicial review to impose on the country an approach known as Social Darwinism.\(^\text{25}\) As Chapter 7, section B explains, this vision of society, characterized by such notions as “the survival of the fittest,” embraced the principle of political economy known as laissez faire capitalism according to

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\(^{24}\) Benjamin N. Twiss, Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court (1942). See also Arthur S. Miller, The Supreme Court and American Capitalism (1968).

\(^{25}\) Richard Hofstadter, Social Darwinism in American Thought (Rev. ed. 1955), Chs. 2, 3.
which the determination of most matters in life was consigned to the free market. The role
of government was strictly limited to maintaining order, protecting private property, and
preserving the sanctity of economic rights that made possible the accumulation of wealth.

Wielding the club of judicial review wrapped in doctrines such as dual federalism and the
“liberty of contract,” the Court between 1895 and 1936 repelled efforts by Congress and
state legislatures to legalize the right to join unions, require safe conditions on the job,
establish a minimum wage, limit the maximum hours employees could be made to work,
and end child labor. It took the adoption of the Sixteenth Amendment in 1913 to trump
the Court’s decision in Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912
(1895), striking down the most modest of graduated income taxes (2% on all income in
excess of $4,000 a year). In judging regulatory policies adopted by the elected branches
of government, the Court elevated economic liberties and property rights to a forbidding
constitutional plane, demanding that government clearly demonstrate some special interest
to permit their restriction. Blind to the economic exploitation of working people whose
labor made possible the economic development of the country, the Court also turned a deaf
ear both to the ever-increasing segregation of African-Americans and the political,
economic, and social subordination of women.

By the 1930s, Professor (later Judge) Henry Edgerton could write with discomforting
accuracy that the role of the Supreme Court in American history had been marked by an
almost single-minded devotion to defending the interests of the powerful and wealthy.
Speaking of the acts of Congress that the Court had declared unconstitutional up to that
point, Edgerton said: “There is not a case in the entire series which protected the ‘civil
liberties’ of freedom of speech, press, and assembly; * * * not one that protected the right to
vote; * * * not one which protected the vital interests of the working majority of the
population in organizing or in wages * * *.” On the contrary, he found the Court’s record
littered with “the Dred Scott case, which helped to entrench slavery, * * * cases which
protected the oppression of Negroes; the employers and workmen’s compensation cases,
which protected the hiring of women and children at starvation wages; the income tax case,
which prevented the shifting of tax burdens from the poor to the rich; and * * * many * * *
[other] instances in which the Court’s review, * * * [did] harm to common men.”26

Democratic Dominance Returns: From the New Deal to the 1950s

The prolonged and widespread misery of the Great Depression brought a keen appreciation
that legal doctrines could not long survive when they squarely contradicted real-world facts.
Among the many lessons taught by the economic hardship of the 1930s were the reality
of interdependence among the sectors of the modern industrial economy and the error of
leaving people’s welfare exclusively to be determined by the free market. With a quarter of
the workforce unemployed by 1934, President Franklin Roosevelt presented an historic
agenda of recovery and reform policies that carved out for government a new role of
stewardship over the economy. In the realigning election of 1932, the American electorate
handed political control to the Democratic Party. Four years later, by a huge popular
margin, the public registered its emphatic approval of FDR’s policies, which were based on
the acceptance of positive government, that is the concept that government should do for
the people what they could not do for themselves or could not do as well. As in previous
instances where the abrupt coming to power of a new political coalition set the elected
branches at loggerheads with the judiciary, so the New Deal forces controlling
the Presidency and the Congress faced a head-on collision with the Court caught in a

(1937).
time-warp. After the Old Court repeatedly invoked constitutional doctrines now thoroughly out of popular favor to stymie the policies favored by FDR and his political allies, the President launched his controversial campaign to “pack the Court.” Although Roosevelt was unsuccessful in actually adding more Justices, his effort ultimately succeeded when the Court conducted one of its face-saving retreats (see Chapter 5, section B). As more and more vacancies occurred and the President filled them with appointees who shared his values, the Court fell solidly in line behind his economic policies and those of future Democratic administrations.

This “constitutional revolution” put an end to several things: the Court’s role as special protector of the wealthy and powerful, the Court’s use of constitutional doctrines to impose on the country its preferred view of economic policy, and the Justices’ proclivity for justifying decisions in the language of constitutional absolutism (or “mechanical jurisprudence”). When it came to reviewing statutes imposing economic regulation, the Court saw the issues through the lens of judicial self-restraint. But the constitutional revolution of the 1930s also left a legacy of disagreement: Were the Justices bound to apply judicial self-restraint to all legislation, regardless of the interest affected? Was the Court required to apply the same test of constitutionality in judging whether civil liberties were infringed as when there were claims that economic rights were violated? Roosevelt’s appointees (which by 1943 constituted eight of the nine Justices) split (evenly) over the answer.

Since the early 1940s, this controversy has been at the core of the Court’s politics. In terms of the modes of constitutional interpretation, it is reflected in the great debate among the Justices over interest-balancing, on the one hand, and strict scrutiny, on the other. At their cores, these frameworks of judicial review embrace very different concepts of justice and therefore reflect different political values and attitudes about civil rights and liberties. Generally speaking, fairly cohesive control over the Court’s constitutional decisions by advocates of strict scrutiny has been concentrated in two modern periods: 1943–1949, during which the Court did much to lay the foundation for the protection of First Amendment rights; and the years of the Warren Court (1953–1969), which saw the flowering of strict scrutiny in the protection of civil rights and liberties, both generally and in reinvigorating the meaning of “equal protection of the laws.”

The Warren Court

The vision of American society that animated most of the Warren Court’s constitutional decisions had at its center a firm belief that individuals were ends in themselves, not simply means to an end, and therefore were morally and legally entitled to equal dignity and respect. The specific conceptions of constitutional principles that the Warren Court articulated strongly reflected the values of libertarianism and equalitarianism. For the first time in American history, the Court came to see itself as the defender of out-groups in society. The means for the achievement of this liberal vision was the application of strict scrutiny to laws that directly infringed fundamental rights, or unequally distributed fundamental rights, or invidiously discriminated among citizens on the basis of suspect classifications (characteristics such as race over which people had no control, which were a basis for stereotyping, and which historically made individuals targets of prejudice). A Court committed to the protection of fundamental rights and equal treatment necessarily assumes the role of defending the powerless and unpopular because, although all citizens are equally entitled to what the law guarantees, the exercise of constitutional rights means more to powerless individuals. Since people with unpopular views often must resort to confrontational means to voice their message, this makes it more likely they will lock horns with the police or other officials, and therefore that a legal controversy will arise. If the change
in constitutional doctrines in the 1930s from absolutism to interest-balancing amounted to a “constitutional revolution,” the Warren Court’s shift to regularly applying strict scrutiny in civil rights and liberties cases created a “second constitutional revolution” in the 1950s and 1960s.27

There were flickers of this vision during the early Warren Court years (1954–1957), especially in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), which abandoned the “separate but equal” doctrine that perpetuated racial segregation, and other decisions in which the Court defended the First Amendment rights of individuals targeted in anti-Communist “witch hunts” of the early 1950s. These rulings provoked an unsuccessful Court-curbing campaign in 1958 by certain elements in Congress (see Chapter 3, section C) and a brief intermission in the Court’s judicial activism resulted. But with the retirement of Justice Frankfurter in 1962, the Warren Court’s commitment to its role as a defender of politically powerless out-groups in American society resumed. Among the many facets of the Warren Court’s constitutional revolution were the vigorous expansion of First Amendment rights, the application of virtually all provisions of the Bill of Rights against state infringement (see Chapter 8, section A), the reapportionment revolution (see Chapter 14, section D), the recognition of the constitutional right of privacy (Chapter 10), and the extensive development of Fourth, Fifth, and Sixth Amendment rights, including the application of adversary system protections to the pretrial stage of the criminal process (see Chapters 8 and 9).

The Justices in the Era of Divided Government: The Burger and Rehnquist Courts

The Warren Court era ended with the retirement of the Chief Justice and the resignation of Justice Fortas under politically charged circumstances.28 This spelled substantial change for the Court because the new appointments would come from a President with political values noticeably to the right of the out-going Johnson Administration that had appointed liberal Justices such as Abe Fortas and Thurgood Marshall. Moreover, as presidential candidate in the 1968 election, Richard Nixon had made an issue of the Warren Court’s criminal justice decisions, which he characterized as “weakening the peace forces as against the criminal forces in our society.” As a self-described “judicial conservative,” Nixon pledged to nominate individuals to the Court who would “interpret the Constitution, and not * * * [go] outside the Constitution.” Nixon appealed during both his 1968 and 1972 presidential campaigns to “‘Middle America’—that broad segment of average men and women—unblack, unpoor, and unyoung—* * * [who were] [h]arassed by minority and youth protest, bewildered by assassinations, frustrated by an aimless war, victimized by mounting crime, and threatened by wide-spread rioting, * * * who thought society was coming apart at its seams and * * * felt powerless to do anything about it.”29 The election of 1968 was unusual in American history because—unlike the realigning elections of 1800, 1860, 1932, and 1936—it brought an era of party dominance to an end but did not replace it with unified control by a new political coalition. In stark contrast to previous periods of American history, nearly two-thirds of the time between 1969 and 2006, political control of the national government was divided between the parties (with one party controlling the Presidency but not Congress or vice versa, or one party controlling the Presidency and one house of Congress but not the

other). Some experts on political parties have called this “dealignment,” but whatever the term used, the primary features of this era of divided government are clearly evident: polarized political party leaders frequently using harsh rhetoric sitting atop parties that are narrowly based; a disaffected electorate that feels alienated from both parties and turns out to vote less and less; a growth in third parties, political independents, and ticket-splitting; government that never starts and elections that never end; politicians preoccupied with symbolic actions rather than solving problems; a thoroughly personalized Presidency less attached than ever to the party in Congress; and televised politics of confrontation instead of informal negotiation and workable compromise. In the case of the Court, where the margin of decision has been close and the stakes high, this was reflected in a long line of bruising, demeaning, and embittering judicial confirmation battles (beginning with the Fortas Affair in 1968 and extending through the rejection of two Nixon nominees to the Court in the early 1970s, the failure to approve the nomination of Robert Bork in 1986, and the paper-thin 52–48 Senate vote to confirm Justice Clarence Thomas in 1990). In the Court’s performance, it was reflected in the proliferation of opinions that run longer and reflect less agreement than ever among the Justices. Polarization in the political system has been matched by polarization on the Court, where like-minded Justices at the extremes vote together more and more and move further and further away from those at the other end.

Beginning with Nixon’s appointment of Warren Burger to succeed Earl Warren as Chief Justice in 1969, every Supreme Court Justice but two (Justices Ginsburg and Breyer) has been named by a Republican President. In 1986, Burger was persuaded to retire and was replaced by President Reagan’s elevation of William Rehnquist to the post (he had been appointed an Associate Justice by Nixon in 1972). The themes that dominated the constitutional rulings of the Burger and Rehnquist Courts were very similar, quite definitely to the right of the Warren Court, and the Justices’ decisions grew more and more conservative. Although landmark decisions of the Warren Court (on school desegregation, reapportionment, Miranda rights, privacy, and freedoms of speech, press and association) were not overturned, they were not expanded. Mostly, they were trimmed, sometimes severely. Because of the preeminence of divided government and an apparent interest of Justices in remaining on the Court as long as humanly possible, nominees did not stream on to the Court in sufficient numbers to jettison strict scrutiny in favor of across-the-board interest-balancing in civil liberties cases. Indeed, despite repeated efforts by Republican Presidents to appoint Justices who would overturn Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, the 1973 Burger Court decision constitutionalizing a woman’s right to choose on abortion, the decision stands, although it has been pared (see Chapter 10). The result has been a redirecting of the Court’s constitutional jurisprudence toward the interests of Middle America and away from the interests of women and minorities. Evidence of this constitutional compromise or moderation is particularly evident in the emergence of what has come to be known as intermediate or middle-tier scrutiny (see Chapter 14, section E), an approach that might be described as half-way between strict scrutiny and interest-balancing. The Burger and Rehnquist Courts applied this constitutional approach to judge statutes distinguishing between individuals on the basis of gender and illegitimacy (Chapter 14, section E) and laws regulating symbolic speech (Chapter 11, section C) and advertising (Chapter 11, section E).

The Burger and Rehnquist Courts increasingly adopted a “dual federalist” view of the federal system, buttressing the decision-making independence of the states against regulatory policies
adopted by the Congress (see Chapter 5, section C). Notably, Justices on the Rehnquist Court for the most part sharpened the teeth of the Takings Clause of the Fifth Amendment by strengthening or expanding the rights of property owners to just compensation in the face of zoning regulation by the states and municipalities (see Chapter 7, section C). The Burger and Rehnquist Courts also showed far greater sensitivity to the interests of corporations and property-owners than could have been imagined by the Warren Court, especially when First Amendment issues were raised: striking down substantial campaign finance regulation on the grounds that the expenditure of money is a form of expression (Chapter 11, section D), protecting the free speech rights of corporations (Chapter 11, section D), recognizing a constitutionally protected right of commercial speech (advertising) (Chapter 11, section E), and negating any free speech right to picket on private property, such as shopping malls (Chapter 11, section B). All of this is hardly surprising, since the interests served by these constitutional developments are those of business and the wealthy, groups usually associated with the Republican Party, which has controlled the White House (and therefore nominations to the Court) for most of the last four decades. Whether these trends of the recent past deepen or are arrested under Rehnquist’s successor, Chief Justice John Roberts, depends on whether the pattern of divided government confirmed by the 2006 election continues or whether, because of the Iraq war and the many scandals that are the legacy of George W. Bush’s administration, a dramatic realignment of the political system may be underway.

Speaking Up and Speaking More

Highlighting political trends in the Court’s constitutional decisions of the past necessarily supposes clarity in the Court’s rulings. Regardless of the era, the Court speaks most clearly, and therefore most effectively, when it speaks with a single voice—a principle that Chief Justice Marshall took very much to heart. Even as late as the 1920s, Chief Justice Taft admonished his colleagues to abide by a rule of “No dissent unless absolutely necessary.”

Beginning, however, with the escalating disagreement among Franklin Roosevelt’s appointees over which mode of interpretation should be applied in judging the constitutionality of statutes challenged as violating a “preferred freedom,” the Justices have foregone an institutionally-oriented perspective for one that has been increasingly individualistic. Rather than minimizing the prospect of many voices speaking, the Justices have come to regard it as more important to get on the record with their own views, or to address an audience beyond the conference room, or to rebut every opposing point of view. As Exhibit 2.1 shows, conflict on the Court, as measured by the level of dissent, escalated rapidly during the 1940s and remains high. Except for a dozen of the last 80 Terms, the level of dissent in constitutional cases has been higher than statutory cases and, over the last decade, has run 15–20 percentage points higher.

The readiness to dissent has been accompanied by a shrinking output of cases, greater fragmentation among the Justices, and more frequent and longer opinions. Anyone who reads the Justices’ opinions unedited cannot fail to notice that they frequently contain long, discursive paragraphs and footnotes that have the feel of scoring debater’s points in rebutting and often re-rebutting the arguments of fellow Justices. In short, members of the Court today decide less, speak more often, and take longer to say it than at anytime in history. Exhibit 2.2 presents several measures that support these conclusions. Across the 80 Terms since the Court acquired practical control over its docket, the trend is unmistakable: With each passing Court, the Justices have averaged more opinions per constitutional case, more pages per case in the United States Reports, and—perhaps most alarmingly—more cases decided by plurality opinions. It is likely, of course, that some of the nearly four-fold increase in the average number of pages taken to dispose of a single constitutional case is
Exhibit 2.1  Dissent Rates in Constitutional and Non-Constitutional Cases
October 1926–2004 Terms
explained by the increasing complexity of legal questions litigated in a mature, industrially-
developed nation that recognizes a larger number of individual rights than was true in Taft’s
day. A society whose parts have become more and more interdependent, one that has
recognized more and more freedoms, and therefore one where considerable fine-tuning is
required to harmonize conflicting legal interests would logically require judicial opinions
that explain more. But however true this may be, the simultaneous increase in all the
measures presented in Exhibit 2.2 more clearly suggests that the Justices, influenced by
sharply different values, have become much more outspoken. As with political elites in
America, they have become more and more polarized. The tenor of constitutional disputes—
like the rhetoric of political disputes in the country generally—has gotten sharper. It is a
sobering observation, for example, that on average today more than four constitutional cases
each Term will be resolved without an Opinion of the Court, that is to say by a plurality
opinion. A plurality opinion is one written by a Justice in the majority that announces the
judgment of the Court but whose reasoning is shared by only some, not all, of them. Because
a majority of Justices can’t agree on the reasoning, a plurality opinion cannot bind the
Court. Such a thing was unheard of in Taft’s day. But during the 1970, 1975, and 1988
Terms, the number of plurality opinions climbed into double digits—accounting at high
tide for nearly 30% of all the Court’s nonunanimous constitutional decisions.

In sum, the trends revealed in Exhibit 2.2 present the unsettling prospect of the Justices
reverting to something like the delivery of seriatim opinions. It was this practice of each
Justice speaking individually that led Marshall to create the Opinion of the Court in the
first place. As he well understood, the wagging of many tongues weakens the Court
politically and sows confusion about what in fact it has decided. If what has gone before is
any guide as to what is yet to come, betting that these trends will be arrested, now that a
new Chief Justice has taken the helm, is a longshot.

The Court and Political Accountability

This brief tour through the eras of American political history returns us to the central
problem that is said to plague constitutional interpretation: the undemocratic nature of the

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Supreme Court's role as the ultimate interpreter of the Constitution. But in this there may be less than first meets the eye. In fact, the dilemma posed at the beginning of this chapter is an embarrassment only when it comes to the justification of judicial review. However, when it comes to explaining the Court's role in the political system, it is essentially a false dilemma. The real issue is not whether the Supreme Court is undemocratic, but for how long it is undemocratic (if indeed it is undemocratic at all, since that depends on what is meant by democratic).

To be sure, as this historical overview of the Court has shown, there have been critical points in American history where the time lag that inheres in the Court has put it politically at odds with the elected branches. But given the many weapons in Congress's arsenal to bring the Court to heel, the fact that no one—not even Supreme Court Justices—can live forever, and the inevitability that both the President and the Senate will take into account the political attitudes of any judicial nominee, it is only a matter of time before the Court will fall in line with the popularly elected institutions of the government. Given these limitations on the duration of any disagreement between the Court and Congress, the reality would appear to be a far cry from depicting the Court as a loose cannon, laying down barrage after constitutional barrage, forever staving off the enactment of policies the American public favors. However much constitutional absolutists—such as Justice Black—may have decried it, the political reality is that the rights enunciated by the Supreme Court in the long run can never be other than what the rest of the political system will permit.

Checks and balances see to that. The long and short of it, therefore, is that constitutional rights can never have an existence that is independent of politics. At worst, the exercise of judicial review postpones the inevitable.

As Gerald Rosenberg has argued, "U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts." To sum it up, "A court's contribution * * * is akin to officially recognizing the evolving state of affairs, more like the cutting of a ribbon on a new project than its construction."

This book is organized around the concepts and doctrines of American constitutional law instead of a chronological narrative because that is what makes the study of law different from the study of history. That the chapters do not continually repeat the central truth that the Court's work product is largely determined by the political values and attitudes of its members, does not diminish the message that a change in the composition of the Court is usually the best clue to why judicial doctrines change. An understanding of constitutional law more often requires awareness of political facts than it does knowledge of abstractions. Nearly a century and a quarter ago, then-to-be Supreme Court Justice Oliver Wendell Holmes, Jr., wrote:

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31. Political science research has not been able to demonstrate much of a relationship in general between how judges decide cases and the method (election vs. appointment) by which judges are selected. See Craig Ducat, Mikel Wyckoff, and Victor Flango, "State Judges and Federal Constitutional Rights," 4 Research in Law and Policy Studies 155 (1995); Victor Eugene Flango and Craig R. Ducat, "What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort," 5 The Justice System Journal 25 (1979); Philip L. Dubois, From Bench to Ballot: Judicial Elections and the Quest for Accountability (1980). But there is evidence that having to face the voters in the near future does affect a judge's willingness to uphold imposition of the death penalty. See Melinda G. Hall, "Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study," 49 Journal of Politics 1117 (1987). Judicial independence is less likely to provide an across-the-board guarantee of constitutional rights than it is to usefully deflect the impact of the public's emotional reaction in the decision of individual cases.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics. In order to show what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. 

Although he was writing about the evolution of common law doctrines, Holmes could just as easily have been writing about American constitutional law.

CHAPTER 3

LEGISLATIVE POWER

The essence of judicial power, discussed in Chapter 1, is the application of general rules to individual cases. The power to legislate is the power to write rules of general applicability, to design the legal categories into which courts then sort the individual claims that come before them. Although ours is “a government of separated institutions sharing powers” rather than one marked by a separation of powers, Congress’s principal responsibility—the only one shared equally by both of its Houses—is writing general rules. To be sure, the bodies that comprise Congress in a sense exercise judicial power when the House impeaches and the Senate tries the impeachment, and executive power when the Senate advises and consents to a presidential appointment. But the Houses of Congress are barred from exercising the core functions of other branches: Congress may not write a law that punishes a specifically identified individual (bills of attainder are explicitly prohibited by the Constitution); nor may Congress compel the Executive to initiate a criminal prosecution or enforce a law itself. Conversely, the other branches court trouble when they legislate: A Supreme Court that invalidates a law because it does not conform to the Justices’ notion of what constitutes good public policy risks being assailed as a “super-legislature”; when Congress writes a vague statute that leaves the principal design of public policy in the hands of the executive branch, its actions have been contested as an unconstitutional delegation of legislative power. That the bulk of the powers assigned to the national government appears in Article I of the Constitution—the legislative article—is convincing evidence that those who drafted the Constitution saw Congress as the architect of federal policymaking.

Qualifications of Members of Congress

The legislative powers of the national government are jointly exercised by the men and women who comprise the House of Representatives and the Senate. The Constitution specifies that to be elected a Representative an individual shall be at least 25 years of age, a

citizen of the United States for at least seven years, and a resident of the district from which he or she is elected (Art. I, § 2, cl. 2). It prescribes that a Senator must be at least 30 years of age, a citizen of the United States for at least nine years, and also reside in the state from which he or she is elected (Art. I, § 3, cl. 3). Increasingly, however, the many advantages enjoyed by incumbents have often made reelection virtually a foregone conclusion. As a result, turnover in the membership of the House and Senate has been relatively small. As voters sensed that many federal legislators had grown oblivious to their interests and views, a groundswell developed to add term limits to these qualifications by passing voter initiatives (propositions put before the voters at a general election to amend the state constitution that got on the ballot through petitions amassing enough voter signatures). By May 1995, term limits on federal legislators had been approved in nearly two dozen states and, in most of these, voters had also adopted term limits for various state legislative and executive officials.

In U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S.Ct. 1842 (1995), a bare majority of the Supreme Court held that such efforts to impose congressional term limits were unconstitutional because the provisions identified previously stated “exclusive qualifications” for membership in the House and Senate. The Court relied principally on its previous ruling in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 (1969). In that case, the House disqualified an otherwise duly elected and eligible Representative on the basis of his prior misconduct as chairman of a House committee. The Court held that the House could not refuse to seat him, although it could expel him from office after he was sworn in. In short, the House had no “authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.” The Court rested its conclusion on both the “relevant historical materials” pertaining to debates at the Constitutional Convention and the “fundamental principle of our representative democracy * * * ‘that the people should choose whom they please to govern them.’ ” In U.S. Term Limits, the Court pointed out that, although the Framers were well aware that rotation in office (term limits) was the practice at the time in some state legislatures, they nonetheless rejected it on the ground that it deprived the people of their fundamental right to choose whom they wanted. Nor could term limits be justified as an exertion of the reserved powers of the states because their authority to regulate the “Times, Places and Manner of Holding Elections” did not exist before the adoption of the Constitution (and thus could not be said to have been a power retained by them). It was also inconsistent with the Framers’ clear intent “to minimize the possibility of state interference with federal elections.” The decision that qualifications for service in Congress should be fixed by the Constitution and uniform throughout the United States, said the Court, “reflects the Framers’ understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government.” Nor could the states attempt to achieve their objective by ballot-labeling. Some states sought to identify primary and general election candidates who failed to voluntarily respect or support term limits by placing statements on the ballot next to their names such as “Disregarded Voters’ Instructions on Term Limits” or “Declined to Pledge to Support Term Limits.” In Cook v. Gralike, 531 U.S. 510, 121 S.Ct. 1029 (2001), the Court ruled that the use of this “Scarlet Letter,” as it came to be known, was unconstitutional for substantially the same reasons given in U.S. Term Limits. If there are to be federal term limits, then it will take a constitutional amendment to impose them.
A. THE SOURCES AND SCOPE OF CONGRESS’S POWER TO LEGISLATE

Congress’s powers to legislate do not emanate from only one source and, therefore, do not necessarily have identical scope. This section examines four different sources of national legislative power: enumerated and implied powers, amendment-enforcing powers, inherent powers, and the treaty power. Before considering them, however, it is important to note that Congress is not authorized to act simply because its ideas for legislation seem to be good ones. Although the Preamble declares that the national government was created “to promote the general Welfare” and pursue other vital objectives, this statement of broad governmental purposes “walks before” the Constitution, is of no legal effect, and does not constitute a grant of specific power. To the extent that undefined grants of legislative power exist in the American system, they are possessed by the states, not the national government. Broad legislative authority to enact policy in the areas of public health, safety, and welfare—called the “police power”—is in the hands of the states. These residual powers—also known as reserved powers—are discussed at length in Chapter 6. Suffice it to say that Congress must tether its legislation to one of the four sources of power discussed in this section, or it possesses no constitutional authority to act.

Enumerated and Implied Powers

An understanding of the parameters of Congress’s legislative power should logically begin with the 17 powers of the national government listed in Article I, section 8. It is here that Congress is given the authority to conduct the affairs of government—among them powers to print currency, provide for the instruments of national defense, regulate commerce, and tax and spend for the general welfare—without which it would indeed be difficult to think of the United States as a viable nation. These enumerated powers are enhanced by the last clause of section 8—the so-called Elastic or Necessary and Proper Clause—by which Congress is authorized “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.” Chief Justice Marshall’s opinion in McCulloch v. Maryland (p. 106) is the Court’s definitive statement about the posture to be taken in the interpretation of those legislative powers. While the enumerated powers set out the functions or goals of government that the national government is authorized to pursue, the Necessary and Proper Clause authorizes the selection of specific means by which those goals may be achieved.

At issue in McCulloch was the power of Congress to charter the second Bank of the United States. As part of the financial plan proposed by Alexander Hamilton, the first Secretary of the Treasury, Congress passed a bill chartering the first Bank of the United States in 1791. When the legislation reached President George Washington, he asked Hamilton and Thomas Jefferson, then Secretary of State, for their written opinions on the constitutionality of the measure. Jefferson maintained that the legislation was unconstitutional because it could not be supported by a strict reading of the powers contained in Article I, section 8. Hamilton argued for the constitutionality of the national bank on the grounds that the national bank was a “necessary and proper” means to fulfill the enumerated functions the national government was authorized to perform. Washington signed the bill, and the first Bank of the United States lasted until 1811 when the Congress, dominated by Democratic-Republicans, refused to recharter it. Five years later, the traditional hostility of the Jeffersonians to the national bank weakened sufficiently in the flush of nationalism following the War of 1812 for Congress to charter the second national bank. It was the constitutional challenge to it that occasioned Chief Justice Marshall’s opinion. In his opinion, Marshall described the nature of the Union and so anchored the
constitutional posture of broad interpretation, discussed the relationship between the implied and the enumerated powers, and upheld the supremacy of the national government’s powers when they collide with the states’ reserved (police) powers. Marshall’s arguments closely paralleled the original defense of the bank mounted by Hamilton.

McCulloch v. Maryland
Supreme Court of the United States, 1819
17 U.S. (4 Wheat.) 316, 4 L.Ed. 579

BACKGROUND & FACTS In 1816, Congress enacted legislation rechartering a national bank, one branch of which was subsequently located at Baltimore. Two years later the Maryland legislature passed a statute taxing all banks operating in Maryland not chartered by the state. The act levied approximately a 2% tax on the value of all notes issued by the bank or, alternatively, a flat annual fee of $15,000, payable in advance. Provisions of the statute were backed by a $500 penalty for each violation. McCulloch, the cashier of the Baltimore branch of the U.S. bank, issued notes and refused to pay the tax. The Maryland Court of Appeals upheld his conviction under the statute. The U.S. Supreme Court voted to reverse, and Chief Justice Marshall, speaking for the Court, directed the first part of his opinion to a discussion of the scope of Congress’s powers under Article I.

MARSHALL, Ch. J., delivered the opinion of the court:

* * *

The first question made in the cause is, has Congress power to incorporate a bank? * * *

* * *

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal*. * *. It was reported to the then existing Congress of the United States, with a request that it might “be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.”

This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is “ordained and established” in the name of the people; and is declared to be ordained, “in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.” The assent of the states, in their sovereign capacity, is implied
in calling a convention, and thus submitting
that instrument to the people. * * * [T]he
people were at perfect liberty to accept or
reject it; and their act was final. It * * * could
not be negatived, by the state governments.
The constitution, when thus adopted, was of
complete obligation, and bound the state
sovereignties.

* * *

The government of the Union, then * * *
is, emphatically, and truly, a government of
the people. In form and in substance it
emanates from them. Its powers are granted
by them, and are to be exercised directly on
them, and for their benefit.

This government is acknowledged by all to
be one of enumerated powers. The principle,
that it can exercise only the powers granted to
it, * * * is now universally admitted. But the
question respecting the extent of the powers
actually granted, is perpetually arising, and
will probably continue to arise, as long as our
system shall exist.

In discussing these questions, the con-
flicting powers of the general and state
governments must be brought into view,
and the supremacy of their respective laws,
when they are in opposition, must be
settled.

If any one proposition could command
the universal assent of mankind, we might
expect it would be this—that the govern-
ment of the Union, though limited in its
powers, is supreme within its sphere of
action. This would seem to result necessar-
ily from its nature. It is the government of
all; its powers are delegated by all; it
represents all, and acts for all. Though
any one state may be willing to control its
operations, no state is willing to allow
others to control them. The nation, on
those subjects on which it can act, must
necessarily bind its component parts. But
this question is not left to mere reason; the
people have, in express terms, decided it by
saying, “this constitution, and the laws of
the United States, which shall be made in
pursuance thereof,” “shall be the supreme
law of the land,” and by requiring that the
members of the state legislatures, and the
officers of the executive and judicial
departments of the states shall take the
oath of fidelity to it.

The government of the United States,
then, though limited in its powers, is
supreme; and its laws, when made in
pursuance of the constitution, form the
supreme law of the land, “anything in
the constitution or laws of any state to the
contrary notwithstanding.”

Among the enumerated powers, we do
not find that of establishing a bank or
creating a corporation. But there is no
phrase in the instrument which, like the
articles of confederation, excludes inciden-
tal or implied powers; and which requires
that everything granted shall be expressly
and minutely described. Even the 10th
amendment, which was framed for the
purpose of quieting the excessive jealousies
which had been excited, omits the word
“expressly,” and declares only that the
powers “not delegated to the United States,
nor prohibited to the states, are reserved to
the states or to the people;” thus leaving the
question, whether the particular power
which may become the subject of contest
has been delegated to the one government,
or prohibited to the other, to depend on a
fair construction of the whole instrument.
The men who drew and adopted this
amendment had experienced the embarrass-
ments resulting from the insertion of th[e]
word ["expressly"] in the articles of confed-
eration, and probably omitted it to avoid
those embarrassments. A constitution, to
contain an accurate detail of all the
subdivisions of which its great powers will
admit, and of all the means by which they
may be carried into execution, * * * could
scarcely be embraced by the human mind. It
would probably never be understood by the
public. Its nature, therefore, requires, that
only its great outlines should be marked, its
important objects designated, and the minor
ingredients which compose those objects be
deduced from the nature of the objects
themselves. * * * [W]e must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government.

* * * [I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

* * * [T]he constitution * * * does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. * * *

* * *

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

* * * * * * The power of creating a corporation * * * is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed.

The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. * * *

* * * [T]he constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making “all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.”

The counsel for the State of Maryland have urged various arguments, to prove that this clause * * * is really restrictive of the general right * * * of selecting means for executing the enumerated powers.

* * *

[T]he argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be “necessary and proper” for carrying them into execution. The word “necessary” is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.
Is it true that this is the sense in which the word “necessary” is always used? Does it always import an absolute physical necessity * * *? We think it does not. * * * [W]e find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. * * *

* * * The subject [of this case] is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used * * * would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. * * *

* * * Take, for example, the power “to establish post-offices and post-roads.” * * * [F]rom this has been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. * * *

* * *

[The Necessary and Proper Clause was not intended to limit Congress’s power to legislate] for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. * * * If * * * [the] intention [of the Framers] had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. “In carrying into execution the foregoing powers, and all others,” etc., “no laws shall be passed but such as are necessary and proper.” Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

[This clause] cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. * * *

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties
assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

***

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

Branches [of the national bank wherever they can advantageously be located,] * * * being conducive to the complete accomplishment of the object, are equally constitutional. * * *

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the state of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states * * * [and] is to be concurrently exercised by the two governments[,] are truths which have never been denied. But, such is the paramount character of the constitution * * * [that it sometimes withdraws from the states the power to tax, as when] [t]he states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. * * * [T]he same paramount character would seem to restrain * * * a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. * * *

The constitution and the laws made in pursuance thereof are supreme; * * * they control the constitution and laws of the respective states, and cannot be controlled by them. From this, * * * other propositions are deduced as corollaries * * *. These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

***

That the power of taxing [the bank] by the states may be exercised so as to destroy it, is too obvious to be denied. * * * [T]he sovereignty of the state * * * [in the exercise of its taxing powers] is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by [the constitution] must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and do modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

***

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? * * * [Such] powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be
supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution.

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***

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. This did not design to make their government dependent on the states.

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***

The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

***

By reading McCulloch, one might easily be misled into believing that all of Congress's legislative power in the original Constitution is contained in Article I, section 8, but this is not so. In Chapter 1, we saw that under Article III Congress has power with respect to establishing federal courts and defining the appellate jurisdiction of the Supreme Court. And Article I, section 4, to take another example, gives Congress the power to make or alter regulations respecting “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives.”
Amendment-Enforcing Powers

Congress also derives legislative authority from constitutional grants of power by amendment. Beginning with the three Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), most amendments to the Constitution adopted thereafter contain a final section that empowers Congress to enforce the provisions of the amendment “by appropriate legislation.” At issue in South Carolina v. Katzenbach, which follows, is the constitutionality of the critical preclearance provisions of the Voting Rights Act of 1965, 79 Stat. 437. Congress enacted the law as appropriate legislation to enforce the Fifteenth Amendment. Chief Justice Warren’s opinion for the Court discusses the statute’s provisions and ascribes them to the failure of litigation and previous legislative efforts at eradicating racial discrimination in voting. In the course of his opinion, Chief Justice Warren also identified the test of constitutionality to be applied to amendment-enforcing legislation.

SOUTH CAROLINA v. KATZENBACH
Supreme Court of the United States, 1966
383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769

BACKGROUND & FACTS Under the Supreme Court’s original jurisdiction, South Carolina filed a complaint, seeking a declaration as to the constitutionality of several sections of the Voting Rights Act of 1965 and asking that Nicholas Katzenbach, the U.S. Attorney General, be enjoined from their enforcement. The Act to which South Carolina objected was designed to identify and remedy racial discrimination in voting. The remedial provisions of the Act applied to any state or political subdivision that was found by the U.S. Attorney General to have maintained a “test or device” (e.g., literacy test, constitution interpretation test, requirement that the voter possess “good moral character”) as a prerequisite to voting on November 1, 1964, and that was determined by the Director of the Census to have less than 50% of its voting-age residents registered or voting in the November 1964 election. The Act provided, among other remedies, that such tests and devices be promptly suspended, that federal registrars and poll-watchers be assigned, and that states identified by the Act obtain a declaratory judgment from the U.S. District Court for the District of Columbia approving any new test or device before it could become effective.

South Carolina challenged provisions of the Act principally as a violation of the Tenth Amendment, though it asserted additional arguments that the Act also violated due process and the principle of equal treatment of states. The Attorney General defended on the ground that such legislation was well founded on Congress’s power to legislate pursuant to provisions of the Fifteenth Amendment.

Mr. Chief Justice WARREN delivered the opinion of the Court.

* * *

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National
Legislature to effectuate by “appropriate” measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress’ constitutional responsibilities.***

[B]eginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, “good character” tests, and the requirement that registrants “understand” or “interpret” certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926 (1915). *** Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872 (1939). The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944), and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953). Improper challenges were nullified in United States v. Thomas, 362 U.S. 58, 80 S.Ct. 612 (1960). Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960). Finally, discriminatory application of voting tests was condemned in Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817 (1965).

According to the evidence in recent Justice Department voting suits, the latter strategem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment. Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread “pattern or practice.” White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error. The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials. Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination.***

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination.***

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the
federal decrees or have enacted difficult new
tests designed to prolong the existing
disparity between white and Negro registra-
tion. Alternatively, certain local officials
have defied and evaded court orders or have
simply closed their registration offices to
freeze the voting rolls. The provision of the
1960 law authorizing registration by federal
officers has had little impact on local
maladministration because of its procedural
complexities.

The Voting Rights Act of 1965 reflects
Congress' firm intention to rid the country
of racial discrimination in voting. The heart
of the Act is a complex scheme of stringent
remedies aimed at areas where voting
discrimination has been most flagrant.
Section 4(a)–(d) lays down a formula
defining the States and political subdivi-
sions to which these new remedies apply.
The first of the remedies, contained in § 4(a),
is the suspension of literacy tests and
similar voting qualifications for a period
of five years from the last occurrence of
substantial voting discrimination. Section 5
prescribes a second remedy, the suspension
of all new voting regulations pending
review by federal authorities to determine
whether their use would perpetuate voting
discrimination. The third remedy, covered
in §§ 6(b), 7, 9, and 13(a), is the
assignment of federal examiners on certifi-
cation by the Attorney General to list
qualified applicants who are thereafter
entitled to vote in all elections.

Section 8 authorizes the appoint-
ment of federal poll-watchers in places to
which federal examiners have already been
assigned. Section 10(d) excuses those made
eligible to vote in sections of the country
covered by § 4(b) of the Act from paying
accumulated past poll taxes for state and
local elections.

The remaining remedial portions of the
Act are aimed at voting discrimination in
any area of the country where it may occur.
Section 2 broadly prohibits the use of voting
rules to abridge exercise of the franchise on
racial grounds. Section 4(e) excuses
citizens educated in American schools
conducted in a foreign language from
passing English-language literacy tests.
Section 10(a)–(c) facilitates constitutional liti-
gation challenging the imposition of all poll
taxes for state and local elections. Sections
11 and 12(a)–(d) authorize civil and
criminal sanctions against interference with
the exercise of rights guaranteed by the Act.

Has Congress exercised its powers
under the Fifteenth Amendment in an
appropriate manner with relation to the States?
The ground rules for resolving this question
are clear. The language and purpose of the
Fifteenth Amendment, the prior decisions
construing its several provisions, and the
general doctrines of constitutional interpreta-
tion, all point to one fundamental principle. As
against the reserved powers of the States,
Congress may use any rational means to
effectuate the constitutional prohibition of
racial discrimination in voting.

Section 1 of the Fifteenth Amendment
declares that "[t]he 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." This declaration
has always been treated as self-executing
and has repeatedly been construed, without
further legislative specification, to invali-
date state voting qualifications or proce-
dures which are discriminatory on their face
or in practice.

South Carolina contends that the cases
cited above are precedents only for the
authority of the judiciary to strike down
state statutes and procedures—that to allow
an exercise of this authority by Congress
would be to rob the courts of their rightful
constitutional role. On the contrary, § 2 of
the Fifteenth Amendment expressly de-
clares that "Congress shall have power to
enforce this article by appropriate legisla-
tion." By adding this authorization, the
Framers indicated that Congress was to be
chiefly responsible for implementing the
rights created in § 1. Accordingly, in
addition to the courts, Congress has full
remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

***

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."


***

We therefore reject South Carolina’s argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824).

***

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. * * * We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. * * *

The bill of complaint is dismissed.

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Mr. Justice BLACK, concurring and dissenting.

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Though * * * I agree with most of the Court’s conclusions, I dissent from its holding * * * [in part] of the Act * * *. Section 5 * * * provide[s] that a State covered by § 4(b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. * * * [I]t is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. [Emphasis supplied.] * * *

***

(b) * * * One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not
like is in direct conflict with the clear command of our Constitution that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. ***

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Although the Voting Rights Act is best remembered for its effectiveness in attacking racial discrimination against African-Americans throughout the South, another provision of the law addressed the disenfranchisement of Puerto Ricans living in New York City. Existing New York election law specified that no person would be entitled to vote, however satisfactorily other registration requirements were met, unless the individual could read and write English. In Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966), the Supreme Court upheld section 4(e) of the Voting Rights Act, which provided that no one who had successfully completed the sixth grade in a public or accredited private school in Puerto Rico could be denied the vote because of an inability to speak or write English. Because this provision was not directed at racial discrimination, it could not be justified on the ground that it enforced the Fifteenth Amendment. Congress instead relied on its authority to enforce the Equal Protection Clause of the Fourteenth Amendment. The Court easily sustained section 4(e), using the same test of constitutionality it applied to the preclearance provisions sustained in South Carolina v. Katzenbach. But Justice Brennan, speaking for the Court, went further. In a sentence that evoked stunning possibilities, he wrote, “More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York City nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.” The Court seemed to be saying in no uncertain terms that Congress had ample legislative authority enforcing the Equal Protection Clause to require the states to provide equal public services and benefits to people. In light of the Morgan decision, this requires nothing more than Congress’s say-so; it does not require a previous determination by the Court that an existing state policy denies equal protection. Subsequent Court decisions in the conservative era following the Warren Court quickly backed away from the thrust of the Morgan ruling. Indeed, as the decision in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981) demonstrates, the Court has been very reluctant to infer any congressional intent to “impose affirmative obligations on the States to fund certain services” unless Congress says so “unambiguously.”

As noted before, only the constitutional amendments adopted since the Civil War contain an amendment-enforcing section. What if Congress passed a law that imposed its own interpretation of a First Amendment right—say, the right to the free exercise of religious belief—under the guise of enforcing that right as a component of the “liberty” that is guaranteed against state infringement by the Due Process Clause of the Fourteenth Amendment? Congress responded in exactly this manner to the Supreme Court’s decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990) (see Chapter 13) when it passed the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488. In Smith, the Court had discarded the use of strict scrutiny (the compelling interest test) by which, until then, it had measured violations of the First Amendment’s Free Exercise Clause. Before the decision in Smith, where a state permitted a citizen to be exempted from a law generally applicable to its citizens, it could not refuse to recognize an exemption claimed on the basis of religious belief unless it could show
there was a compelling reason for not allowing such an exception. For example, if a state denied unemployment benefits to an individual who was capable of working and who was offered suitable work (a general rule applicable to all citizens drawing unemployment benefits) but refused to work because the job he had been offered required him to work on Saturday and his religious belief forbade that, the state would have to show it had a compelling reason for denying him the benefits. Smith held that the state need not accommodate this exercise of religious belief—that neutral laws of general applicability were constitutional according to the test of reasonableness, even if they had the side effect of burdening a person’s religious belief. A politically diverse congressional coalition responded to Smith by enacting the RFRA, which reimposed the compelling-interest test. The RFRA criticized the Smith decision for burdening the exercise of religious belief and reinstituted “the compelling interest test as set forth in prior Federal court rulings [as] a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” In City of Boerne v. Flores, which follows, the Court addressed the constitutionality of the legislation as an exercise of Congress’s power under § 5 of the Fourteenth Amendment to enforce the guarantee of “liberty” contained in the Due Process Clause, which has been read to include the religious freedoms contained in the First Amendment.

**City of Boerne v. Flores**

Supreme Court of the United States, 1997
521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624

**BACKGROUND & FACTS** P. F. Flores, the Catholic Archbishop of San Antonio, applied for a building permit to enlarge a church in Boerne, Texas. Local authorities denied the permit, relying on an ordinance governing historic preservation in the locale that included the small church, which had been constructed in the mission style of the region’s early history. The archbishop then challenged the denial of the permit under the Religious Freedom Restoration Act of 1993 (RFRA). A federal district court granted judgment for the city on the grounds that in passing the statute Congress had exceeded the legitimate scope of its amendment-enforcing power under the Fourteenth Amendment. A federal appeals court, upholding the constitutionality of the law, reversed the judgment, and the Supreme Court granted certiorari.

Justice KENNEDY delivered the opinion of the Court.

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RFRA prohibits “[g]overnment” from “substantially burden[ing]” a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *** The Act’s mandate applies to any “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,” as well as to any “State, or . . . subdivision of a State.” *** The Act’s universal coverage *** “applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA’s enactment].” ***

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*** In assessing the breadth of §5’s enforcement power, we begin with its text. Congress has been given the power “to enforce” the “provisions of this article.” *** Congress can enact legislation under §5 enforcing the constitutional right to the free exercise of religion. The “provisions of this article,” to which §5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress’ power to enforce the Free Exercise Clause follows from our holding in Cantwell v. Connecticut, 310
U.S. 296, 303, 60 S.Ct. 900, 903 (1940), that the “fundamental concept of liberty embraced in [the Fourteenth Amendment’s Due Process Clause] embraces the liberties guaranteed by the First Amendment.”

Congress’ power under §5, however, extends only to “enforc[ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial.”

The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation.

The power to interpret the Constitution in a case or controversy remains in the Judiciary.

The remedial and preventive nature of Congress’ enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment.

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*** In South Carolina v. Katzenbach, we emphasized that “[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects.”

There we upheld various provisions of the Voting Rights Act of 1965, finding them to be “remedies aimed at areas where voting discrimination has been most flagrant,” and necessary to “banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”

We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests.

The Act’s new remedies, which used the administrative resources of the Federal Government, included the suspension of both literacy tests and, pending federal review, all new voting regulations in covered jurisdictions, as well as the assignment of federal examiners to list qualified applicants enabling those listed to vote. The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow costly character of case-by-case litigation.

***

If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like most acts . . . alterable when the legislature shall please to alter it.” Marbury v. Madison, 5 U.S. (1 Cranch), at 177, 2 L.Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power.

Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

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A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.

The absence of more recent episodes stems from the fact that, as one witness testified, “deliberate persecution is not the usual problem in this country.”

Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, and on zoning regulations and historic preservation laws.
(like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues. ** It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. **

*** RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. ***

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA’s restrictions apply to every agency and official of the Federal, State, and local Governments. * * * RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. * * * RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress’ enforcement power, even in the area of voting rights. In South Carolina v. Katzenbach, the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant, *** and affected a discrete class of state laws, i.e., state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate “at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years.” *** The provisions restricting and banning literacy tests * * * attacked a particular type of voting qualification, one with a long history as a “notorious means to deny and abridge voting rights on racial grounds.” * * * [Another] provision permitted a covered jurisdiction to avoid preclearance requirements under certain conditions and, moreover, lapsed in seven years. This is not to say * * * that §5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress’ means are proportionate to ends legitimate under §5.

*** Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. *** Laws valid under Smith would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. *** [The statute] *** would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to
which RFRA applies are not ones which will have been motivated by religious bigotry. * * * It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. * * *

* * * The judgment of the Court of Appeals sustaining the Act’s constitutionality is reversed.

It is so ordered.

Justice STEVENS, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a “law respecting an establishment of religion” that violates the First Amendment to the Constitution.

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. * * *

* * *

Justice O’CONNOR, with whom Justice BREYER joins except as to a portion * * *, dissenting.

I dissent from the Court’s disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress’ power to enforce §5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court’s holding there. Therefore, I would direct the parties to brief the question whether Smith represents the correct understanding of the Free Exercise Clause and set the case for reargument. * * *

* * *

[Justice SOUTER also dissented.]

But the Court subsequently held that the RFRA could constitutionally be applied to limit the intrusion of federal programs, regulations, and laws on the free exercise of religious belief. Congress’s authority over federal policies doesn’t rest on any amendment-enforcing power but its legislative power under Article I. Just as surely as it can enact a criminal law or a program to tax and spend, so Congress can recognize limitations on the reach of its legislative authority. In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S.Ct. 1211 (2006), the Court sustained an RFRA-based challenge to federal drug laws mounted by adherents of a religious sect that used an hallucinogenic tea in its rite of religious communion. An ingredient in the tea was listed as a controlled substance regulated by federal law.

Also relying upon the Katzenbach cases as the touchstone of analysis when Congress’s use of amendment-enforcing powers is challenged, a closely and sharply divided Court in United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740 (2000), held that § 5 of the Fourteenth Amendment failed to provide adequate constitutional underpinning for the Violence Against
Women Act (VAWA) of 1994. In that case, a female freshman at Virginia Polytechnic Institute brought suit against three male students for assault and rape under a provision of the law that declared “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” It also afforded an injured party the right to sue for compensatory and punitive damages and for injunctive relief. Unlike the legislation challenged in the two Katzenbach cases, however, the Court faulted the VAWA because the law applied to purely private conduct and did not impose any consequences on the state or any of its officials. The majority held that the Fourteenth Amendment prohibited only discriminatory state action. The Court in Morrison also concluded that the statute was not appropriately corrective but “applie[d] uniformly throughout the Nation[,]” even though Congress’s findings, upon which the VAWA was based, “indicat[e]d that the problem of discrimination against victims of gender-motivated crimes d[id] not exist in all States, or even most States.” The five-Justice majority in Morrison also held that Congress could not constitutionally enact the VAWA relying on the Commerce Clause (p. 326).

By contrast, in Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 123 S.Ct. 1972 (2003), the Court held that Congress could rely on § 5 of the Fourteenth Amendment to make a state liable for damages if it violated the Family Medical Leave Act of 1993 (FMLA). That law entitles employees of both private businesses and state and local agencies to 12 weeks of unpaid leave annually to deal with a “serious health condition” of a child, parent, or spouse. Although the FMLA would not have abrogated the states’ sovereign immunity from unconsented-to lawsuits (see p. 339) had it been based on the Commerce Clause, the Court held that Congress’s power under § 5 could override this immunity because the Amendment clearly gives Congress constitutional authority to limit state power. The FMLA is explicit about its application to states and their political subdivisions as well as to private businesses, and making the states liable for damages was “appropriate legislation” to further the nondiscriminatory treatment of men and women guaranteed by the Equal Protection Clause. Said the Court: “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.” The family-care leave provision, it concluded, was “congruent and proportional to the targeted violation.”

Inherent Powers

A third source of Congress’s authority to legislate flows from what are called “inherent powers.” Talk of “inherent powers” seems both contradictory and troublesome in a polity with a written constitution, but it is undeniable that the Court has recognized such a basis for legislative action (and, to an uncertain degree, for policies independently pursued by the President as well). Basically, inherent powers flow from the concept of sovereignty. These are powers, in other words, that pertain to any sovereign nation, and Congress, as the incarnation of national sovereignty, may exercise the powers inhering in and characteristic of a nation-state. Addressing the legitimacy of Congress’s power to govern territory that the nation acquires either by conquest or by treaty, not derivable from any specific grant of authority in the Constitution, Chief Justice Marshall, speaking for the Court in American
Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828), wrote: “Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source, whence the power is derived, the possession of it is unquestioned” (emphasis supplied). Whether in an exact constitutional sense it results—in peaceful circumstances—from the confluence of the treaty power with Congress’s power to dispose of federal territory or property (Art. IV, § 3, ¶ 2), or—in more violent times—constitutes an implied consequence of the war power, the power to govern acquired territory is implicit in the concept of the modern nation-state.

Nearly 60 years later, in United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109 (1886), the Court validated Congress’s paternalistic authority over American Indians whose “weakness and helplessness,” it found, made them “dependent” and “wards of the nation.” Explicitly linking legislative power to national sovereignty, the Court said, “But this power of Congress to organize territorial governments and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government and can be found nowhere else” (emphasis supplied). By the same token, in Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016 (1893), the Court upheld Congress’s right “to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [as] being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare * * *.” Congress in 1892 had enacted legislation continuing its exclusion of Chinese people from entry into the United States and requiring Chinese resident aliens to obtain certificates of residence under penalty of law. In a pointed dissent, Justice Brewer objected that “[t]his doctrine of powers inherent in sovereignty is one both indefinite and dangerous” and more fitted to a “despotism” than a nation with powers “fixed and bounded by a written constitution.”

Supreme Court decisions over the past two and a half decades extending the guarantees of due process and equal protection to resident aliens (see Chapter 14) would appear to have made decisions like Fong Yue Ting a relic of the past, but the arbitrary and often abusive treatment of aliens entering this country and of those resident here during World War II and much of the Cold War make it a relic of the not-too-distant past. Recently, in fact, the Supreme Court, in Zadvydas v. Davis, 533 U.S. 678, 121 S.Ct. 2491 (2001), had reaffirmed that “once an alien enters the country * * * the Due Process Clause applies to all ‘persons’ within the United States, whether their presence is lawful, unlawful, temporary, or permanent.” Thus, the Constitution “does not permit indefinite detention” of aliens to be deported, but limits such civil “detention to a period reasonably necessary to bring about that alien’s removal from the United States.” The Court observed, “The distinction between an alien who has effected entry into the United States and one who has never entered runs throughout immigration law. * * * It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”

Due process is essential when it comes to the detention and deportation of aliens. However, concerns about the nation's vulnerability after the tragic events of September 11, 2001, and national discontent over the large number of illegal aliens in the United States—now estimated at 12 million—intensify the difficulty in striking a constitutional balance between the competing interests of national security and individual fairness. Thus, in Demore v. Kim, 538 U.S. 510, 123 S.Ct. 1708 (2003), the Court upheld the mandatory (and renewable) detention of aliens convicted of committing a "crime of violence" until they could be deported without permitting bail or requiring the government to demonstrate individual dangerousness. The Court noted that deportable criminal aliens constituted a significant proportion of federal prison inmates (25% and rising) and that they frequently failed to show up for their removal hearings.

The aftermath of 9/11 provoked a more sweeping response. Well over 1,000 people were arrested and jailed in the course of the government's massive effort to investigate and apprehend those connected with the attacks or who posed a possible threat. The government refused to disclose the number of individuals held, their names, the reasons for their detention, and information relating to their whereabouts. The individuals detained fell into three categories: those apprehended for immigration violations, those detained on criminal charges, and those held on material-witness warrants. In Center for National Security Studies v. U.S. Department of Justice, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104, 124 S.Ct. 1041 (2004), a federal appeals court held that the government was not required to make any disclosures, either by the Freedom of Information Act or the First Amendment.

Amid louder calls that illegal aliens need to be sent back, recent revelations about the malfunctioning of our immigration courts are a special cause for concern. Particularly disturbing has been the sharp increase in immigration cases that have crowded the dockets of federal appeals courts. In 2001, immigration cases accounted for 3% of all the cases heard by federal courts of appeals; by 2004, the proportion had climbed to 17%. Two out of every five federal appeals in New York and California were immigration cases. In most of the federal court cases, the affected individual was seeking asylum. The cause of much of this need for federal judicial oversight has been the hasty, slipshod, and often abusive hearing of cases by many of the 215 immigration judges and by the 11-member Board of Immigration Appeals (BIA) which is supposed to review and correct erroneous and intemperate decisions by individual immigration judges. The losing party in a case before the BIA can appeal the Board's decision to a federal appeals court. But the BIA was severely downsized in 2002 and the poor quality of its review has led to a rising chorus of criticism by federal appeals judges for the lack of fairness, impartiality, civility, and even comprehensibility in the administration of immigration law. See New York Times, Dec. 26, 2005, pp. A1, A22; Jan. 1, 2006, p. A9. See also Wang v. Attorney General of the U.S., 423 F.3d 260 (3rd Cir. 2005); Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005). Due process is an important check on the arbitrary exercise of inherent power, especially when such power gives rise to the attitude that a sovereign can simply do as it likes.

Although the next chapter considers several claims of inherent power to act, surely the one with the greatest constitutional vitality is the President's claim that he has inherent power to conduct foreign policy. In United States v. Curtiss-Wright Export Corp. (p. 234), a controversy that ostensibly revolved around the legitimacy of Congress's delegation of power to President Franklin Roosevelt to impose an arms embargo, Justice Sutherland, speaking for the Court, embroidered a theory that went beyond sustaining the embargo to justify not simply presidential dominance over foreign policy, but also the constitutional entitlement of the Executive to act alone (and even contrary to Congress). Sutherland's expansive rhetoric in Curtiss-Wright had consequences: The postures of presidential
aggressiveness and congressional submission reflected in our Vietnam and Iraq involve-
mements are part and parcel of the legacy of inherent power bequeathed by the Court’s dicta.

The Treaty Power

A fourth and final source of Congress’s legislative authority is the treaty power. Article VI, paragraph 2 of the Constitution provides: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ***.”

The possibility that arises is whether the national government can obtain by treaty powers that which it otherwise does not possess. This is a matter of particular anxiety to defenders of states’ rights who fear the use of the treaty power as a vehicle for doing an end run around the procedure of constitutional amendment. The decision in Missouri v. Holland below fueled their concern. In that case, Congress passed a statute protecting migratory birds in order to enforce certain treaty provisions. Missouri objected on the grounds that control over such birds within that state’s boundaries fell under its jurisdiction. While the Court’s decision certainly does appear to suggest that treaties that contradict an explicit provision of the Constitution would be null and void, Justice Holmes’s treatment of the much more ambiguous issue in this case leaves the concern of states’ righters unresolved. Holmes puts a good deal of emphasis on a feature peculiar to this case—the migratory quality of the birds and the consequent lack of a substantial state claim. Fears were further heightened by the decision in United States v. Belmont (p. 229), which presented the specter of a state’s public policy being thwarted by a simple executive agreement. The proliferation of executive agreements and the decline in the United States of the formalities of the treaty power magnified what seemed to some observers to be the dangers of this loophole in the federal relationship.

One of the sharpest manifestations of this concern surfaced in the proposed Bricker Amendment (p. 126), which was aimed at terminating both the self-executing quality of treaties and the possibility that the treaty power could be used to outflank the process of constitutional amendment. The proposed amendment drew support from an alliance of isolationists and segregationists who intended to prevent the United States from signing the U.N. Human Rights Accord, which, in the days before the Court’s ruling in Brown v. Board of Education, would have empowered Congress to enact civil rights laws. The original version of the amendment quite obviously targeted both Missouri v. Holland (see section 2) and Belmont (see section 3) and would have effectively cut off any prospect that the national government could do by treaty or executive agreement what it could not do through existing constitutional provisions. The revised version, which substantially blunted the thrust of the amendment as originally proposed and which was made necessary in order to secure the additional votes necessary to pass it, took aim only at Belmont (see section 2). In the end, the proposed amendment failed, thanks in large part to the vigorous opposition of President Dwight Eisenhower, who saw it as a throwback to the isolationism of the past.

Missouri v. Holland

Supreme Court of the United States, 1920
252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641

Background & Facts After a federal statute dealing with the problem had been declared unconstitutional three years earlier, Great Britain and the United States signed a treaty in 1916 to save from extinction various species of birds that migrated through both the United States and Canada. In addition to provisions for protecting the birds, the treaty stipulated that both countries would attempt to
institute measures necessary to fulfill the purposes of the agreement. In 1918, Congress passed the Migratory Bird Treaty Act, which authorized the Secretary of Agriculture to issue regulations concerning the killing, capturing, and selling of those birds named in the treaty. The State of Missouri brought a complaint in federal district court to prevent Ray Holland, a game warden, from enforcing the Act and the Secretary's regulations. Among other objections, Missouri claimed that the statute was unconstitutional by virtue of the Tenth Amendment and that its sovereign right as a state had been violated. The district court held the Migratory Bird Treaty Act constitutional, and Missouri appealed.

Mr. Justice HOLMES delivered the opinion of the court.

* * *

The question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. * * * Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896), this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, “a power which must belong to and somewhere reside in every civilized government” is not to be found. Andrews v. Andrews, 188 U.S. 14, 33, 23 S.Ct. 237 (1903). What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not
have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State’s rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

***

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Decree affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

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**NOTE—THE PROPOSED BRICKER AMENDMENT**

Late in January 1954, the U.S. Senate began debate on a proposed constitutional amendment introduced by Senator John W. Bricker (R–Ohio) and cosponsored by more than 60 other senators. S.J. Res. 1, known as the Bricker Amendment, was a response to the perceived threat of international agreements to the American constitutional structure. Given the Supreme Court’s holding in *Missouri v. Holland*, its sponsors feared that provisions of treaties that the United States had signed, particularly recently signed U.N. treaties on human rights, might be applied to significantly alter protections guaranteed by the Constitution (e.g., property rights, rights reserved to the states). Their fears were not entirely unfounded. See Fujii v. State, 217 P.2d 481 (Cal. App. 1950), but see also the decision on appeal to the California Supreme Court, 38 Cal.2d 718, 242 P.2d 617 (1952). The proposed amendment also reflected irritation with the possible impact of executive agreements. Many of the senators, still critical of President Franklin Roosevelt’s Yalta Accords, sought to constrain the internal application of this type of agreement.

The Bricker Amendment was reported out of the Senate Judiciary Committee by a 9–5 vote in the following form:
Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty. [Emphasis supplied.]

Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Section 4. The Congress shall have power to enforce this article by appropriate legislation.

Section 5. 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.

While there were numerous modifications offered over the course of the month-long debate—some by the Senate Republican leadership hoping to allay the opposition of President Eisenhower—the most significant proposal came from Senator Walter F. George (D–Ga.). Subsequently accepted as the final version of the amendment when it was considered for passage, the George substitute proposal read as follows:

Sec. 1. A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect.

Sec. 2. An international agreement other than a treaty shall become effective as internal law in the United States only by an act of the Congress.

Sec. 3. On the question of advising and consenting to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.

Sec. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission.

The alterations were aimed chiefly at eradicating the “which clause” (see the italicized portion of section 2, supra) in the committee’s version—a feature of the amendment that raised considerable opposition from the more internationally-minded senators. The George proposal also contained a new section, authored initially by Senator William F. Knowland (R–Calif.), which required a roll call vote in the Senate on the ratification of treaties.

On February 26, the Senate voted on passage of the Bricker Amendment in the form of the George substitute proposal, and it was defeated. The vote was 60–31, two votes short of the constitutionally required two-thirds majority necessary for passage. That vote was the high-water mark of the amendment’s support. Similar amendments were introduced in the next two Congresses, but these died in committee.

B. Delegation of Legislative Power

Article I, section 1 prescribes, “All legislative powers herein granted shall be vested in a Congress of the United States * * *” (emphasis supplied). However jealously Congress may prize its power to make laws, the tempo and complexity of contemporary life make it necessary for Congress to delegate some lawmaking power to officers and agencies of the executive branch. For example, setting rates and making rules for airlines and railroads require a capacity to make changes on a day-to-day basis, something that would be difficult to accomplish by the legislative process. Establishing such rates and rules also requires special knowledge and information more easily acquired and retained by executive agencies and personnel. Furthermore, ambiguity in a statute authorizing such regulation may have been the product of legislative compromise essential to passage of the law in the first place. Nonetheless, setting rates and making rules are, strictly speaking, lawmaking acts.
Legal and political theory, as well as the words of the Constitution, have also created problems with respect to the delegation of power. We have long celebrated an ancient maxim of Roman law, potestas delegata non potest delegari. In translation this means that a delegated power must not be redelegated. Where our political theory regards the lawmaking power of Congress as a delegation of power to it by the people, it follows that delegation by the Congress is redelegation. John Locke, who provided much of the theory upon which our institutions were built, categorically asserted that “[t]he Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.” One may well question the importance of both the legal and the political theory. Why the concern about delegation? In a word, the principal reason is accountability. In human affairs, it is at times important to have it clear where authority and responsibility rest. Suppose a school principal gives a certain teacher the duty to maintain order during recess, and the teacher redelegates the duty to a groundskeeper who happens to be in the area who, in turn, redelegates the duty to an older student. Who is responsible legally and otherwise if a student is injured during the recess because of inadequate supervision? In short, whatever the practical need for delegation, it would seem that there must also be some limitations.

For a time, the Supreme Court struggled with the issue. In 1928, in deciding Hampton & Co. v. United States, the Court held that “if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix * * * rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” While the legislation at issue in Hampton passed constitutional muster, the National Industrial Recovery Act, under attack in the Panama Refining and Schechter cases (p. 130) seven years later, did not. In these two decisions, the Court held that Congress had gone too far in delegating its lawmaking power. Said the Court in Schechter, “We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the Panama Company case that the Constitution has never been regarded as denying Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and determination of facts to which the policy as declared by the Legislature is to apply.” However, the Court ruled that here Congress had in effect set down no policy at all.

J. W. Hampton, Jr., & Co. v. United States
Supreme Court of the United States, 1928
276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624

BACKGROUND & FACTS Section 315(a) of Title III of the Tariff Act of 1922 empowered the President to increase or decrease duties imposed by the Act in order to equalize the differences in production cost of articles produced in the United States and in foreign countries. In 1924, after hearings by the United States Tariff Commission, the President issued a proclamation raising the four cents per pound duty on barium dioxide to six cents per pound. J. W. Hampton, Jr., and Company, subject to the duty, challenged the constitutionality of section 315 as an invalid delegation of legislative power to the President. The Customs Court and the Court of Customs Appeals upheld the delegation of power. It was from the latter that the Hampton Company appealed.
Mr. Chief Justice TAFT delivered the opinion of the Court.

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The issue here is as to the constitutionality of § 315, upon which depends the authority for the proclamation of the President and for two of the six cents per pound duty collected from the petitioner. The contention of the taxpayers is *** that the section is invalid in that it is a delegation to the President of the legislative power *** [under] Article I, *** to lay and collect taxes, duties, imposts and excises. ***

*** Congress intended *** § 315 *** to secure *** the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States. *** [This would] enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. *** Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. ***

The Tariff Commission does not itself fix duties, but before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard.

The well-known maxim “Delegata potestas non potest delegari,” [an agent cannot redelegate his powers] applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress *** should exercise the legislative power, the President *** the executive power, and the Courts or the judiciary the judicial power *** [I] [I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. ***

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should
become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. * * *

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One of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214, 32 S.Ct. 436, 441 (1912), “The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.”

***

[T]he same principle that permits Congress to exercise its rate-making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority. * * *

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* * * Section 315 and its provisions are within the power of Congress. The judgment of the Court of Customs Appeals is affirmed. Affirmed.

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**NOTE—THE PANAMA REFINING AND SCHECHTER CASES**

The constitutional controversy over the delegation of legislative power reached its zenith during the 1930s. With nearly a quarter of the work force unemployed, wage levels cut in half, prices down a third, and mounting bank failures and bankruptcies, the Great Depression was an economic dislocation unparalleled in American history. Following Franklin Roosevelt’s inauguration as President, Congress reacted to the emergency by quickly passing the National Industrial Recovery Act (NIRA) in 1933. The legislation and the agency created by it, the National Recovery Administration, aimed at bringing stability and order to the marketplace by controlling the unbridled, destructive competition that was multiplying business collapses. In a pair of decisions that it handed down two years later, the Supreme Court declared the essence as well as a particular section of the NIRA unconstitutional.
In Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935), more popularly known as the Hot Oil Case, the Court invalidated section 9(c) of the Act. That portion of the NIRA sought to prevent a glut of oil and oil products on the market by prohibiting the transportation of petroleum and petroleum products in interstate and foreign commerce in excess of the amount permitted by state authorities. Pursuant to the Act, President Roosevelt issued an executive order making the prohibition in section 9(c) operable and authorizing the Secretary of the Interior to administer and enforce it. To equalize supply with demand, the Secretary allocated ceilings on crude oil production among the several states with the President's approval. Each state receiving a quota subdivided it and thus determined the level of crude oil production for each private enterprise. Speaking for eight of the nine members of the Court (Justice Cardozo dissented), Chief Justice Hughes explained:

* * * Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

Noting that the Act was prefaced by such goals as removing obstructions that tended to diminish the flow of foreign and domestic commerce, promoting the organization of industry, eliminating unfair competitive practices, and promoting the fullest possible use of present productive capacity, the Court determined that articulation of these broad policies did not furnish a helpful guide to limit the Act's broad grant of authority in section 9(c). Although the Chief Justice agreed that the Constitution was never intended to deny Congress "the necessary resources of flexibility and practicality" essential to the legislation of policies and standards, he pointed out that, as written, the Act failed to prescribe limits to guide the Chief Executive's determinations of fact. The Chief Justice added, "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

The second of the Court's decisions, Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935), struck at the essence of the NIRA. Under attack in Schechter were the promulgation and enforcement of NIRA-authorized "codes of fair competition." Drawn up by trade associations "representative" of businesses of all sizes in the various industries, the codes established standards touching on such matters as wages, hours, working conditions, and employment and business practices. These codes were subject to the approval of the President, and violation of a code provision was a punishable offense. In addition to attacking the Live Poultry Code as an unconstitutional delegation of legislative power, the Schechters also argued that it violated the Commerce Clause. (More specific details of the Schechter case and the Court's invalidation of the NIRA, also on Commerce Clause grounds, appear at p. 302.)

Addressing the delegation-of-power question and speaking for a unanimous Court in Schechter, Chief Justice Hughes held that, by generally authorizing "codes of fair competition," the NIRA failed to provide any adequate definition of the things the codes would cover. "Fair competition" was far too vague, and, as the Court had already noted in Panama Refining, the broad policy purposes declared at the outset of the NIRA were unhelpful as guidelines. Indeed, the Court was of the view that the delegation of legislative power in Schechter was worse than that in Panama Refining, since, at least in the latter case, "the subject of the statutory prohibition was defined." Compounding the difficulty in Schechter was the fact that the statute identified no procedures for actually creating the codes. And probably most questionable of all was the fact that the code writing was done by private parties. In other words, the legislative power was actually being exercised by people who were entirely outside the government.

The delegation-of-power deficiencies highlighted by the Court in Panama Refining and Schechter are generally regarded as unique to a time when significant governmental regulation of the economy
was a relative novelty. The decisions in these two cases still stand and have not been explicitly overruled.

Since 1935, Congress has been careful to prescribe some kind of standard when it has delegated power, but standards such as “rates shall be fair and responsible” or directions to the Federal Communications Commission, for example, to license radio and television stations “in the public interest, convenience, and necessity” afford dubious guidance. The fact is that the “intelligible principle” test—itself pretty vague—is not a very useful tool to keep power from slipping through Congress’s fingers. As the Court put it in Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 121 S.Ct. 903 (2001), “Even in sweeping regulatory schemes we have never demanded * * * that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’ ” In Whitman, a trucking-industry trade group attacked, as an unconstitutional delegation of power, the language in the Clean Air Act of 1970 that authorized the Environmental Protection Agency (EPA) to establish pollutant levels that would be “requisite to protect the public health” with “an adequate margin of safety.” Declaring that the law need not specify how hazardous is hazardous, the Court said that the provision “requiring the EPA to set air quality standards at the level that is ‘requisite’—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.” The federal courts have not struck down a congressional act as an unconstitutional delegation of power since the mid-1930s. As a result, many eminent legal authorities have concluded that Congress may now delegate power as it chooses.

A measure of what a non-issue the delegation of legislative power has become is reflected in the judicial stamp of approval given Congress’s enactment of legislation in 1970 authorizing a variety of presidential responses to deal with runaway inflation. All told, it amounted to the most comprehensive peacetime set of economic controls in American history. The Economic Stabilization Act of 1970, 84 Stat. 799, as amended by 85 Stat. 743, authorized the President to take effective measures that would “stabilize the economy, reduce inflation, minimize unemployment, improve the Nation’s competitive position in world trade, and protect the purchasing power of the dollar” by “stabiliz[ing] prices, rents, wages, salaries, dividends, and interest.” The executive branch was authorized to impose wage and price controls that were “fair and equitable” and necessary to “prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials,” and “windfall profits.” Although existing contractual agreements were grandfathered in, wage and price caps under the President’s guidelines were to “call for generally comparable sacrifices by business and labor as well as other segments of the economy.” The legislation allowed the President to “delegate the performance of any function under [the statute] to such officers, departments, and agencies of the United States as he deems appropriate, or to boards, commissions, and similar entities composed in whole or in part of members appointed to represent different sectors of the economy and the general public.” Worth noting is the fact that, prior to its amendment in December 1971, the Act contained even less detail than this. It provided merely that “[t]he President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970,” and that “[s]uch orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequity.” The constitutionality of the original delegation of power to the President was upheld in Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connolly, 337 F.Supp. 737 (D.D.C. 1971), and the constitutionality of the statute was

Doubtless, some of the Court's concern over delegation in the 1930s was inspired by the opposition of some of the more conservative Justices to the economic programs of the New Deal. Concern about the delegation of power per se often is difficult to separate from disagreement with the substance of the legislation at issue, but there is another reason why delegation, such a seemingly quaint constitutional preoccupation of the thirties, has become a virtual dead letter in federal constitutional law today. As we noted earlier, the major reason for constraining the delegation of power is to preserve accountability. If Congress delegated its policymaking authority to unelected officers or employees of agencies in the executive branch, how could the voting public make government responsive to their wishes on matters of public policy? In other words, implicit in the concern about delegation is not only the value of accountability, but also the concept of legislative supremacy. The major reason for its demise was that, since delegation of power is a measure of the political balance between the legislative and executive branches, the conditions that were largely responsible for the creation of New Deal economic policies were simultaneously responsible for the rise of the modern Presidency and the transference of policymaking power and initiative to the executive branch. To the extent that Congress legislates ambiguously, it relinquishes its capacity to direct officeholders of the executive branch, and so the real policymaking power falls to them. Many of the same factors that made it increasingly difficult for Congress to write precise legislation were factors that turned Congress from an institution of policymaking leadership into a usually reactive, frequently passive body.

Although its enactment of the economic stabilization legislation reflects the fact that Congress apparently has resigned itself to the inevitability of surrendering enormous policymaking discretion to the executive branch, especially in crisis times, Congress has nevertheless attempted to retain dominance in policymaking by writing into innumerable pieces of legislation a device through which it could veto subsequent policymaking decisions by the President or other executive officers when it disagreed with them. This mechanism, known as "the legislative veto," was declared unconstitutional by the Court in Immigration & Naturalization Service v. Chadha, which follows. The omnipresence and apparent necessity of the legislative veto are matters well traversed in Justice White's dissenting opinion. However, as the Court ruled, such considerations of utility were insufficient to overcome what the majority saw as clear rules to the contrary contained in Article I. Although the validity of the legislative veto presents an important constitutional question, was it necessary for the Court to consider the question in its largest dimensions? Justice Powell saw the form of the legislative veto presented in Chadha as a kind of bill of attainder and opted to decide the case on much narrower grounds.

IMMIGRATION & NATURALIZATION SERVICE v. CHADHA

Supreme Court of the United States, 1983
462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317

BACKGROUND & FACTS Nearly 200 statutes passed by Congress since 1932 provide for a legislative veto, which means that Congress has delegated broad authority to persons or agencies of the executive branch, subject to potential disapproval of any specific policy by a vote of either or both the House and the
Senate. For example, under the War Powers Resolution (p. 240), Congress could, by a concurrent resolution, force a President to remove American military forces engaged in hostilities in another nation. Under the Congressional Budget and Impoundment Control Act of 1974, either House could vote to disapprove presidential impoundment of funds already appropriated and thereby compel the expenditure of money earmarked for a particular program. According to an analogous provision of the International Security Assistance and Arms Control Act of 1976, Congress could override a decision by the President concerning the sale of military equipment to another country. So, too, through provisions contained in pieces of legislation governing numerous federal agencies, Congress has retained the power to reject particular regulations adopted by various federal commissions, bureaus, and boards.

Section 244(c)(2) of the Immigration and Nationality Act permits either the House or the Senate to disapprove a decision made by the Attorney General under his grant of authority within the Act to allow a specific deportable alien to remain in this country. Chadha, an East Indian born in Kenya and holding a British passport, overstayed his immigrant student visa. When ordered to show cause why he should not be deported for having remained in the United States longer than the time permitted, Chadha argued that he met the standard for exemption set out in section 244(a)(1) of the Act; that is, he had continuously resided in the United States for seven years, was of good moral character, and would suffer “extreme hardship” if required to leave. The Attorney General’s recommendation that Chadha’s deportation be suspended was transmitted to Congress pursuant to the Act; however, within the period of time allowed by the law, the House of Representatives voted to disapprove the Attorney General’s recommendation to cancel the deportation proceedings against Chadha and five other aliens. Chadha then filed a petition for review of the deportation order with the U.S. Court of Appeals for the Ninth Circuit, attacking the legislative veto employed by the House as unconstitutional. The federal appeals court so ruled, and the government appealed.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act authorizing [a legislative veto of the Attorney General’s decision].

We need not challenge that assertion. We can even concede this utilitarian argument although the long range political wisdom of this “invention” is arguable. * * * But policy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions in statutes which delegate authority to executive and independent agencies * * *.

Justice WHITE undertakes to make a case for the proposition that the one-House veto is a useful “political invention,” * * * and we need not challenge that assertion. We can even concede this utilitarian argument although the long range political wisdom of this “invention” is arguable. * * * But policy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.
are critical to the resolution of this case, we set them out verbatim. Art. I provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” Art. I, § 1. (Emphasis added).

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; * * *” Art. I, § 7, cl. 2. (Emphasis added).

“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.” Art. I, § 7, cl. 3. (Emphasis added).

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. * * * We find that the purposes underlying the Presentment Clauses, Art. I, § 7, cl. 2, 3, and the bicameral requirement of Art. I, § 1, and § 7, cl. 2, guide our resolution of the important question presented in this case. * * *

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. * * *

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. * * *

The President’s role in the lawmaking process also reflects the Framers’ careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. * * *

* * *

The bicameral requirement of Art. I, §§ 1, 7 was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials. * * *

* * *

The Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President’s unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. * * *

It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legisla-
tive, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

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* * * In purporting to exercise power defined in Art. I, § 8, cl. 4 to "establish a uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under § 244. The one-House veto operated in this case to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress had acted and its action has altered Chadha's status.

The legislative character of the one-House veto in this case is confirmed by the character of the Congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. * * *

* * * After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

* * * There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;

(c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and
separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. * * *

* * *

We hold that the Congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice POWELL, concurring in the judgment.

* * * In my view, the case may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur in the judgment.

* * *

On its face, the House’s action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. * * *

The impropriety of the House’s assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to “the tyranny of a shifting majority.”

Chief Justice Marshall observed: “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments.” Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136, 3 L.Ed. 162 (1810). In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

Justice WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a “legislative veto.” For this reason, the Court’s decision is of surpassing importance. * * *

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch.
and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. **

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[T]he legislative veto is more than “efficient, convenient, and useful.” ** It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress’ control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory.

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches **. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation’s lawmaker. ** [T]he Executive has ** often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

[T]he apparent sweep of the Court’s decision today is regrettable. The Court’s Article I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decisions in a case involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class is irresponsible. **

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. **

*** The Constitution does not directly authorize or prohibit the legislative veto. ** and I would not infer disapproval of the mechanism from its absence. ** Only within the last half century has the complexity and size of the Federal Government’s responsibility grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure their role as the nation’s lawmakers. ** Our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. **

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*** The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the presidential veto confer such power upon the President. **

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*** The Court’s holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies, and to private individuals and groups. **

This Court’s decisions sanctioning such delegations make clear that Article I does
not require all action with the effect of legislation to be passed as a law.

Theoretically, agencies and officials were asked only to “fill up the details” [I]. In practice, however, restrictions on the scope of the power that could be delegated diminished and all but disappeared. [T]he “intelligible principle” [see Hampton & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348 (1928)] through which agencies have attained enormous control over the economic affairs of the country was held to include such formulations as “just and reasonable,” “public interest,” “public convenience, interest, or necessity,” and “unfair methods of competition.”

By virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation.

If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. It is enough that the initial statutory authorizations comply with the Article I requirements.

Nor does § 244 infringe on the judicial power, as Justice POWELL would hold. Section 244 makes clear that Congress has reserved its own judgment as part of the statutory process. Congressional action does not substitute for judicial review of the Attorney General’s decisions. [T]he courts have not been given the authority to review whether an alien should be given permanent status. [T]here is no constitutional obligation to provide any judicial review whatever for a failure to suspend deportation. “The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien’s right to be in the country has been made by Congress to depend.” Fong Yue Ting v. United States, 149 U.S. 698, 713–714, 13 S.Ct. 1016, 1022 (1893). I do not suggest that all legislative vetoes are necessarily consistent with separation of powers principles. A legislative check on an inherently executive function, for example that of initiating prosecutions, poses an entirely different question. But the legislative veto device here—and in many other settings—is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress.

[Justice REHNQUIST also dissented].

At first glance, Chadha may convey the impression that meaningful congressional oversight of executive branch agencies has been frustrated. This is not so. If it is true that “[w]hen Congress controls, it legislates the particulars; when Congress withdraws, it legislates in general terms[,]” plenty of room remains for Congress to fiddle with the details because it retains several important instruments for reining in agency policies with which it disagrees. One possibility is to keep the object of its suspicion on a very short leash by appropriating funds for only short periods, thus forcing the agency to come back again and again. Other possibilities are writing specific provisions in appropriations bills that limit the use of funds by an agency or require an agency to secure the approval of the appropriations committees before it can exceed certain spending limitations or transfer funds between accounts. Congress, too, can make use of the joint resolution of approval (as it does in executive branch

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reorganization) that shifts the burden to the President by requiring him to obtain the approval of both Houses within a certain number of days. This is tantamount to a one-House veto but has the bonus of not requiring any action on Congress’s part to be effective. A milder form of oversight is Congress’s use of the report-and-wait procedure “in which the enabling statute simply requires that proposed decisions or actions lie before Congress or its committees for a specified number of days before taking effect. * * * [F]ormal congressional action to veto or negate the proposed decision or action has to take the form of a regular bill and, if passed by both houses, be submitted to the President for his approval.” This convenient tool flags policies for Congress’s possible attention before agencies can implement them.

It has been argued that the sort of legislative veto invalidated in Chadha was more of a symbolic display of Congress’s authority than a practical means of assuring congressional control and that it was a little-used instrument, favored mainly by junior members of Congress. Veteran legislators, simply by virtue of their committee assignments achieved under the seniority system, occupy vantage points from which they can exert considerable leverage over federal agencies. Such informal means of congressional oversight continue to be vital mechanisms for maintaining congressional surveillance and control. Knowledge is power, and the explosion in the size of committee staffs has made possible the unearthing and mastery of administrative details that would have been unimaginable in a bygone era when agencies could more easily play a game of information-control in which congressional committees were often captives of the facts agencies chose to share with them. In an era of chronically divided government, sharp and sustained partisanship, and scandals that have sapped the moral strength of presidential leadership, some political professionals have argued that, since the 1970s, the pendulum of power has swung against the Executive so that arguably Congress now has the upper hand.

The parade of ever-larger budget deficits that were a legacy of the 1980s also occasioned legislative responses that generated delegation-of-power controversies. At first, Congress tried to deal with the mushrooming deficits by passing the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act, which aimed to eliminate the federal deficit in six years. To achieve that objective, the statute set maximum permissible amounts of the federal deficit for each of the fiscal years between 1986 and 1991, progressively reducing it to zero. Should the deficit in any year exceed the maximum allowable, the law required across-the-board spending cuts equally in defense and non-defense programs to reach the target level. These spending reductions were to be achieved through a complicated set of procedures: The Office of Management and Budget and the Congressional Budget Office were to independently estimate the size of the deficit and calculate necessary program-by-program spending cuts to reach the target. These reports were then to be sent to the Comptroller General, who was to forward recommendations based on them to the President. The President was then obligated to implement the spending reductions automatically if Congress did not act to trim the budget.

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In Bowsher v. Synar, 478 U.S. 714, 106 S.Ct. 3181 (1986), the Supreme Court held that assignment of such budget-cutting decisions to the Comptroller General violated the separation of powers. It was clear from the Budget and Accounting Act of 1921 which created the office, the Court reasoned, that the Comptroller General, although nominated by the President and confirmed by the Senate, was removable only at Congress’s initiative and for any number of reasons (such as “inefficiency,” “neglect of duty,” and “malfeasance”) that, in effect, made him vulnerable to removal at any “actual or perceived transgressions of the legislative will.” Although Congress had never acted to remove a Comptroller General for political reasons, this was no guarantee of future independence, so the Comptroller General remained, in effect, Congress’s agent. Since the Comptroller General’s participation was indispensable to the implementation of budget cuts under Gramm-Rudman-Hollings, the law gave him executive powers. As Chief Justice Burger concluded, speaking for the Court: “To permit an officer controlled by Congress to execute the laws could be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in a fashion found not to be satisfactory to Congress. This kind of congressional control over the execution of the laws, Chadha makes clear, is unconstitutional”—“once Congress makes its choice in enacting legislation, its participation ends.” In dissent, Justice White protested: “[T]he Court overlooks or deliberately ignores the decisive difference between the congressional removal provision and the legislative veto struck down in Chadha: under the Budget and Accounting Act, Congress may remove the Comptroller only through a joint resolution, which by definition must be passed by both Houses of Congress and signed by the President. ** In other words, a removal of the Comptroller under the statute satisfies the requirements of bicameralism and presentment laid down in Chadha.”

With the demise of Gramm-Rudman-Hollings, Congress sought to attack “pork barrel” provisions—long thought to be a significant cause of federal overspending—by giving the President a line-item veto to eliminate from bills individual pet projects and special tax breaks put there by legislators anxious to curry favor with important constituency interests. Invoking much the same sort of textual analysis it employed in Chadha, the Court struck down the line-item veto in Clinton v. City of New York below. As we shall see in the next chapter, Morrison v. Olson (p. 176) raises a similar issue from the point of view of the executive branch—whether assignment of prosecutorial powers to a special prosecutor, functioning independently of the Justice Department, breaches the constitutional commitment of law enforcement functions to the executive branch. In Chadha, Bowsher, Clinton, and Morrison, the exchanges between the majority and the dissenters return us to the essential tension posed at the beginning of this chapter—that between maintaining separation of the core governmental functions of the three coordinate branches, on the one hand, and the practical workability of such institutions sharing powers, on the other hand.

**Clinton v. City of New York**
Supreme Court of the United States, 1998
524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393

Background & Facts  Congress passed the Line Item Veto Act in April 1996 and it became effective January 1, 1997. Two months later, President Clinton used the line item veto to cancel a provision of the Balanced Budget Act of 1997 and two provisions of the Taxpayer Relief Act of 1997. In the first instance, he
struck a provision that waived the federal government’s right to recoup as much as $2.6 billion in taxes that New York State had levied against Medicaid providers, and in the second instance he deleted a provision that permitted the owners of certain food refineries and processors to defer recognition of capital gains if they sold their stock to eligible farmers’ cooperatives, such as Snake River Potato Growers, Inc. A federal district court consolidated the suits growing out of these two exercises of the President’s power and held that the line item veto violated the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution. The federal government appealed and the Supreme Court expedited consideration of this case as provided for in the Line Item Veto Act.

Justice STEVENS delivered the opinion of the Court.

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[New York] State now has a multibillion dollar contingent liability that had been eliminated by § 4722(c) of the Balanced Budget Act of 1997. The District Court correctly concluded that the State “suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law.”

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The Snake River farmers’ cooperative also suffered an immediate injury when the President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants.

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The Line Item Veto Act gives the President the power to “cancel in whole” three types of provisions that have been signed into law: “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.” It is undisputed that the New York case involves an “item of new direct spending” and that the Snake River case involves a “limited tax benefit” as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. He must determine, with respect to each cancellation, that it will “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.” Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. If, however, a “disapproval bill” pertaining to a special message is enacted into law, the cancellations set forth in that message become “null and void.” The Act sets forth a detailed expedited procedure for the consideration of a “disapproval bill,” but no such bill was passed for either of the cancellations involved in these cases. A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, but he does, of course, retain his constitutional authority to veto such a bill.

*** Under the plain text of the statute, the two actions of the President that are challenged in these cases prevented one section of the Balanced Budget Act of 1997 and one section of the Taxpayer Relief Act of 1997 “from having legal force or effect.”
The remaining provisions of those statutes, with the exception of the second canceled item in the latter, continue to have the same force and effect as they had when signed into law.

[A]fter a bill has passed both Houses of Congress, but “before it become[s] a Law,” it must be presented to the President. If he approves it, “he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.” Art. I, § 7, cl. 2. His “return” of a bill, which is usually described as a “veto,” is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President’s “return” of a bill pursuant to Article I, § 7, and the exercise of the President’s cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. * * * What has emerged in these cases from the President’s exercise of his statutory cancellation powers * * * are truncated versions of two bills that passed both Houses of Congress. * * *

* * *

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on Field v. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892), the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act. Second, the Government submits that the substance of the authority to cancel tax and spending items “is, in practical effect, no more and no less than the power to ‘decline to spend’ specified sums of money, or to ‘decline to implement’ specified tax measures.” Neither argument is persuasive.

* * *

The Government’s reliance upon * * * tariff and import statutes * * * containing [similar] provisions is unavailing * * *. [T]his Court has recognized that in the foreign affairs arena, the President has “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S.Ct. 216 (1936). “Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.” * * * More important, * * * [in the case of those statutes,] Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President. The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7. The fact that Congress intended such a result is of no moment. * * *

Neither are we persuaded by the Government’s contention that the President’s authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. * * * For example, the First Congress appropriated “sum[s] not exceeding” specified amounts to be spent on various Government operations. * * *
[T]he President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act’s predecessors could even arguably have been construed to authorize such a change.

***

Because we conclude that the Act’s cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court’s alternative holding that the Act “impermissibly disrupts the balance of powers among the three branches of government.”

***

The Balanced Budget Act of 1997 is a 500-page document that became “Public Law 105–33” after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law.” Art. I, § 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105–33 would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as “Public Law 105–33 as modified by the President” may or may not be desirable, but it is surely not a document that may “become a law” pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

If there is to be a new procedure in which the President will play a different role in determining the final text of what may “become a law,” such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution. ***

The judgment of the District Court is affirmed.

It is so ordered.

Justice KENNEDY, concurring.

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The principal object of the statute was not to enhance the President’s power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President’s powers beyond what the Framers would have endorsed.

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By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

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Justice SCALIA, with whom Justice O’CONNOR ** and Justice BREYER join ** concurring in part and dissenting in part.

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[T]he Court’s problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to “cancel”—prevent from “having legal force or effect”—certain parts of duly enacted statutes.

Article I, § 7 of the Constitution obviously prevents the President from cancelling a law that Congress has not authorized him to cancel. ** But that is not this case. **
Insofar as the degree of political “law-making” power conferred upon the Executive is concerned, there is not a dime’s worth of difference between Congress’s authorizing the President to cancel a spending item, and Congress’s authorizing money to be spent on a particular item at the President’s discretion. * * * Examples of appropriations committed to the discretion of the President abound in our history. * * *

Had the Line Item Veto Act authorized the President to “decline to spend” any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. * * * The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President’s action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

Justice BREYER, with whom Justice O’CONNOR and Justice SCALIA join as to [p]art * * * dissenting.

To understand why one cannot say, literally speaking, that the President has repealed or amended any law, imagine how the provisions of law before us might have been, but were not, written. Imagine that the canceled New York health care tax provision at issue here * * * had instead said the following:

Section One. Taxes . . . that were collected by the State of New York from a health care provider before June 1, 1997 and for which a waiver of provisions [requiring payment] have been sought . . . are deemed to be permissible health care related taxes . . . provided however that the President may prevent the just-mentioned provision from having legal force or effect if he determines x, y and z. (Assume x, y and z to be the same determinations required by the Line Item Veto Act).

Whatever a person might say, or think, about the constitutionality of this imaginary law, there is one thing the English language would prevent one from saying. One could not say that a President who “prevent[s]” the deeming language from “having legal force or effect,” * * * has either repealed or amended this particular hypothetical statute. Rather, the President has followed that law to the letter. He has exercised the power it explicitly delegates to him. He has executed the law, not repealed it.

It could make no significant difference to this linguistic point were the italicized proviso to appear, not as part of what I have called Section One, but, instead, at the bottom of the statute page, say referenced by an asterisk, with a statement that it applies to every spending provision in the act next to which a similar asterisk appears. And that being so, it could make no difference if that proviso appeared, instead, in a different, earlier-enacted law, along with legal language that makes it applicable to every future spending provision picked out according to a specified formula. * * *

But, of course, this last-mentioned possibility is this very case. * * *

Because I disagree with the Court’s holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles—principles that arise out of the Constitution’s vesting of the “executive Power” in “a President,” U.S. Const., Art. II, § 1, and “[a]ll legislative Powers” in “a Congress,” Art. I, § 1. There are three relevant Separation of Powers questions here: (1) Has Congress given the President the wrong kind of power, i.e., “non-Executive” power? (2) Has Congress given the President the power to “encroach” upon Congress’ own constitutionally reserved territory? (3) Has Congress given
the President too much power, violating the doctrine of “nondelegation?” * * * [W]ith respect to this Act, the answer to all these questions is “no.”

The power the Act conveys is the right kind of power. It is “executive.” As explained above, an exercise of that power “executes” the Act. Conceptually speaking, it closely resembles the kind of delegated authority—to spend or not to spend appropriations, to change or not to change tariff rates—that Congress has frequently granted the President, any differences being differences in degree, not kind. * * *

[W]ith respect to this Act, the answer to all these questions is “no.”

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One cannot say that the Act “encroaches” upon Congress’ power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply. * * * Indeed, the President acts only in response to, and on the terms set by, the Congress.

Nor can one say that the Act’s basic substantive objective is constitutionally improper, for the earliest Congresses could have, * * * and often did, confer on the President this sort of discretionary authority over spending * * *.

[W]ith respect to this Act, the answer to all these questions is “no.”

The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 225–226, 63 S.Ct. 997, 1013–1014 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as “public interest, convenience, or necessity” require); * * * Yakus v. United States, 321 U.S. 414, 427, 64 S.Ct. 660, 668–669 (1944) (upholding delegation to Price Administrator to fix commodity prices that would be “fair” and “equitable”).

Notwithstanding the Supreme Court’s decision in Clinton v. City of New York, the push for a line-item veto goes on, fueled by further escalation of the federal deficit and the belief that congressional pork-barrel projects substantially increase the red ink. In June 2006, the House of Representatives passed legislation to give President George W. Bush a line-item veto, although a less-hefty one than that challenged in Clinton. It would have allowed the President to return to Congress those items in a tax or spending bill that he thought were wasteful and unnecessary. Congress would then have been required to vote again on those provisions; a simple majority in both the House and Senate could have overridden his
objections. Although the House passed the line-item veto by a margin of 247–172, largely
along party lines (Republicans voting in favor and Democrats against), the legislation never
made it to a vote in the Senate. Its passage was complicated by the number of legislators
who thought a line-item veto would only further weaken Congress's power in dealing with
an administration that had all-too-frequently shown it liked nothing better than setting
policy by itself. Bush's use of presidential "signing statements" (see p. 264), nullifying the
enforcement of specific provisions of a law with which the President disagreed, can be seen
as a unilateral executive response to this impasse. After all, a presidential signing statement
that refuses to enforce certain provisions of a law passed by Congress is just another form of
a line-item veto.

C. THE POWER TO INVESTIGATE

From examinations of military mishaps during army campaigns against Indian tribes on the
frontier in the 1790s and early 1800s, to exposés of political corruption during the second
half of the nineteenth century, to surveys of social and economic ills in the 1930s, to probes
of organized crime and labor racketeering during the fifties, to inquiries into presidential
wrongdoing and campaign hanky-panky of the Watergate era, right down to Iran-Contra,
the Whitewater Affair, and the recent firings of nine U.S. Attorneys, congressional
investigations have always been with us. Although there has been a great deal of criticism
over the years of how particular investigations have been conducted and about the
extent of the power to investigate, there are few who would maintain that Congress does not (or
should not) constitutionally have the power at all. First, Congress must be able to gather
facts if it is to legislate wisely. As the Court put it in McGrain v. Daugherty, 273 U.S. 135,
47 S.Ct. 319 (1927), "[T]he power of inquiry—with process to enforce it—is an essential
and appropriate auxiliary to the legislative function." The power to investigate is, therefore,
implied in the power to legislate. In McGrain, the Court explained:

A legislative body cannot legislate wisely or effectively in the absence of information
respecting the conditions which the legislation is intended to affect or change; and where the
legislative body does not itself possess the requisite information—which not infrequently is
true—recourse must be had to others who do possess it. Experience has taught that mere
requests for such information often are unavailing, and also that information which is
volunteered is not always accurate or complete; so some means of compulsion are essential to
obtain what is needed. All this was true before and when the Constitution was framed and
adopted. In that period the power of inquiry, with enforcing process, was regarded and
employed as a necessary and appropriate attribute of the power to legislate—indeed, was
treated as inhering in it. Thus there is ample warrant for thinking as we do, that the
constitutional provisions which commit the legislative function to the two houses are intended
to include this attribute to the end that the function may be effectively exercised.

Second, it is generally agreed that legislative oversight of the executive branch is also
implicit in legislative power. After all, Congress establishes the various departments,
agencies, and commissions of the executive branch; defines their functions; provides the
funds to run them; and fashions programs and policies for them to administer. Logic requires
that Congress see to it that these offices and agencies perform as intended. Woodrow
Wilson, long before he became President, espoused this rationale for the informing
function:

It is the proper duty of a representative body to look diligently into every affair of government
and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody
the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and disposition of the administrative agents of the government, the country must remain in embarrassing crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.8

Third, it might be argued that a legislature in a democratic society has an obligation to educate the public as to the need for legislation or to point up the abuses of the executive branch. Generally, this is best accomplished by debate in the legislature, but sometimes an investigation can better serve to dramatize the issues and capture the public’s attention. As McGrain v. Daugherty made clear, however, any informing function Congress has is only ancillary to its legislative function. Although an investigation conducted just for the purpose of educating the public might be a worthwhile experience, in the hands of ignoble inquisitors it could also be conducted solely to make an example out of somebody, or simply to enhance the reputations of the investigators, and thus amount to little more than “exposure for the sake of exposure.” A potent criticism leveled at congressional investigations, even when they have been conducted ostensibly for legislative purposes, has been that they have been used to punish people rather than to develop the facts pertaining to a problem requiring legislative attention. When legislative committees have intentionally sought to mete out punishment by investigation, they have been doing what the Constitution intended to prevent by its specific provision against bills of attainder, that is, legislative acts that inflict punishment on specific individuals without trial. Although an investigation is not a legislative “act” in a strict legal sense, surely the Framers’ abhorrence would logically extend to all such legislative actions, except in those rare instances where the legislators occupy a quasi-judicial role in impeachment and removal proceedings.

Since the purpose of an investigation is not to punish, but to find facts, the usual adversarial safeguards that apply at trials are absent. To the extent, however, that congressional committees would be required to adhere to extensive procedural requirements, an investigation would likely be deflected from its central information-gathering function and be turned into a mini-trial. Therefore, although congressional or committee rules may accord to witnesses who are called to testify certain privileges such as reading prepared statements or having the aid of counsel, the only right that a witness constitutionally possesses is the Fifth Amendment right against compelled self-incrimination. Unfortunately, committee members seeking to make a witness look bad, especially when hearings are televised, have often asked questions solely to goad the hapless witness into repeatedly responding, “I decline to answer on the grounds that my answer would tend to incriminate me.” Especially in controversial matters, then, it frequently seems that we are forced to choose between an effective investigation and a fair one.

Exactly how uncomfortable the witness chair is when it is occupied by someone with a controversial past is handsomely illustrated by the testimony of professional baseball players summoned to answer questions about the use of steroids in baseball. The dilemma that confronts a witness appearing under a cloud is aptly summarized by Mark McGwire’s initial statement in the note that follows. Self-protection and self-respect, however, can be construed as evasiveness, especially if he has been named by another witness—in this instance, Jose Canseco. And even if all or some of the behavior was legal at the time, the dilemma of whether to answer persists because past behavior is likely to be viewed through a contemporary lens. At what point does inquiry about someone’s past behavior become punishment by public exposure? Yet, as the committee members point out, Congress’s

oversight function and its power to write laws that effectively govern future behavior could not be exercised if legislators could not draw upon the experience of the individuals directly involved and therefore, presumably, the most knowledgeable. The awkward position in which the baseball players found themselves in 2005 was really no different than the dilemma faced by former members and alleged-to-have-been members of the American Communist Party who were summoned to appear before the House Committee on Un-American Activities in the late 1940s and 1950s. Like Mark McGwire’s former use of androstenedione, membership in the Communist Party during the desperate days of the Great Depression was perfectly legal and not particularly controversial. The brow-beating and bullying of vulnerable witnesses by HUAC in the heyday of the anti-communist hysteria at the height of the Cold War ultimately embarrassed the House into adopting the current version of Rule 11, which is referred to in the transcript of the steroids-in-baseball investigation.

You may wonder why it is any of Congress’s business that baseball players used steroids. The inquiry is relevant on two grounds, both of which are mentioned in the colloquies between the committee members and the player-witnesses. First, Congress has authority under the Commerce Clause to control the interstate distribution of harmful substances, a power it exercised when it banned steroids in 1990. The Supreme Court has consistently upheld a broad reading of this power, most recently when the Justices rejected a constitutional challenge to the federal government’s prohibition on marijuana use, even for medical purposes (see p. 331). Second, baseball enjoys a privilege unique in professional sports: unlike football, basketball, or hockey, it is exempt from the anti-trust laws. Although there is a lively dispute about whether this exemption applies only to the “reserve clause” or whether it applies to all aspects of professional baseball, the Supreme Court on half-a-dozen occasions has recognized and reaffirmed this special status. Although the Court’s conclusion that “giving exhibitions of baseball” did not involve interstate commerce is probably more attributable to the quaint view of economics entertained by a majority of the Justices during the 1920s than to baseball’s special niche as “the national pastime,” Congress has maintained a steadfast silence about the Court’s ruling, although it could have removed this special privilege any time by simple legislation. (For the original decision, see Federal Baseball v. National League, 259 U.S. 200, 42 S.Ct. 465 (1922); the Court most recently reaffirmed baseball’s exemption in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099 (1972).) As the committee strongly hinted, however, if professional baseball remained unwilling to comply effectively with Congress’s anti-drug policy, Congress could readily end the exemption.

NOTE—BALLPLAYERS TESTIFY ABOUT THE USE OF STEROIDS IN MAJOR LEAGUE BASEBALL

On March 17, 2005, the Committee on Government Reform of the U.S. House of Representatives held a hearing on the ineffectual efforts of professional baseball to deal with players’ use of steroids. Among those called to testify were parents of children who used steroids while playing high school or college ball with tragic consequences, medical professionals who addressed the health risks of using steroids, the baseball commissioner and others responsible for monitoring and deterring the use of steroids in the major leagues, and current and former ballplayers, some of whom were admitted or

alleged steroid users. The following excerpts from the hearing focus on the testimony of several players summoned to appear: Jose Canseco, Mark McGwire, Rafael Palmeiro, Curt Schilling, and Sammy Sosa. The scandal of steroid use in baseball—every bit as notorious as the 1919 Black Sox scandal—was inflamed by Jose Canseco’s book, Juiced: Wild Times, Rampant ’Roids, Smash Hits and How Baseball Got Big, published in February 2005. In it, he admitted using the stuff and also named other players as users.

In Juicing the Game, Howard Bryant assessed the impact of Canseco’s book as “devastating.” Bryant wrote: “Canseco is a zealot, weary of baseball’s hypocrisy, vindictive in his candor. He says that, during his seventeen-year career, steroids were a known fact from the commissioner all the way down to the batboys. He says he personally injected some of the game’s biggest names, from Rafael Palmeiro * * * to Mark McGwire. * * * In making his points, he violates the tenet of clubhouse secrecy that for years maintained the steroid era. He violates the trust of the players with whom he won and lost games, with whom he caroused, drank, and laughed. Canseco returns years of ridicule with a withering indictment of the sport, its racism, its double standards, and its tacit and blatant condoning of the steroids that to a large degree fueled the sport’s comeback [after the players’ strike that wiped out the 1994 World Series].”

Small wonder, then, that the other players summoned to testify put plenty of distance between themselves and Canseco. Asking the questions in these excerpts are committee members Tom Davis (chairman), Henry Waxman (ranking minority member), Elijah Cummings, Patrick McHenry, Mark Souder, Paul Kanjorski, William Clay, and Christopher Shays.

Mr. McGWIRE. Mr. Chairman, members of the committee * * *. My name is Mark McGwire. I played the game of baseball since I was 9 years old. I was privileged to be able to play 15 years in the Major Leagues. * * * I love and respect our national pastime. * * *

* * * I admire the parents who had the courage to appear before the committee and warn of the dangers of steroid use. * * *

* * *

I applaud the work of the committee in exposing this problem so that the dangers are clearly understood. There has been a problem with steroids in baseball, like any sport where there is pressure to perform at the highest level, and there has been no testing to control performance-enhancing drugs if problems develop.

* * * I will use whatever influence and popularity that I have to discourage young athletes from taking any drug that is not recommended by a doctor. What I will not do, however, is participate in naming names, in implicating my friends and teammates.

I retired from baseball 4 years ago. I live a quiet life with my wife and children. I have always been a team player. I have never been a person who spread rumors or say things about teammates that could hurt them. I do not sit in judgment of other players, whether it deals with sexual preference, their marital problems or other personal habits, including whether or not they use chemical substances. That has never been my style, and I do not intend to change this just because the cameras are turned on, nor do I intend to dignify Mr. Canseco’s book.

* * * I have been advised that my testimony here could be used to harm friends and respected teammates, or that some ambitious prosecutor can use convicted criminals who would do and say anything to solve their own problems, and create jeopardy for my friends.

Asking me or any other player to answer questions about who took steroids in front of television cameras will not solve the problem. If a player answers no, he simply will not be believed. If he answers yes, he risks public scorn and endless government investigations.

My lawyers have advised me that I cannot answer these questions without jeopardizing my friends, my family and myself. I intend to follow their advice.

It is my understanding that Major League Baseball and the Players’ Union have taken steps to address the steroid issue. If these policies need to be strengthened, I would support that.

*** I am also offering to be a spokesman for Major League Baseball to convince young athletes to avoid dangerous drugs of all sorts.

***

Mr. PALMEIRO. *** Mr. Chairman and members of the committee. My name is Ralph Palmeiro, and I’m a professional baseball player.

*** I have never used steroids, period. I do not know how to say it any more clearly than that. Never. The reference to me in Mr. Canseco’s book is absolutely false. I am against the use of steroids. I don’t think athletes should use steroids, and I don’t think our kids should use them. The point of view is one, unfortunately, that is not shared by our former colleague Jose Canseco. Mr. Canseco is an unashamed advocate for increased steroid use by all athletes.

*** Congress should work with the league and the Players Association to make sure that the new policy being put in place achieves the goal of stamping steroids out of the sport. To the degree an individual player can be helpful, perhaps as an advocate to young people about the dangers of steroids, I hope you will call on us.

***

Mr. SCHILLING. *** I understand from the invitation I received to appear before this committee that my presence has been requested because I have been outspoken on this issue. I’m honored to be cochairman on an advisory committee, tasked with putting together recommendations on how to prevent steroid usage among young people. I recognize that professional athletes are role models for many of the youth in this country.

While I don’t profess to have the medical expertise to adequately describe the dangers of steroid use, I do believe I have the expertise to comment on whether steroids are necessary to excel in athletics. I think it is critical to convey to the youth who desire to excel in sports that steroids are not necessary in order to excel in any athletic event.

[Jose Canseco’s] book which devotes hundreds of pages to glorifying steroid usage, and which contends that steroid use is justified and will be the norm in the country in several years is a disgrace, was written irresponsibly, and sends exactly the opposite message that needs to be sent to kids. The allegations made in that book, the attempt to smear the names of players, both past and present, having been made by one who for years vehemently denied steroid use should be seen for what they are, an attempt to make money at the expense of others.

***

Do I believe steroids are being used by Major League Baseball players? Yes. Past and present testing says as much. Do I believe we should continue to test and monitor steroid usage in Major League Baseball? Absolutely. I believe the message has been heard by players, and that serious, positive, forward-thinking steps have been taken on the issue.

*** Everywhere you look, we are bombarded by advertising of supplements and feel-good medications. I urge you to evaluate the way in which these products are manufactured and the way in which they are marketed. If we are going to send a message to the young athlete that steroid use is bad and steroids are not necessary to achieve success, you cannot allow that message to be drowned out by the manufacturers’ advertising to the contrary. If the government thought enough of American youth to rally against the tobacco industry and its advertising to our youth, why should the supplement industry be any different?

***

Chairman Tom Davis. *** Mr. Schilling *** and *** Mr. Palmeiro, as I read the Major League policy, it says if the player tests positive for a steroid, a 10-day suspension or up to a $10,000 fine. So under the policy, a suspension is optional, and you could do a fine up to $10,000. It could be less than that. Our feeling is it ought to be a suspension because a suspension carries with it a
public acknowledgement. Under the rules as we read them, a fine does not. Do you have any thoughts on that? * * *

Mr. SCHILLING. I don’t think for a second there is any question about making names public upon of failed test. * * * I’m under the impression, there will be no chance for a failed test to not be made public.

Chairman Tom Davis. It is not what it says, just to let you understand. Your position, you think it ought to be made public?

Mr. SCHILLING. I think that’s the position of players as a whole.

Mr. PALMEIRO. I believe the players should be suspended. * * *

Chairman Tom Davis. That is one of the major concerns, and it was huge surprise to us * * *

Mr. Canseco, * * * I think that Major League Baseball knew that there was steroid use going on and for years didn’t do anything to stop it?

Mr. Canseco. Absolutely, yes.

Chairman Tom Davis. And why do you think baseball didn’t do anything about this?

Mr. Canseco. I guess in baseball at the time there was a saying, if it’s not broke, don’t fix it. And baseball was coming back to life. Steroids were part of the game. And I don’t think anyone really wanted to take a stance on it.

Mr. Waxman. I don’t know which of you to ask, what I want to know is you have seen steroid use in baseball. You have seen it from inside the clubhouse. Mr. Palmeiro, maybe it would be best to ask you, is it something that most of the baseball players knew about?

Mr. Palmeiro. I have never seen the use of steroids in the clubhouse.

Mr. Waxman. How about the fact that players were using steroids; is that something that other players knew?

Mr. Palmeiro. I’m sure players knew about it. I really didn’t pay much attention to it. I was focused on what I had to do as part of my job.

Mr. Waxman. Did players know? You have spoken out about this. Did you know that other players were using steroids?

Mr. SCHILLING. I think there was suspicion. I don’t think any of us knew, contrary to the claim of former players. * * *

Mr. Waxman. Does it stop with ballplayers? Steroid use has grown. Do you think that the team trainers, the managers and general managers, and even the owners might have been aware that some players were using steroids?

Mr. Canseco. No doubt in my mind, absolutely.

Mr. Waxman. It’s not a secret that stayed with the players; others knew it in the baseball community?

Mr. Canseco. Absolutely.

Mr. Waxman. Do any of you disagree with that?

Mr. SCHILLING. * * * Unless you were Jose and you were actually using it, I don’t think you had firsthand knowledge of who knew.

Mr. Canseco. * * * [T]he most effective thing * * * would be for us to admit there’s a major problem. * * * From what I’m hearing, * * * I was the only individual in Major League Baseball that used steroids. That’s hard to believe.

Mr. Waxman. Mr. Sosa, do you think we ought to have th[e] gold standard of the Olympic program, zero tolerance? [If] you got caught using steroids; for whatever the sport is, that you are suspended for 2 years, and after that second offense, you’re out. Do you think that would be effective with baseball and other sports as well?
Mr. SOSA. * * * I don’t have too much to tell you.
Mr. WAXMAN. * * * How about you, Mr. McGwire?
Mr. McGWIRE. I don’t know, but I think we should find the right standard.
Mr. WAXMAN. Do you think that the standard the baseball commission is using right now is the right standard?
Mr. McGWIRE. I don’t know. I’m not a current player.

Mr. PALMEIRO. I wouldn’t have a problem of playing under any type of standard. Like I said, I have never taken it, so if you want to play under the rules of the Olympics, I welcome it.

Mr. CUMMINGS. * * * Mr. Canseco, * * * [y]ou said in your book, * * * “I’m tired of hearing such short-sighted crap from people who have no idea what they are talking about. Steroids are here to stay. That’s a fact, I guarantee. Steroids are the future. By the time my 8-year-old daughter Josie has graduated from high school, a majority of all professional athletes in all sports will be taking steroids, and believe it or not, that’s good news.” * * * You sit here one moment talking about how * * * to prevent it in the future, but * * * you are saying * * * almost the opposite * * * in your book.
Mr. CANSECO. * * * [I]f Congress does nothing about this issue, it will go on forever. That I guarantee you. And basically, steroids are only good for certain individuals, not good for everyone. I think I specify that, in previous chapters, if you medically need it, if it is prescribed to you. I think those are the things I spoke about.
Mr. CUMMINGS. You realize it is a Federal crime to abuse steroids?
Mr. CANSECO. Yes.
Mr. CUMMINGS. Are you now for a zero tolerance policy?
Mr. CANSECO. Absolutely.
Mr. CUMMINGS. You made some allegations, and as I understand it, Mr. Schilling, Mr. Thomas, Mr. Sosa and Mr. Palmeiro said they never used the substances. Is that right, Mr. Sosa?
Mr. Sosa. Yes.
Mr. CUMMINGS. Mr. McGwire, would you like to comment on that? I didn’t hear you say anything about it. You don’t have to. I just ask. You don’t want to comment. Are you taking the fifth?
Mr. McGWIRE. I’m not here to discuss the past. I’m here to be positive about this subject.

Mr. SOUDER. The simple way to solve this is the way that Mr. Sosa and Mr. Palmeiro and Mr. Schilling and Mr. Thomas ha[ve] said. I’m clean, I have been clean, I’ve taken the test, and I have passed the test. This is pretty simple, and the American people are figuring out who is willing to say that and who isn’t.
And as far as this being about the past, that’s what we do. This is an oversight committee. If the Enron people come in here and say, we don’t want to talk about the past, do you think Congress is going to let them get away with that? When we were doing investigations on the travel office, on Whitewater, if President Nixon had said about Watergate when Congress was investigating Watergate, we don’t talk about the past, how in the world are we supposed to pass legislation? When you are a protected monopoly, and all of your salaries are paid because you are a protected monopoly, how are we supposed to figure out what our obligations are to the taxpayers if you say you won’t want to talk about the past?

Mr. MCHENRY. * * * I have a simple question, and you can answer yes or no or choose to not answer. That is certainly your right. Is using steroids * * * cheating?
Mr. SCHILLING. Yes.
Mr. PALMEIRO. I believe it is.
Mr. McGWIRE. Not for me to determine.

Mr. Sosa. I think so.
Mr. CANSECO. I think so. * * * It also cheats the individual who uses it because eventually if found out * * * they have to go through this. * * *

Mr. McHENRY. My followup question is to Mr. McGwire. You said you would like to be a spokesman on this issue. What is your message?

Mr. McGWIRE. My message is that steroids is bad. Don't do them. * * * And I want to tell everybody that I will do everything I can, if you allow me, to turn this into a positive. There is so much negativity said out here. We need to start talking about positive things here.

Mr. McHENRY. How do you know they're bad?

Mr. McHENRY. * * * Would you say that perhaps you have known people that have taken steroids, and you have seen ill effects on that, or would your message be that you have seen the direct effects of steroids?

Chairman TOM DAVIS. Let me just note here that House [R]ule 11 protects witnesses and the public from the disclosure of defamatory, degrading or incriminating testimony in open session. House rules at this point are both clear and strict. I think if the testimony tends to defame, the committee can't proceed in open session, and we want to proceed in open session today. So with that in mind, you can choose to answer that, Mr. McGwire.

Mr. McHENRY. Respectfully, my question is just about the message he would carry to the people. * * *

Mr. McGWIRE. I have accepted, by my attorney's advice, not to comment on this issue. * * *

Mr. KANJORSKI. * * * Mr. Canseco, * * * in your book * * * you confessed to taking steroids; is that correct?

Mr. CANSECO. Yes. In the past I have, yes.

Mr. KANJORSKI. * * * Why did you use steroids?

Mr. CANSECO. Well, there are many reasons. There's a chapter in my book, where my mom passed away, and I was called in from California. I was playing "A" ball that year, and when I flew home she was in the hospital and she was brain-dead from an aneurysm. She never had seen me play Minor League in general, and I promised her I was going to be the best athlete in the world, no matter what it took. * * *

Mr. KANJORSKI. Would it be fair to say that you did it because the motivation was to build your body to be more competitive, and ultimately make more money?

Mr. CANSECO. I don't even think the money was an issue there. I think just becoming, you know, the best athlete I could possibly become.

Mr. CLAY. Mr. McGwire, you have already acknowledged that you used certain supplements, including andro, as part of your training routine. In addition to andro, which was legal at the time[,] * * * what other supplements did you use?

Mr. McGWIRE. I am not here to talk about the past.

Mr. CLAY. * * * Mr. Canseco, how did steroids enhance your effort to hit the home run or your ability to hit the ball?

Mr. CANSECO. [S]ince I was a child, I have * * * been diagnosed with degenerative disk disease, scoliosis, arthritis. I have had four major back surgeries, elbow surgery. * * * I was a * * * different case than anyone else * * *. [Steroids] helped my physical stature and my muscle density, helped me stand up straight. But I had so many other physical problems, that's why I said if you are completely healthy, I would never, ever, have touched the stuff. Never.

Mr. CLAY. Would you have been able to perform at that level that you did achieve without steroids? * * *

Mr. CANSECO. I am an exception to the rule, because I had all these ailments. And I truly believe that * * * it helped me because of my * * * problems.
Mr. Clay. Thank you for your honesty.

Mr. McGwire, let me go back and ask you, would you have been able to perform at that level without using andros?

Mr. McGwire. I am not going to talk about the past.

Mr. Shays. *** Some of your testimony has been very helpful. I want you to know that this committee had requested a Major League Baseball joint drug prevention and treatment program. We wanted a copy of it. We asked for it, we wrote a letter, and then we had to subpoena it.

Now, I would like to ask the three who are active baseball players, I would like to have you tell me what you think, or thought until today, the policy was. And let me first say, we thought that it was—the first positive test, 10-day suspension; second positive test, 30-day suspension; third positive test, 60-day suspension; fourth positive test, 1-year suspension; and then any subsequent positive test, you are out for life. That’s what we thought it was.

I want to ask the three active players, starting with you, Mr. Sosa, if you thought that was the policy, or did you think that it was what we have now learned: that you could also be fined up to $10,000 on the first offense; fined up to $25,000 on the second offense; fined up to $50,000 on the third offense; fined up to $100,000 on the fourth offense.

Were you aware that you could be given a fine instead of suspension?

Mr. Sosa. No.

Mr. Palmeiro. I wasn’t aware of it. ***

Mr. Schilling. No, I wasn’t aware of it.

Mr. Shays. What does that tell you about Major League Baseball and the management if we couldn’t get this information voluntarily, we couldn’t get it through a request by letter after asking for it, we had to subpoena this? Why would this document, and why should this document have been prevented from coming to us? Would anyone care to answer that question?

Let me ask you another question. I hear the concept of team player. And trust me, I don’t care at this hearing, I don’t care to get into the issue of cheating or records. I don’t care at this hearing to know if you took drugs or not. I don’t care to have you name names. But what piqued my interest was the concept that as a team player, I am not going to name names.

I would like to know the obligation that each of you think you have for your team to make sure you don’t have drugs being used by teammates.

Mr. Palmeiro. I am not sure how I would handle that. I have never had that problem. You know, if it became a problem, I guess I would confront the player.

Mr. McGwire. I agree. I have never had that problem. And being retired and out of the game, I couldn’t even think about that.

Mr. Shays. Never had the problem of seeing your colleagues use drugs?

Mr. McGwire. Pardon me?

Mr. Shays. Never had a problem of seeing your colleagues use drugs, steroids; is that what you mean? I don’t know what you mean by you never had that problem.

Mr. McGwire. I am not going to get into the past.

Mr. Shays. OK, I am not really asking about the past.

Mr. Sosa, what obligation do you think that you have to your team if you are aware that someone is using drugs on your team?

Mr. Sosa. I am a private person, I don’t really go, you know, ask people whether they—

Mr. Shays. I will just conclude by saying I think I know your answer, sir.

It just seems to me that one of the messages you may be telling young people is that a team player—it’s an interesting concept of a team player, it seems to me. It seems to me you do have an obligation.
Mark McGwire’s opening statement (p. 150), however, did not detail all the risks associated with testifying at a congressional investigation. Identifying another possible mishap fell to Rafael Palmeiro. On August 1, 2005, major league baseball announced that he had failed a drug test; the steroid stanozolol was found in his system. He was then suspended for 10 days. But as the transcript of the hearing shows, Palmeiro said that he had never taken steroids, and he made the denial several times. He later said his best guess was that the positive test result was due to liquid B-12 tainted with stanozolol. The B-12, he said, had been supplied by a teammate, Miguel Tejada, but Tejada tested negative for steroid use twice during the 2005 season and other B-12 samples supplied by him tested negative, as well. After looking into whether Palmeiro had committed perjury at the March 17 hearing, the committee decided not to recommend that the Justice Department file charges. Observing that a “referral for perjury is a serious step that requires convincing evidence,” the committee found confusing and contradictory evidence in its investigation. Moreover, a positive steroid test result after March 17—the day on which Palmeiro repeatedly made the denials under oath—would not necessarily prove that he had used steroids before that.

Investigations and the First Amendment

Throughout the late 1940s and the 1950s, while the Cold War raged, Congress devoted seemingly inexhaustible attention to what it saw as the threat posed by Communist infiltration of numerous domestic organizations and activities. Fueled in the beginning by testimony from former American Communists who were pressured to expose others they once knew in the party or whom they thought were subversive, the naming of names took a fearsome toll on the private lives, reputations, and employability of the accurately- and inaccurately-identified alike. The glare of publicity that accompanied what critics characterized as politically-inspired “witch hunts” affected virtually every area of American life: labor unions, government employment, education, even Hollywood. Spearheading this effort was the House Committee on Un-American Activities (HUAC), a standing committee of the U.S. Congress until—after a name change in 1969—it was eventually abolished in 1975. In two especially noteworthy cases, Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173 (1957), and Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081 (1959), witnesses called before HUAC refused to answer some of the questions on First Amendment grounds. Although no one can be punished for invoking the Fifth Amendment, witnesses who later have been judged to have incorrectly relied on the First Amendment can be punished for contempt of Congress. The critical issue, then, is deciding when someone is within his or her First Amendment rights in refusing to answer. Because the judiciary has never regarded an inquiry into unconstitutional motives on the part of legislators as a valid basis for nullifying an otherwise legitimate legislative act, a witness will not be heard to complain that the purpose of the inquiry was to punish.

Consequently, the Court devised a less subjective approach to determine when a witness is obliged to answer. Reconstructed from Justice Harlan’s opinion in Barenblatt, this appears to consist of a three-part test: (1) Is Congress engaged in a valid legislative function? (2) Has the committee been duly authorized to conduct the inquiry? (3) Is the question asked pertinent to the authorized subject of the inquiry? If the answer to all three questions is “yes,” the First Amendment cannot legitimately be invoked as the basis for refusing to answer.

To begin with, Congress may not investigate activities over which it has no legislative authority. To do so would amount to exposure for the sake of exposure. But is membership in a political organization something Congress can legislate about? In Barenblatt, the Justices disagreed. Speaking for a bare majority of the Court, Justice Harlan concluded that, in
accordance with Congress's previous findings, the Communist Party—at least in post-World War II America—was a criminal conspiracy whose members were dedicated to overthrowing the government by means of force and violence. Balancing Barenblatt's right to silence (about the individuals with whom he had associated) under the First Amendment against the government's interest in self-preservation, the government's interest outweighed Barenblatt's. Speaking for the dissenters, Justice Black argued that the Communist Party was a political party (whose members, like those of any other political party, may occasionally commit illegal acts). Barenblatt's freedom to associate, as an essential part of freedom of speech, was absolutely protected by the very wording of the First Amendment (“Congress shall make no law * * * abridging the freedom of speech”). Thus, if Congress could not legislate about party membership, it had no constitutional authority to inquire about it.

Second, Justice Harlan concluded that the House of Representatives had duly authorized the inquiry. Rule XI, adopted in 1938 when HUAC was created as a special committee, provided: “The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.” Although the authorizing resolution was open-ended, Harlan pointed out that the committee's operation had unquestionably been endorsed by subsequent Congresses which had elevated HUAC from a standing to a permanent committee of the House and repeatedly funded its operation.

Citing the Court's previous decision in Watkins, Justice Black disagreed. In Watkins, decided just two years earlier, Chief Justice Warren, speaking for a majority of the Justices that included Harlan, held that the House rule purporting to authorize HUAC's investigations was unconstitutionally vague. Warren had written, “It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American?' What is that single, solitary 'principle of the form of government as guaranteed by our Constitution?'” He continued, “No one could reasonably deduce from [its] charter the kind of investigation that the Committee was directed to make.” With so little to guide the witness in deciding whether the committee was operating within its authorized jurisdiction and, therefore, whether someone was obligated to answer, invoking the First Amendment became little more than a high-stakes guessing game. That denied Watkins due process. The only sure path lay in always complying with the committee's requests, which meant the witness automatically forfeited his First Amendment rights. Since the committee's authorizing resolution remained exactly as it was in Watkins, Black argued, Barenblatt need not answer.

The last component of the three-part test asked whether the questions asked were pertinent to the subject which the committee was authorized to investigate. Harlan distinguished Watkins' experience, in which he had only the committee's name to go on, from that of Barenblatt. Barenblatt had many more clues: the committee chairman had identified the specific nature of the inquiry—Communism in education; Barenblatt had been present to hear the questions asked of preceding witnesses; and the questions asked pertained to Barenblatt's own membership, not that of others. Moreover, unlike Watkins, who answered questions about his own membership but declined to name others, Barenblatt had indicated to the committee only that he might decline to answer some of the committee's questions. As Harlan pointed out, Barenblatt's was, at best, a contemplated objection; failure to explicitly object deprived the committee of the opportunity to make it clear why the questions put to him were pertinent and, therefore, why he was obliged to
answer.11 Justice Black’s response to Harlan’s argument was short and simple: If Congress had done nothing to change the resolution authorizing HUAC so that it remained as unconstitutionally vague as it was in Watkins, then no question could be pertinent.

However, when an investigating committee of the Florida legislature subpoenaed the president of the Miami branch of the N.A.A.C.P. in the mid-1950s to turn over the organization’s membership lists, the Court, four years later, drew a sharp line between investigating that group and inquiring about membership in the Communist Party. Speaking for the Court in Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889 (1963), Justice Goldberg began from the premise that “[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association, and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.” While Barenblatt had held that could be demonstrated with respect to Communist affiliation, “it is not alleged Communists who are the witnesses before the [state investigation] committee and it is not discovery of their membership in that party which is the object of the challenged inquiries. Rather, it is the N.A.A.C.P. itself which is the subject of the investigation *** [and] *** there is no suggestion that the Miami branch of the N.A.A.C.P. or the national organization with which it is affiliated was, or is, itself a subversive organization.” The state had failed to produce any evidence “to demonstrate any substantial relationship between the N.A.A.C.P. and subversive activities ***.” In the absence of such a showing, investigating membership

11. Except for this difference, critics of the Court’s performance in Barenblatt argued that Harlan’s distinctions between the facts of the two cases were specious: That HUAC had become a standing committee and had been funded continuously were facts also true in 1957 when Watkins was decided and therefore could not be cited as factors distinguishing the cases. In the critics’ view, Harlan’s majority opinion served as little more than camouflage for the real aim in Barenblatt, which was to signal the conservative coalition of Republicans and Southern Democrats then controlling Congress that the Justices intended to retreat from a string of controversial rulings that had provoked legislation designed to curb the Court. According to their interpretation, Barenblatt was simply the closing act of a recurring political drama known as “Court-curbing,” a phenomenon triggered whenever the values of a majority of Justices are seriously out of step with those of the prevailing majority in Congress. This historical pattern is marked by three stages: (1) judicial provocation, (2) congressional threat, and (3) judicial retreat.

In the mid-1950s, the first step—judicial provocation—was illustrated by a spate of rulings that vigorously defended the constitutional rights of witnesses subpoenaed by investigating committees, government employees accused of disloyalty, criminal defendants, and segregated African-Americans. Congress then retaliated by attempting to pass legislation to overturn the Court’s statutory rulings and to rein in its constitutional rulings by stripping the Court of some of its appellate jurisdiction. (At other times in American history, Congress threatened to impeach and remove Justices, enlarge the number of Justices on the Court, pass a constitutional amendment, or cancel an upcoming Term of the Court.) In 1958, the threat took the specific form of the Jenner-Butler bill and an even more extreme measure, HR 3. In the third, final, and inevitable stage, the Court—always overmatched in any pitched battle with Congress—gave in, its retreat accomplished either by reaching a different result in cases currently before it whose facts were virtually identical to those of the offending cases or by overruling the offensive precedents outright. The confrontation of the 1950s repeated a pattern that had been evident in 1801, in 1867, and in 1937. (The denouement of the conflict between Congress and the Court during the Great Depression is illustrated, for example, by the Court’s opinions in National Labor Relations Board v. Jones & Laughlin Steel Corp. (see Chapter 5) and West Coast Hotel Co. v. Parrish (see Chapter 7).) For a discussion of this repeating model of Court-curbing in American history, see Stuart S. Nagel, “Curbing the Court: The Politics of Congressional Reaction,” in The Legal Process from a Behavioral Perspective (1969), pp. 260–279. For discussion of curbing the Court in the 1950s, see “Court-Curb Proposals Stimulated by Controversial Decisions,” Congress and the Nation, vol. 1 (1965), p. 1442; see also Walter F. Murphy, Congress and the Court (1962). For an itemized list of the cases provoking the confrontation of the 1950s and those registering the Court’s retreat, see earlier editions of this casebook.
in “a concededly legitimate and nonsubversive organization” amounted to nothing more than the exposure of vulnerable individuals. And, quoting from an earlier decision, the Court noted, “We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered intense resentment and opposition of the politically dominant white community ***.” Unlike many of the witnesses called before HUAC, the Court would not leave the N.A.A.C.P. members to be unmasked under the spotlight of a public hearing and then left to face retribution in the shadows—whether firing or blacklisting by employers or threats or violence from vengeful individuals. Nowadays, as the steroids-in-baseball transcript shows, witnesses are protected, not only by court rulings, but also by congressional rules. In contrast to the quite calculated sensationalism of HUAC’s exposés, the House’s current Rule 11 provides that a witness’s defamatory, degrading, or incriminating testimony is to be vetted in closed—rather than open—session.

**Immunity**

The advantage of invoking the First Amendment is not having to recite a constitutional claim in which you acknowledge that you may have committed a crime; the peril of invoking it is that, if the claim is incorrectly made, you can be punished for contempt. Invoking the Fifth Amendment besmirches your reputation simply by claiming the right, but you can never be punished for doing so. All in all, as we have shown, people forced to make the choice are caught between a rock and a hard place. Suppose, however, that you are willing to take the heat for invoking the Fifth Amendment; can you still be made to testify?

The answer is “yes,” if you have been given immunity. Immunity is government’s assurance that what you say cannot be used to punish you. You may have to admit that you participated in criminal activity, but your admission cannot be used against you in a criminal prosecution.

How much immunity is enough immunity? Supreme Court decisions have made it clear that individuals to whom immunity has been given cannot refuse to testify. The Court has also held that immunity encompasses several senses in which the witness’s statements may be used: (1) use immunity, in which the statements made by the witness may not be used against him or her in a criminal prosecution; (2) derivative use immunity, in which leads obtained from the witness’s statements cannot be used to procure other incriminating evidence; and (3) transactional immunity, in which the witness cannot be subjected to any punishment for the criminal act committed regardless of what other evidence may be obtained.

Although the Court has held that when immunity is granted, it need not be transactional immunity, it must at least amount to use and derivative use immunity. If evidence of the crime is obtained from sources entirely independent of the witness’s statements—an unlikely prospect perhaps—then there is no constitutional impediment to convicting him or her of the crime. The principle articulated by the Court is that the scope of the immunity granted must be congruent with—but is not required to be broader than—the protection conferred by the Fifth Amendment’s guarantee against self-incrimination. Constitutionally speaking, the witness is entitled to be no worse off with a grant of immunity than would be the case if he or she had invoked the Fifth Amendment.

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United States v. North, which follows, raises the issue of using immunized statements in preparing witnesses who testified against the defendant in his multicount federal trial on charges related to the Iran-Contra Affair. Given the Court’s interpretation of what is constitutionally forbidden to prosecutors when a witness is given immunity, is it possible for a witness called to testify before a congressional investigating committee to be successfully prosecuted on criminal charges afterward?

**United States v. North**
United States Court of Appeals, District of Columbia Circuit, 1990
910 F.2d 843

**BACKGROUND & FACTS** Following the appearance of a story in a Lebanese newspaper in November 1986 that agents of the Reagan administration had secretly sold weapons to Iran, the House and Senate established committees to investigate this and the additional allegation that proceeds from the sale had gone to fund the rebels or “Contrás” fighting in Nicaragua at a time when Congress had legislated to bar aid to these resistance forces. In July 1987, Lieutenant Colonel Oliver North, a former staff member of the National Security Council (NSC), was called to testify before a joint meeting of the Iran-Contra committees. Invoking his right against self-incrimination guaranteed by the Fifth Amendment, he declined to testify; but Congress compelled his testimony by a grant of use immunity under 18 U.S.C.A. § 6002. His testimony, which lasted for six days, was carried live on national television and radio and was rebroadcast numerous times on news programs.

At the same time these hearings were being conducted, a Special Division of the U.S. Court of Appeals for the District of Columbia Circuit authorized the appointment of an independent counsel (IC), Lawrence E. Walsh, to investigate and prosecute criminal wrongdoing arising out of the Iran-Contra Affair. The IC secured indictments against North and other operatives of the Reagan administration, including Admiral John Poindexter and General Richard Secord. North himself was indicted on a dozen criminal counts and convicted on three. These included lying to Congress and altering, destroying, and removing official NSC documents. North appealed, and his convictions were reversed. The Supreme Court later denied certiorari, 500 U.S. 941, 111 S.Ct. 2235 (1991).

The appeals court in this case addressed the problems created when an individual who has made incriminating statements under a grant of immunity is subsequently prosecuted. As both the per curiam and dissenting opinions suggest, it may be impossible to have a successful criminal prosecution if Congress insists on investigating that criminal activity first and compels testimony by grants of immunity.

Before WALD, Chief Judge, SILBERMAN and SENTELLE, Circuit Judges.

PER CURIAM:

* * *

* * * Because the privilege against self-incrimination “reflects many of our fundamental values and most noble aspirations,” Murphy v. Waterfront Comm’n, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596 (1964), and because it is “the essential mainstay of our adversary system,” the Constitution requires “that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.” Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620 (1966).

The prohibition against compelled testimony is not absolute, however. Under the
rule of Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972), a grant of use immunity under 18 U.S.C. § 600213 enables the government to compel a witness’s self-incriminating testimony. This is so because the statute prohibits the government both from using the immunized testimony itself and also from using any evidence derived directly or indirectly therefrom. ***

When the government proceeds to prosecute a previously immunized witness, it has “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” Kastigar, 406 U.S. at 461–62, 92 S.Ct. at 1665. ***

A trial court must normally hold a hearing (a “Kastigar hearing”) for the purpose of allowing the government to demonstrate that it obtained all of the evidence it proposes to use from sources independent of the compelled testimony.***

[T]he failure of the government to meet its burden can have most drastic consequences. * * *

North’s primary Kastigar complaint is that the District Court failed to require the IC to demonstrate an independent source for each item of evidence or testimony presented to the grand jury and the petit jury ***. North also claims that the IC made an improper nonevidentiary use of the immunized testimony (as by employing it for purposes of trial strategy) ***. North also protests that his immunized testimony was improperly used to refresh the recollection of witnesses before the grand jury and at trial, that this refreshment caused them to alter their testimony ***.

*** [T]he use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes evidentiary use rather than nonevidentiary use. ***

***

* * * Prosecutorial knowledge of the immunized testimony may help explicate evidence theretofore unintelligible, and it may expose as significant facts once thought irrelevant (or vice versa). Compelled testimony could indicate which witnesses to call, and in what order. Compelled testimony may be helpful in developing opening and closing arguments. ***

[In] Kastigar * * * [the] Court * * * held that

immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. 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. ***

[T]he Court pointed out that “[t]he statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom. * * * This total prohibition on

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13. The federal use immunity statute, 18 U.S.C. § 6002, provides as follows:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
1. a court or grand jury of the United States,
2. an agency of the United States, or
3. either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

[Footnote by the court.]
use provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.” *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665 (emphasis supplied). Section 6002 ***, the Court concluded, ***“leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.”***

*** In our view, the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, [however], constitutes indirect evidentiary not nonevidentiary use. This observation also applies to witnesses who studied, reviewed, or were exposed to the immunized testimony in order to prepare themselves or others as witnesses.

*** When the government puts on witnesses who refresh, supplement, or modify that evidence with compelled testimony, the government uses that testimony to indict and convict. The fact that the government violates the Fifth Amendment in a circuitous or haphazard fashion is cold comfort to the citizen who has been forced to incriminate himself by threat of imprisonment for contempt. *** [It] cannot be dismissed as merely nonevidentiary. ***

*** The fact that a sizable number of grand jury witnesses, trial witnesses, and their aides apparently immersed themselves in North’s immunized testimony leads us to doubt whether what is in question here is simply “stimulation” of memory by “a bit” of compelled testimony. *** *Kastigar* does not prohibit simply “a whole lot of use,” or “excessive use,” or “primary use” of compelled testimony. It prohibits “any use,” direct or indirect. From a prosecutor’s standpoint, an unhappy byproduct of the Fifth Amendment is that *Kastigar* may very well require a trial within a trial *** if such a proceeding is necessary for the court to determine whether or not the government has in any fashion used compelled testimony to indict or convict a defendant.

*** It may be that it is possible in the present case to separate the wheat of the witnesses’ unspoiled memory from the chaff of North’s immunized testimony, but it may not. There at least should be a *Kastigar* hearing and specific findings on that question. If it proves impossible to make such a separation, then it may well be the case that the prosecution cannot proceed. Certainly this danger is a real one in a case such as this where the immunized testimony is so broadly disseminated that interested parties study it and even casual observers have some notion of its content. Nevertheless, the Fifth Amendment requires that the government establish priorities before making the immunization decision. The government must occasionally decide which it values more: immunization (perhaps to discharge institutional duties, such as congressional fact-finding and information-dissemination) or prosecution. If the government chooses immunization, then it must understand that the Fifth Amendment and *Kastigar* mean that it is taking a great chance that the witness cannot constitutionally be indicted or prosecuted.

***

The convictions are vacated and the case is remanded to the District Court. On remand, if the prosecution is to continue, the District Court must hold a full *Kastigar* hearing that will inquire into the content as well as the sources of the grand jury and trial witnesses’ testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by estab-
lishing that the witness was never exposed to North’s immunized testimony, or that the allegedly tainted testimony contains no evidence not “canned” by the prosecution before such exposure occurred. ** *

*** If the government has in fact introduced trial evidence that fails the Kastigar analysis, then the defendant is entitled to a new trial. If the same is true as to grand jury evidence, then the indictment must be dismissed.

*** WALD, Chief Judge, dissenting ***:

Oliver North’s was a case of epic proportions, massively publicized, for many weeks engaging the rapt attention and emotions of the nation. The panel today reverses his convictions *** [and] remand[s] for an “item-by-item, line-by-line” hearing on whether any bit of evidence, as yet unidentified, may have reflected exposure to North’s immunized testimony before Congress.

After studying for months the thousands of pages of transcripts and hundreds of documents produced for the grand jury and trial, I, on the other hand, am satisfied that North received a fair trial—not a perfect one, but a competently managed and a fair one. *** I do not find *** any *** reversible error. I am convinced that the essentials of a fair trial were accorded North, and that his conviction on the three Counts of which the jury found him guilty should be affirmed.

***

While national television coverage should not be allowed to impinge on North’s statutory and constitutional rights, neither does it entitle North to escape zealous but fair prosecution. Kastigar’s strictures must be applied in a manner that protects a defendant’s constitutional rights, but also preserves the public’s interest in conducting prosecutions of officials whose crimes have far-flung implications for national policy. We require trial judges to conduct fair trials, not perfect ones ***. North has failed to identify a single suspected Kastigar violation in the thousands of pages of grand jury and trial testimony, other than the misguided efforts of in-house Justice Department officials to use his immunized testimony to brief witnesses who essentially corroborated his own version of events, and who swore under oath that their ultimate testimony was derived from personal recollection only. When an “ex parte review in appellate chambers,” *** yields a clear result that is entirely consistent with the trial court’s own findings, a remand for further lengthy hearings is unjustified. ***

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D. THE SPEECH OR DEBATE CLAUSE (CONGRESSIONAL IMMUNITY)

The Constitution specifies that members of Congress “shall not be questioned in any other Place” for “any Speech or Debate in either House.” Art. I, § 6, ¶ 1. The purpose of this grant of immunity was to secure the independence of the legislative branch, especially against interference by the Executive. English history, particularly during the reign of the Stuarts, was littered with attempts by the monarch—frequently successful and often by force—to intimidate members of the House of Commons. In what is perhaps the most notorious example, Charles I, accompanied by a detachment of soldiers, invaded the floor of the House of Commons in January 1642 to arrest five members for treason. However, they had been warned in advance and fled. When the King demanded to know where the fugitives were hiding, the Speaker—in an heroic defense of the integrity of the House of Commons—refused to say. Indeed, several Speakers of the Commons lost their heads when they refused to submit to royal bullying or officially reported to the King that the House of
Yet any grant of absolute immunity carries the potential for mischief. If a representative or senator makes defamatory statements outside the halls of Congress, he is as subject to suit by the injured party as anyone else. But if those statements are made on the floor or in committee rooms, such statements—no matter how irresponsible or damaging—cannot legally be held against him. The tension between maintaining the integrity of Congress and preserving an immunity that frequently appears to place the legislator above the law pervades all decisions interpreting the Speech and Debate Clause. The Supreme Court has endeavored to walk this constitutional tightrope by distinguishing conduct that is part of the legislative process from that which is not.

Reviewing the most important principles that define Speech or Debate protection, the Court noted, in Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614 (1972), that the clause provides no defense to a member of Congress against arrest, trial, conviction, or punishment on criminal charges, although a federal legislator is immune from being served with civil process while Congress is in session. While there is no immunity from criminal sanctions, evidence against a congressperson or senator cannot be drawn from speeches, votes, or any other act done in the course of the legislative process. Not only are legislators immunized with respect to any actions they perform in the legislative process, so are their aids, provided these assistants are acting on behalf of the legislator.

In Gravel, a United States senator and his aide were subpoenaed to answer questions before a federal grand jury about their handling of classified government documents, specifically “The Pentagon Papers,” a 47-volume Defense Department study that detailed the unfolding of American involvement in Vietnam. After Gravel convened a midnight meeting of his obscure Senate subcommittee and read excerpts aloud, he had the entire study entered into the record. The grand jury subpoenaed Gravel and his legislative assistant to answer questions about their involvement in arrangements with a commercial publisher to make the study available to the public. The Court held that, although reading excerpts and entering the volumes into the record at the subcommittee hearing were within the bounds of Speech or Debate Clause immunity, Gravel’s involvement in making arrangements for the public dissemination of the study were not. The subcommittee meeting was part of the legislative process, since Congress was informing itself. Informing the public, on the other hand, was held to be outside the legislative process, so neither Gravel nor his assistant were immune from a grand jury inquiry about arrangements for commercial publication.

This bit of line-drawing proved to be too much for Justice Brennan, who found it embodied “a far too narrow view of the legislative function.” In dissent, he protested: “[T]he Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system[,] * * * the legislator’s duty to inform the public about matters affecting the administration of government. That this ‘informing function’ falls into the class of things ‘generally done in a session of the House by one of its members in relation to the business before it,’ * * * was explicitly acknowledged by the Court in Watkins v. United States. In speaking of the ‘power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government,’ the Court noted that ‘[f]rom the earliest times in its history, the Congress has assiduously performed an “informing function” of this nature.’” Justice Brennan found additional support for this broad view in statements by Jefferson and Madison that “reflect[ed] a deep conviction of the Framers that self-government can succeed only when the people are informed by their representatives, without interference from the Executive or Judiciary, concerning the conduct of their agents in government.”
A year later, the Court repeated this application of the clause in Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018 (1973). In that case, the House Committee on the District of Columbia had undertaken an investigation of Washington's public school system and presented its devastating findings in a committee report. As an appendix to the report, the committee included sample truancy reports, disciplinary accounts, test papers, and other evidence used to support its conclusions that the city's public educational system was plagued by severe problems of skipping school, disruption and violence, and underachievement. The exhibits in the appendix identified particular students by name. When copies of the committee report containing these exhibits were made available for purchase by the public, parents of the students who had been named sued the Superintendent of Documents and Public Printer for damages. The Court concluded that, since a committee report distributed to members of the House informed Congress, public officials charged with printing and distributing the report were immune from suit. However, since public sale of the report amounted to Congress informing the public and thus was not part of the legislative process, plaintiffs could sue for damages on that part of their complaint.

In Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675 (1979), the Court affirmed the general proposition that the Speech or Debate Clause provides no immunity when a slanderous or libelous statement is repeated outside the legislative process. That case involved Senator William Proxmire's liability for certain statements made in connection with his Golden Fleece Award, a publicity stunt he created to highlight what he thought were egregious examples of government's wasteful spending. One of these “awards” went jointly to the National Aeronautics and Space Administration and the Navy for funding research by a behavioral scientist into forms of aggression triggered when someone is confined in close quarters for prolonged periods of time. Dr. Hutchinson had conducted government-funded research on aggression in monkeys, which Proxmire ridiculed on the Senate floor as studying why monkeys “grind their teeth.” Proxmire went on to complain that funding this research put the bite on the taxpayer and urged the government “to get out of this ‘monkey business.’ ” Proxmire then repeated much of this in a news release, a newsletter to his constituents, and a television interview. Hutchinson sued, contending that the senator’s statements humiliated him, held him up to public scorn and ridicule, damaged his professional and scholarly reputation, and impaired his income.

Consistent with its previous decisions, the Court held that the clause immunized the senator against any damages arising from the speech because the Senate was informing itself. However, since informing the public was unprotected activity within the meaning of the Speech or Debate Clause, Hutchinson’s suit could proceed on damages resulting from the other three venues in which Proxmire had republished his libel. Although the decisions in Gravel, McMillan, and Proxmire all speak to a lawmaker’s liability for repeating a libel outside the legislative process, now that C-SPAN broadcasts speeches and debates as they actually occur on the floor of each chamber and in the committee rooms, one may well ask whether the distinction between conduct within and outside the legislative process still remains viable.

Although representatives and senators can surely be prosecuted for crimes, nothing said or done in the legislative process can be introduced as evidence against them, nor can there be any inquiry into the motives for their legislative acts. See United States v. Johnson, 383 U.S. 169, 86 S.Ct. 749 (1966); United States v. Helstoski, 442 U.S. 477, 99 S.Ct. 2432 (1970). Increasingly, however, the duties of members of Congress have focused less on legislating and more on running errands for constituents. If, as the late Speaker of the House Tip O’Neill used to say, “All politics is local,” even the least astute representative or senator soon comes to appreciate that the surest route to re-election is constituency service. In this there is a disparity between the scope of congressional immunity and the realities of
the member’s job. As the Court said in United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531 (1972):

Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate “errands” performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called “news letters” to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. * * *

Constitutionally speaking, then, a representative or senator does things outside the legislative process at his or her own risk, no matter how politically necessary it may be to do them.

In response to a criminal prosecution for having taken money for his vote and support of a bill dealing with postage rates, Senator Brewster unsuccessfully argued that the Speech or Debate Clause barred any use of his vote as evidence and any examination into the motivation behind it. Bribery, the Court held, was certainly not part of the legislative process, and inquiry into corruption was not barred because what was bought was a legislative act. As the Court explained: “There is no need for the Government to show that [Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise. * * * When a bribe is taken, it does not matter whether the promise * * * was for the performance of a legislative act as here or, as in Johnson, for use of a Congressman’s influence with the Executive Branch. And an inquiry into the purpose of a bribe *does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.’” 408 U.S., at 526, 92 S.Ct., at 2544.

The most recent go-around over congressional bribery, however, raised a different angle on Speech or Debate Clause protection. The constitutional dispute sprang from a Saturday-night raid by FBI agents in May 2006 on the Capitol Hill office of Representative William Jefferson. It was the first search of a legislator’s office in the 219-year history of Congress. The agents obtained the search warrant for his office after they found some $90,000 stashed in a freezer at Jefferson’s home. The search of the congressman’s home had been based on viewing a videotape which showed him taking a $100,000 bribe. In their Capitol Hill raid, the agents seized computer and other documents. Representative Jefferson argued that this search and seizure violated the separation of powers, specifically the guarantee of autonomy afforded by the Speech and Debate Clause against intrusion and intimidation by agents of the executive branch. In particular, Jefferson objected that finding documents essential to the government’s case would entail rummaging through all the computer files and other documents in search of the incriminating ones. This sorting process, he contended, would necessarily involve the examination of sensitive and confidential documents related to the legislative process in order to identify any related to criminal activity. The search for documents would therefore intrude upon the legislative process and violate the immunity all members of Congress share as participants in that process.

Department of Justice officials replied that they were going to employ independent specialists to “filter” the documents so that the sensitivity of certain files would not be compromised. But, unlike the editing process employed as a result of the Supreme Court’s decision in United States v. Nixon (see p. 211), in which the interest in law enforcement was harmonized with the President’s claim of executive privilege by having a federal judge inspect all of the material in camera and separate the incriminating conversations from ones that were not relevant, examination of the files in this case would not be done by a judge but personnel hired by the executive branch. From the standpoint of Capitol Hill, this intrusion by the Department of Justice was seen as yet another example of an overbearing executive branch expanding its powers at the expense of Congress. The congressional leadership of both parties called for a halt to any examination of the seized documents and demanded their speedy return.

In In re Search of the Rayburn House Office Building Room Number 2113, 432 F.Supp.2d 100 (D.D.C. 2006), Judge Thomas F. Hogan held there was probable cause to search Jefferson’s office and, first-of-its-kind though the search may have been, there was no violation of the separation of powers or the Speech or Debate Clause because the search did not interfere with any legislative act by the congressman. Judge Hogan wrote, “It is well established * * * that a member of Congress is generally bound to the operation of the criminal law as are ordinary persons.” More pointedly, he continued, “Congressman Jefferson’s interpretation of the speech or debate privilege would have the effect of converting every Congressional office into a taxpayer-subsidized sanctuary for crime.” Nor did the separation of powers argument provide much of a defense. Said Judge Hogan, “Rather, the principle of the separation of powers is threatened by the position that the legislative branch enjoys unilateral and unreviewable power to invoke absolute privilege, thus making it immune from the ordinary criminal process of a validly issued search warrant.” On appeal, the three-judge circuit panel subsequently held that, although the Speech or Debate Clause absolutely guaranteed Jefferson the right to review the materials first and to shield any legislative documents from inspection by federal agents, it was enough here that protected materials be returned to him. Materials not protected by the privilege were to be retained by the FBI and could be used to prove any criminal charges against him.15

Probably the most comprehensive examination of legislative immunity is provided in Josh Chafetz’s book, Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions (2007). It discusses the following topics in depth: jurisdictional conflicts between courts and legislative houses, legislators’ freedom of speech, legislators’ freedom from civil suit, the resolution of contested elections, and the disciplinary powers of legislative bodies.

THE FACT THAT the enumerated and implied powers of the national government are contained in the legislative article of the Constitution is fairly clear evidence, as Chief Justice Taft put it in Myers v. United States, 272 U.S. 52, 117, 47 S.Ct. 21, 25 (1926), that “the vesting of the executive power in the President was essentially a grant of the power to execute the laws.” (Emphasis supplied.) Formal presidential participation in the policymaking process is confined to the power to veto bills and the duty to inform Congress annually on the state of the Union, a task all the Presidents from Thomas Jefferson to William Howard Taft performed by written message, not by personally addressing a joint meeting of Congress. That the President as party leader would have a legislative program and would be expected to aggressively seek its passage (especially if his party controlled Congress), that he would otherwise use the veto power to leverage policy out of Congress, and that the State of the Union message would regularly seek to set Congress’s agenda are mainly twentieth-century developments. Today, it is the President who proposes and Congress that disposes, as Richard Neustadt so effectively argued nearly five decades ago in Presidential Power (1960), his classic study of the modern Chief Executive. The first section of this chapter highlights the President’s role as law enforcer; subsequent sections focus on the acquisition of vast political power by the President and emphasize his frequent policy leadership and sometimes independent action. The sequence of materials in this chapter vividly demonstrates the widening gap between the President’s powers on paper and his real power—something that is demonstrated by what modern Presidents now claim for the office.

A. THE PRESIDENT’S APPOINTMENT AND REMOVAL POWERS
The power to appoint and remove subordinates is critical to maintaining effective control over those who help the President execute the law. The President, after all, cannot personally enforce every law, yet the occupant of the office ultimately bears the constitutional responsibility for their enforcement. Article II of the Constitution spells out the President’s appointing powers in the following fashion: “[H]e shall nominate, and by
and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” The power of appointing principal executive and judicial officers of the government is a shared power. Principal officers (major political officeholders outside the subsequently established civil service system) require nomination by the President, and Senate concurrence in their appointment. The naming of “inferior officers,” on the other hand, can be delegated to the President, a cabinet officer, or judges. But who is an “inferior officer?” A nearly unanimous Court in Edmond v. United States, 520 U.S. 651, 117 S.Ct. 1573 (1997), responded: “Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: whether one is an ‘inferior’ officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of greater magnitude. * * * [I]n the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”

The President’s appointment power with respect to officers was impressively vindicated against congressional encroachment by the Court’s ruling in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). In that case, the Court held unconstitutional certain provisions of the Federal Election Campaign Act of 1971, which created a Federal Election Commission comprised of six members, two to be nominated by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House, all to be confirmed by a majority vote of both Houses of Congress. Said the Court, “[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [Article II,] § 2, cl. 2, * * *.”

In view of the specificity with which the Framers spelled out the appointing process, it seems strange in retrospect that they did not make some provision for the removal of officials except by impeachment. Perhaps they felt, as Chief Justice Taft asserted in Myers v. United States (p. 170), that the authority to remove officers was inherent in “executive power.” At any rate, that was the premise under which the government operated until Andrew Johnson’s administration. Amid the intractable dispute between the President and the Radical Republicans over Reconstruction following the Civil War, Congress passed the Tenure of Office Act, 14 Stat. 430, in 1867. That law barred the President from firing the heads of any of the executive departments without Senate consent. President Johnson’s attempt to remove Secretary of War Edwin Stanton in deliberate violation of the statute constituted one of the charges in his impeachment. At issue in Myers was a law passed in 1876 that made first-, second-, and third-class postmasters subject to removal by the President “by and with the consent of the Senate.” Although the Tenure of Office Act was repealed 20 years after its enactment, without ever having been subjected to constitutional challenge, it did not stop the Court in Myers from gratuitously declaring that statute unconstitutional as well, a clear vindication—albeit long after the fact—of President Johnson’s action. In his lengthy opinion for the Court in Myers, Chief Justice Taft observed—also by way of dictum—that the President’s removal power might be subject to limitation where “duties of a quasi-judicial character [were] imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals * * *.”
BACKGROUND & FACTS  In addition to specifying a four-year term of office for postmasters, a provision of an 1876 act passed by Congress declared that first-, second-, and third-class postmasters were to be appointed and removed by the President with the consent of the Senate. Myers was appointed to a first-class postmastership at Portland, Oregon, in July 1917, in conformity with the statute. He was removed from office in February 1920 by the Postmaster General under instructions from the President, but without Senate approval. After protests over his removal went unregarded, Myers sued to recover his lost salary in the U.S. Court of Claims. The Court of Claims ruled against Myers, and an appeal challenging the unfettered removal power of the President was taken to the Supreme Court by Lois Myers, the administratrix of his estate.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

* * *

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. * * * The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. * * * Each head of a department is and must be the President’s alter ego in the matters of that department where the President is required by law to exercise authority.

* * *

* * * There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must therefore control the interpretation of the Constitution as to all appointed by him.

[T]he President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider...
and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

The opinion of Chief Justice TAFT described at length and in detail the debate and adoption of legislation during the First Congress in 1789 that created the first three executive departments—State, Treasury, and War—each to be headed by “a Secretary, to be appointed by the President by and with the advice of the Senate, and to be removable by the President.”

We have devoted much space to this discussion and decision of the question of the presidential power of removal in the First Congress because this was the decision of the First Congress on a question of primary importance in the organization of the government made within two years after the Constitutional Convention and within a much shorter time after its ratification, and because that Congress numbered among its leaders those who had been members of the convention.

From 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this court at variance with the declaration of the First Congress; but there was clear affirmative recognition of it by each branch of the government.

Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate’s consent; that the provisions of the second section of article 2, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed, and not to be extended by implication; that the President’s power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate’s power of checking appointments; and, finally, that to hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.

An argument has been made [that] the executive power of removal by the President, without the consent of the Senate, will open the door to a reintroduction of the spoils system. The evil of the spoils system aimed at in the Civil Service Law and its amendments is in respect to inferior offices. It has never been attempted to extend that law beyond them.
Reform in the federal civil service was begun by the Civil Service Act of 1883. It has been developed from that time, so that the classified service now includes a vast majority of all the civil officers. It may still be enlarged by further legislation. The independent power of removal by the President alone under present conditions works no practical interference with the merit system. Political appointments of inferior officers are still maintained in one important class, that of the first, second and third class postmasters, collectors of internal revenue, marshals, collectors of customs, and other officers of that kind distributed through the country. They are appointed by the President with the consent of the Senate. It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics, and that is what a number of Presidents have recommended.

This court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

In none of the original 13 states did the chief executive possess such power at the time of the adoption of the federal Constitution. In none of the 48 states has such power been conferred at any time since by a state Constitution, with a single possible exception. In a few states the Legislature has granted to the Governor, or other appointing power, the absolute power of removal. The legislative practice of most states reveals a decided tendency to limit, rather than to extend, the Governor’s power of removal.

The practice of Congress to control the exercise of the executive power of removal from inferior offices is evidenced by many statutes which restrict it in many ways besides the removal clause here in question. Each of these restrictive statutes became law with the approval of the President. Every President who has held office since 1861, except President Garfield, approved one or more of such statutes. Some of these statutes, prescribing a fixed term, provide that removal shall be made only for one of several specified causes. Some provide a fixed term, subject generally to removal for cause. Some provide for removal only after hearing.

The historical data submitted present a legislative practice, established by concurrent affirmative action of Congress and the President, to make consent of the Senate a condition of removal from statutory inferior, civil, executive offices to which the appointment is made for a fixed term by the President with such consent. They show that the practice has existed, without interruption, continuously for the last 58 years; that throughout this period, it has governed a great majority of all such offices; that the legislation applying the removal clause specifically to the office of postmaster was enacted more than half a century ago; and that recently the practice has, with the President’s approval, been extended to several newly created offices. The data show further that the insertion of the removal clause in acts creating

Mr. Justice BRANDEIS, dissenting.
inferior civil offices with fixed tenures is part of the broader legislative practice, which has prevailed since the formation of our government, to restrict or regulate in many ways both removal from and nomination to such offices. A persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary. * * *

The persuasive effect of this legislative practice is strengthened by the fact that no instance has been found, even in the earlier period of our history, of concurrent affirmative action of Congress and the President which is inconsistent with the legislative practice of the last 58 years to impose the removal clause. * * * The action taken by Congress in 1789 after the great debate does not present such an instance. The vote then * * * involved merely the decision that the Senate does not, in the absence of legislative grant thereof, have the right to share in the removal of an officer appointed with its consent, and that the President has, in the absence of restrictive legislation, the constitutional power of removal without such consent. Moreover, * * * the debate and the decision related to a high political office, not to inferior ones.

* * *

[Justices HOLMES and McREYNOLDS also dissented.]

The Myers case involved the President’s removal of a low-echelon employee of the Post Office, one of the largest executive departments. The Postmaster General, who headed it, had sat as a member of the Cabinet since 1829, when Andrew Jackson was President. Indeed, until well past the mid-twentieth century, the Postmaster General usually had been the chairman of the President’s political party. This patronage fact would appear to jibe well with the point that the removal power was essential to the President’s political effectiveness.

Beginning with the creation of the Interstate Commerce Commission in 1887, however, the executive branch housed not only the executive departments but also independent regulatory agencies. The independent regulatory commissions, which included the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, the Federal Election Commission, the ICC, and others, had been created with the intent that qualifications for appointment would focus on technical expertise in the area, not political compatibility with the President. In fact, the number of members on these commissions who can be selected from any one political party is strictly limited in an attempt—realistically or not—to depoliticize them. The intended emphasis upon the technical qualifications of personnel was itself simply an extension of the movement toward the merit system of staffing government and away from the previously existing “spoils system,” in which successful candidates for governmental employment had only to do well on a qualifying exam that usually consisted of the single question, “Are you a Democrat (a Republican)?”

In Humphrey’s Executor v. United States, 295 U.S. 602, 55 S.Ct. 869 (1935), a suit challenging President Franklin Roosevelt’s removal of a Republican member of the Federal Trade Commission on grounds that a Democrat would be more sympathetic to the political values of the administration, the Supreme Court grafted a limiting principle on the virtually absolute presidential power of removal enunciated in Myers. Humphrey refused to accede to Roosevelt’s request and resign, whereupon FDR removed him. Although Humphrey died a few months later, the executor of his estate brought suit against the federal government to recover Humphrey’s salary for the period between his discharge and the date of his death.
During that period, Humphrey had insisted that he had the right to continue as a salaried member of the commission and that he could not be ousted simply because the President desired the appointment of someone with more compatible political views.

In *Humphrey’s Executor*, the Supreme Court held that the provision of the Federal Trade Commission Act providing that “any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office” was intended to limit the President’s removal power to these grounds. Writing for the Court, Justice Sutherland said:

> [T]he language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

The Court then went on to distinguish between the offices at issue in *Myers* and *Humphrey’s Executor* and to uphold the constitutionality of the restrictions Congress placed on the removal power of the President where officers of the independent regulatory agencies were concerned.

As Justice Sutherland explained it:

> The office of a postmaster is so essentially unlike the office now involved that the decision in *Myers* cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in *Myers* finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. * * * [T]he necessary reach of that decision goes far enough to include all purely executive officers. It goes no farther * * *.

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of “unfair methods of competition,” that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi-legislatively and in part quasi-judicially. * * * To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.

> * * *

> * * * The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.
The fundamental necessity of maintaining each of the three departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

The limitation on the President’s power to remove for cause, recognized in *Humphrey’s Executor*, was later extended to all quasi-judicial tribunals in the executive branch by the Court’s decision in *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275 (1958).

In one sense, though, the decision in *Wiener* was a political turnabout from *Humphrey’s Executor*: In that instance, President Dwight Eisenhower, a Republican, had ousted Wiener, a Democrat appointed to the War Claims Commission, because of a political disagreement.

The fact remains, however, that Myers and *Humphrey’s Executor* pull in opposite directions, the former in favor of giving the President the sort of direct political clout over an officeholder that enables the Chief Executive to be sure that the laws are “faithfully executed” and the latter in favor of preserving independence of action by removing the sort of political control that comes from the threat of being fired. The tension between these two views became quite evident when the Justices turned their attention in *Morrison v. Olson* (p. 176) to the constitutionality of statutory provisions governing the appointment and removal of independent prosecutors.

Legislation providing for the appointment of an independent prosecutor was adopted in the wake of the Watergate scandal. The “Saturday Night Massacre”—which culminated in the firing of Watergate Special Prosecutor Archibald Cox by Acting Attorney General Robert Bork, following the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus, who refused to comply with President Richard Nixon’s order to dismiss Cox—demonstrated the need for the occasional appointment of a federal prosecutor free of any potential influence by the Justice Department. The “independence” of Cox rested only on Attorney General Richardson’s verbal pledge to the Senate at his confirmation hearing that Cox would remain independent of political control by the administration, which explains why he resigned his office rather than comply with Nixon’s directive. The order to fire Cox had been provoked by the special prosecutor’s persistent attempts to subpoena tape recordings of conversations in the Oval Office that ultimately disclosed the President’s unambiguous participation in the Watergate cover-up.

From the aftermath of Watergate through the George W. Bush administration, 14 special prosecutors were appointed pursuant to legislation passed by Congress. After the Attorney General determines that appointment of a special prosecutor is warranted, a federal three-judge panel makes the selection. The independent counsel legislation was allowed to lapse in 1992, however, because its extension was opposed by President George Bush and blocked by congressional Republicans. Ironically in retrospect, the arrival of a Democratic administration brought a change of heart, and the Independent Counsel Reauthorization, 108 Stat. 732, was passed by Congress and signed into law by President Bill Clinton on June 30, 1994.
MORRISON V. OLSON
Supreme Court of the United States, 1988
487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569

BACKGROUND & FACTS Theodore B. Olson was legal adviser to the U.S. Attorney General at the time a dispute erupted between the House of Representatives and the Environmental Protection Agency (EPA) over documents relevant to a congressional investigation of the “Superfund” toxic waste law. Edward Schmults was then Deputy Attorney General, and Carol Dinkins was head of the Justice Department’s land and natural resources division. On advice of Justice Department officials, President Reagan at first directed the EPA administrator to withhold the documents, but an accommodation was later reached between the administration and Congress. In the meantime, the House Judiciary Committee, smarting from the administration’s initial refusal to cooperate, began an investigation and called Olson to testify. When the committee issued its final report, it suggested that Olson had given false and misleading testimony and also suggested that Schmults and Dinkins had obstructed the investigation by wrongly withholding documents.

Congressman Peter Rodino, chairman of the House Judiciary Committee, requested that the Attorney General seek the appointment of a special prosecutor to look into the allegations against Olson, Schmults, and Dinkins. The Attorney General decided to seek the appointment of a special prosecutor to look into Olson’s conduct, but not that of Schmults and Dinkins. Pursuant to the law governing the appointment of an independent counsel, a federal three-judge panel (the Special Division) named Alexia Morrison to be the special prosecutor. Although the Special Division rejected Morrison’s subsequent request to investigate Schmults and Dinkins as well (since the Attorney General’s decision was not reviewable under the law), the judges determined that she could inquire whether Olson conspired with Schmults and Dinkins to obstruct the House Judiciary Committee’s investigation.

When a federal grand jury issued subpoenas to the three individuals for documents and testimony, Olson and the others moved to quash the subpoenas on the grounds that the provisions of the Ethics in Government Act authorizing the appointment of a special prosecutor were unconstitutional. A federal district court upheld the statute and denied the motion to quash the subpoenas. This judgment, however, was overturned by a divided federal appeals court, and Morrison consequently sought review by the Supreme Court.

Chief Justice REHNQUIST delivered the opinion of the Court.

* * * The parties do not dispute that “[t]he Constitution for purposes of appointment * * * divides all its officers into two classes.” United States v. Germaine, 99 (9 Otto) U.S. 508, 509, 25 L.Ed. 482, 483 (1879). As we stated in Buckley v. Valeo, 424 U.S. 1, 132, 96 S.Ct. 612, 688 (1976), “[p]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.” The initial question is, accordingly, whether appellant is an “inferior” or a “principal” officer. If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause.

The line between “inferior” and “principal” officers is one that is far from clear, and the Framers provided little guidance into
where it should be drawn. * * * [I]n our view appellant clearly falls on the “inferior officer” side of that line. * * *

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be “subordinate” to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree “inferior” in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties. An independent counsel’s role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. * * * The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department. * * *

Third, appellant’s office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant’s office is limited in tenure. * * * [T]he office of independent counsel is “temporary” in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated. * * *

* * *

* * * Appellees argue that even if appellant is an “inferior” officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch. They contend that the Clause does not contemplate congressional authorization of “interbranch appointments,” in which an officer of one branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: “* * *

but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments.” On its face, the language of this “excepting clause” admits of no limitation on interbranch appointments. Indeed, the inclusion of “as they think proper” seems clearly to give Congress significant discretion to determine whether it is “proper” to vest the appointment of, for example, executive officials in the “courts of Law.” * * *

* * *

Appellees next contend that the powers vested in the Special Division by the Act conflict with Article III of the Constitution. * * * As a general rule, we have broadly stated that “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.” Buckley, 424 U.S., at 123, 96 S.Ct., at 684 * * *. The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for the other branches. * * *

Most importantly, the Act vests in the Special Division the power to choose who will serve as independent counsel and the power to define his or her jurisdiction. * * * Clearly, once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the “courts of Law,” there can be no Article III objection to the Special Division’s exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III. Appellees contend, however, that the Division’s Appointments Clause powers do not encompass the power to define the independent counsel’s jurisdiction. We disagree. In our view, Congress’ power under the Clause to vest the “Appointment” of inferior officers in the courts may, in certain circumstances, allow Congress to give the courts some discretion
in defining the nature and scope of the appointed official's authority. Particularly when, as here, Congress creates a temporary "office" the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. * * *

* * *

We are more doubtful about the Special Division's power to terminate the office of the independent counsel * * *. As appellees suggest, the power to terminate, especially when exercised by the Division on its own motion, is "administrative" to the extent that it requires the Special Division to monitor the progress of proceedings of the independent counsel and come to a decision as to whether the counsel's job is "completed." * * *

* * * The termination provisions of the Act do not give the Special Division anything approaching the power to remove the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General. As we see it, "termination" may occur only when the duties of the counsel are truly "completed" or "so substantially completed" that there remains no need for any continuing action by the independent counsel. It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III.

* * *

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

* * *

Unlike both Bowsher [v. Synar, 478 U.S. 714, 106 S.Ct. 3181 (1986)] and Myers [v. United States, 272 U.S. 52, 47 S.Ct. 21 (1926)], this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, "only by the personal action of the Attorney General, and only for good cause." * * * There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. * * * In our view, the removal provisions of the Act make this case more analogous to Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869 (1935), and Wiener v. United States, 357 U.S. 349, 78 S.Ct. 1275 (1958), than to Myers or Bowsher.

* * * In Humphrey's Executor, we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. * * * Were the President to have the power to remove FTC commissioners at will, the "coercive influence" of the removal power would "threaten the independence of [the] commission." * * *

* * *

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a
“good cause” standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are “executive” in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out her duties under the Act, we simply do not see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

* * *

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. * * *

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. * * * Unlike some of our previous cases, most recently Bowsher v. Synar, this case simply does not pose a “danger[r] of congressional usurpation of Executive Branch functions.” 478 U.S., at 727, 106 S.Ct., at 3189 * * *. Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel. * * *

Similarly, we do not think that the Act works any judicial usurpation of properly executive functions. * * * [T]he power to appoint inferior officers such as independent counsels is not in itself an “executive” function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the “courts of Law.” We note nonetheless that under the Act the Special Division has * * * power to appoint an independent counsel * * * only * * * upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General’s decision not to seek appointment * * *. In addition, once the court has appointed a counsel and defined her jurisdiction, it has no power to supervise or control the activities of the counsel. * * * The Act does give a federal court the power to review the Attorney General’s decision to remove an independent counsel, but in our view that is a function that is well within the traditional power of the judiciary.

Finally, we do not think that the Act “impermissibly undermine[s]” the powers of the Executive Branch * * *. It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel’s jurisdiction; and his power to remove a counsel is limited. Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for “good cause,” a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are “faithfully executed” by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General’s decision not to request appointment if he finds “no reasonable grounds to believe that further investigation is warranted” is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the
independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from Executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsels in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore Reversed.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice SCALIA, dissenting.

*** Article II, § 1, cl. 1, of the Constitution provides:

"The executive Power shall be vested in a President of the United States."

*** [T]his does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'," though it qualifies that concession by adding "in the sense that they are 'law enforcement' functions that typically have been undertaken by officials within the Executive Branch." *** The qualifier adds nothing but atmosphere. In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere *** been conducted *** by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General." * * * (Emphasis added.) Governmental investigation and prosecution of crimes is a quintessentially executive function. ***

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" presidential control. "Most important[ly] among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" * * * This is somewhat like
referring to shackles as an effective means of locomotion. * * *

* * * We should say here that the President’s constitutionally assigned duties include complete control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? * * * A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. * * *

While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty. The checks against any Branch’s abuse of its exclusive powers are twofold: First, retaliation by one of the other Branch’s use of its exclusive powers: Congress, for example, can impeach the Executive who willfully fails to enforce the laws; the Executive can decline to prosecute under unconstitutional statutes, * * * and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches * * * who are guilty of abuse. * * *

* * *

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors “pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted,” if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. * * * That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a single Chief Executive. * * * The President is directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame. * * *

* * *

* * * [A]n additional advantage of the unitary Executive [is] that it can achieve a more uniform application of the law. * * * The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation * * * may in her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

* * *
With respect to the appointment power, it should be noted, finally, that under Article II, section 2, paragraph 3, the President has the power to make “recess appointments,” that is, the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” This power was intended to permit the government to continue operating effectively during lengthy periods when Congress was not in session, something more common in simpler, bygone eras than today. The power to make recess appointments extends not merely to temporarily installing officers in the executive branch but, more controversially, to filling vacant federal judgeships, including any that may exist on the Supreme Court. This power stands in evident tension with the principle of judicial independence animating Article III (see the discussion on pp. 38–39) because a recess appointee sits on the bench while his nomination is pending in the Senate, subjecting the nominee to subtle—and perhaps not-so-subtle—coercion from Senators who are looking over his shoulder as he decides cases. Nevertheless, the constitutionality of recess appointments to the federal bench has been consistently upheld by federal appellate courts, although the question has never been addressed by the Supreme Court. Perhaps the best discussion appears in United States v. Woodley, 751 F.2d 1008 (9th Cir. en banc, 1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1269 (1986); see also Evans v. Stephens, 387 F.3d 1220 (11th Cir. en banc, 2004), cert. denied, 544 U.S. 942, 125 S.Ct. 1640 (2005). The last President to make a recess appointment to the Supreme Court was Dwight Eisenhower. Three of the five Justices he named initially got to the Court by that route—Earl Warren, William J. Brennan, Jr., and Potter Stewart—and all were duly confirmed when the Senate returned. Of course, a President with only a year or so remaining in office, whose nominee faced insurmountable opposition, might resort to a recess appointment to out-flank the Senate. President Eisenhower’s motivation in each instance, however, was simply to ensure that the Supreme Court was staffed by a full complement of Justices for the beginning of its October Term.

B. THE SCOPE OF EXECUTIVE POWER

Theories of Executive Power

An understanding of the scope of executive power necessarily begins by asking whether the powers delineated in Article II constitute all the powers the President possesses. For many, if not most, of our nineteenth- and early twentieth-century Presidents, to ask this question was to answer it. This view, known as the literalist theory of the Presidency, was perhaps most concisely stated by President Taft in his book Our Chief Magistrate and His Powers (1916):

The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest *. * *. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist. * * *

This view of the Presidency finds its source both in an emphasis upon the Constitution as a document of legal rules and institutional limitations and in a political philosophy of negative government—the belief that the best government is that which governs least. The literalist theory of the Presidency espoused by Taft as President dovetailed well with his declaration in Myers as Chief Justice that the President’s function was essentially to execute
the laws passed by Congress. It follows that the literalist theory is not the stuff of which many great Supreme Court cases are made simply because the literalist President’s rule of thumb, “When in doubt—don’t,” rarely generates those actions that cause significant legal confrontations.

The stewardship theory is an activist alternative to the glorified clerkship that the literalist theory would make of the Presidency. It finds its sources in the Constitution as a document of possibilities and ambiguities and in a philosophy of positive government—the belief that government has an affirmative duty to make the lives of its citizens better by providing the services that they themselves cannot provide or cannot provide nearly as well. As championed by Theodore Roosevelt, the stewardship theory sees the Presidency as a “bully pulpit”—a vantage point of political and moral leadership—whose occupant in crisis times must draw upon inherent powers to serve the public interest. In an oft-quoted and now famous passage in his Autobiography (1913), Theodore Roosevelt wrote:

The most important factor in getting the right spirit in my Administration, next to insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers. My view was that every Executive officer and above all every Executive officer in high position was a steward of the people bound actively and affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt this view that what was imperatively necessary for the Nation could not be done by the President, unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition.

Other Presidents, such as Woodrow Wilson, found this stewardship theory of executive power buttressed by the fact that “[t]he nation as a whole has chosen him, and is conscious that it has no other political spokesman.” Because the President is unique among all national officeholders in his selection by all and not simply by part of the electorate, he is perceived as being specially endowed with a capacity to discern and embody the public interest. In Wilson’s words, taken from his book Constitutional Government (1908), “He is the representative of no constituency, but of the whole people.” As a consequence, “[h]is is the only voice in national affairs. * * * When he speaks in his true character, he speaks for no special interest.” The rule of thumb by which such activist Presidents operate is that the Chief Executive is empowered to act unless there is a specific prohibition on doing so contained in either the Constitution or a statute. In other words, it counsels the President, “When in doubt—do.”

Several factors, which we can only list here, contributed to this conception of the need for presidential power: the rise of an interdependent, regulated economy centralized still further by the impact of two world wars; the ascendancy since 1932 of a political coalition whose members looked to the federal government for policies of economic security and social justice; the congenital paralysis of Congress, which, because of its sheer size and diversity of membership, can rarely be moved, let alone lead; the dominance of candidates’ personal popularity over political issues in electoral voting; the personalities of presidential candidates, which, attracted to the rigors of political battle, seek satisfaction in the use of power, not its denial; and the persistence of perceived threats to the nation’s security, which require the maintenance of an enormous military establishment and accentuate the importance and impact of foreign relations.
Some writers on the Presidency have discerned a third posture in the use of executive authority—what has been called prerogative power.\(^1\) As posited by John Locke in his *Second Treatise of Civil Government*, this is “nothing but the Power of doing public good without a Rule,” that is, acting in the absence of a statute. But, going further, he wrote, “This Power to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative.” (Emphasis supplied.) In contexts of either great opportunity or impending disaster, this theory of executive power holds that the Executive is entitled to act unilaterally and, if necessary, contrary to statutory or constitutional provisions for the good of the country. This view can be distinguished from the stewardship theory to the extent that it countenances doing what is legally prohibited for “reasons of state”—the apparent lawlessness of the means outweighed by the public-spiritedness of the ends. The President whose actions are usually thought to exemplify this perspective best is Abraham Lincoln. The vigor of his Civil War leadership at the expense of constitutional authority is legendary, especially, but by no means exclusively, during the period in 1861 between the fall of Fort Sumter and the convening of a special session of Congress. He united the President’s prerogatives as commander in chief with his power to “take Care that the Laws be faithfully executed” so that

As interpreted by President Lincoln, the war power specifically included the right to determine the existence of “rebellion” and call forth the militia to suppress it; the right to increase the regular army by calling for volunteers beyond the authorized total; the right to suspend the *habeas corpus* privilege; the right to proclaim martial law; the right to place persons under arrest without warrant and without judicially showing the cause of detention; the right to seize citizens’ property if such seizure should become indispensable to the successful prosecution of the war; the right to spend money from the treasury of the United States without congressional appropriation; the right to suppress newspapers; and the right to do unusual things by proclamation, especially to proclaim freedom to the slaves of those in arms against the Government. These were some of the conspicuous powers which President Lincoln exercised, and in the exercise of which he was as a rule, though not without exception, sustained in the courts.\(^2\)

The exercise of prerogative power thus proposed to rescue us from “the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: ‘Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?’”\(^3\)

Lincoln’s initiation of military action without prior congressional authorization was sustained in *The Prize Cases*, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1863). He had declared a blockade of Southern ports in April 1861. In the course of sanctioning the operation and the resulting seizure of several ships as prizes by the Union Navy, Justice Grier wrote: “The President was bound to meet it [the insurrection] in the shape it presented itself, without waiting for Congress to baptize it with a name * * *.” Grier continued, “Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the government to which this power was intrusted. * * * The proclamation

1. See Daniel P. Franklin, *Extraordinary Measures: The Exercise of Prerogative Powers in the United States* (1991), which not only discusses the concept, but argues that the legislative and judicial branches also possess prerogative powers and that these may exceed those of the executive branch in their importance.
of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.”

In Ex parte Milligan, however, Justice Davis, a Lincoln appointee and old friend, affirmed that the President was still subject to the law and rejected in ringing terms the proposition that the Constitution was suspendable in wartime. Sidestepping both the suspension of habeas corpus and the validity of arrest by the military, the Court directed its attention to the trial of civilians by military commissions in areas outside the Confederacy and not a site of hostilities. It is also worth noting that the date of the Milligan decision, which follows, was 1866, the year after the fighting stopped.

EX PARTE MILLIGAN
Supreme Court of the United States, 1866
71 U.S. (4 Wall.) 2, 18 L.Ed. 281

BACKGROUND & FACTS In October 1864, Milligan, a citizen of Indiana, was arrested by order of the commander of the military district of Indiana for “[conspiring] against the government, [affording] aid and comfort to rebels, and [inciting] the people to insurrection.” Milligan was subsequently brought before a military commission, tried, found guilty, and sentenced to be hanged. In May 1865, Milligan petitioned a circuit court to issue an order that he be released from the custody of the military so that he might either have proceedings instituted against him under civil law or be discharged altogether. In addition to his contention that the Constitution guaranteed him the right to trial by jury, Milligan argued that the March 3, 1863 act of Congress prohibited the military from keeping him in confinement. Although the act authorized, after the fact, President Lincoln’s suspension of the writ of habeas corpus, it also placed certain qualifications on the use of that power. One of the restrictions was that in states where “the administration of the law continued unimpaired in the Federal Courts,” lists of citizens held as prisoners by the military were to be submitted to the appropriate circuit and district judges, and those individuals listed who were not later indicted were to be released to a court to be discharged or dealt with through civil procedures.

In Milligan’s case, a grand jury met and adjourned without bringing an indictment against him. The circuit court, which he theretofore petitioned, was unable to reach agreement on his request (1) for a writ of habeas corpus, (2) for a discharge from military custody, and (3) for a ruling that, because he was a citizen and a resident of Indiana and had never served in the military, the commission lacked jurisdiction to try and sentence him. These three unresolved questions were certified to the Supreme Court for consideration.

Mr. Justice DAVIS delivered the opinion of the court.

* * *

The controlling question in the case is this: Upon the facts stated in Milligan’s petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned,
and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

***

[It is the birthright of every American citizen when charged with crime, to be tried and punished according to law. * * * If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. * * * The [relevant constitutional] provisions * * * on the administration of criminal justice * * * are found in that clause of the original Constitution which says, “That the trial of all crimes, except in case of impeachment, shall be by jury”; and in the fourth, fifth, and sixth articles of the amendments. * * *]

***

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it “in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,” and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is “no unwritten criminal code to which resort can be had as a source of jurisdiction.”

But it is said that the jurisdiction is complete under the “laws and usages of war.”

It can serve no useful purpose to inquire what those laws and usages are * * * [because] they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. * * * One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it * * *. [S]oon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government
had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous * * * to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. * * * The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,” language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, “excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger”; and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. * * *

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

***

*** Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the “military independent of and superior to the civil power”. * * *

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. * * * For this, and other equally weighty reasons, * * * [the Founding Fathers] secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. * * * Unquestionably, there
is then an exigency which demands that the
government, if it should see fit in the exercise
of a proper discretion to make arrests, should
not be required to produce the persons
arrested in answer to a writ of *habeas corpus*.
The Constitution goes no further. It does not
say after a writ of *habeas corpus* is denied a
citizen, that he shall be tried otherwise than
by the course of the common law ***. The
illustrious men who framed that instrument
*** limited the suspension to one great right,
and left the rest to remain forever inviolable.
***

It will be borne in mind that this is not a
question of the power to proclaim martial
law, when war exists in a community and the
courts and civil authorities are over-
thrown. Nor is it a question what rule a
military commander, at the head of his
army, can impose on states in rebellion to
cripple their resources and quell the insur-
rection. *** [But Indiana was neither in
rebellion nor under attack.] On her soil
there was no hostile foot; if once invaded,
that invasion was at an end, and with it all
pretext for martial law. Martial law cannot
arise from a threatened invasion. The
necessity must be actual and present; the
invasion real, such as effectually closes the
courts and deposes the civil administration.

It is difficult to see how the safety of the
country required martial law in Indiana. If
any of her citizens were plotting treason, the
power of arrest could secure them, until the
government was prepared for their trial,
when the courts were open and ready to try
them. It was as easy to protect witnesses
before a civil as a military tribunal; and as
there could be no wish to convict, except
on sufficient legal evidence, surely an
ordained and established court was better
able to judge of this than a military tribunal
composed of gentlemen not trained to the
profession of the law.

*** If, in foreign invasion or civil war,
the courts are actually closed, and it is
impossible to administer criminal justice
according to law, then, on the theatre of
active military operations, where war really
prevails, there is a necessity to furnish a
substitute for the civil authority, thus
overthrown, to preserve the safety of the
army and society; and as no power is left but
the military, it is allowed to govern by
martial rule until the laws can have their
free course. As necessity creates the rule, so
it limits its duration; for, if this government
is continued after the courts are reinstated, it
is a gross usurpation of power. Martial rule
can never exist where the courts are open,
and in the proper and unobstructed exercise
of their jurisdiction. It is also confined to
the locality of actual war. ***

***

If the military trial of Milligan was
contrary to law, then he was entitled, on
the facts stated in his petition, to be
discharged from custody by the terms of
the act of Congress of March 3d, 1863. ***

[It is insisted that Milligan was a prisoner
of war, and, therefore, excluded from the
privileges of the statute. It is not easy to see
how he can be treated as a prisoner of war,
when he lived in Indiana for the past twenty
years, was arrested there, and had not been,
during the late troubles, a resident of any of
the states in rebellion. If in Indiana he
conspired with bad men to assist the enemy,
he is punishable for it in the courts of
Indiana ***.

***

Four members of the Court in *Milligan*,
speaking through Chief Justice Chase,
dissociated themselves from part of Justice Davis’s opinion—the part that went on
gratuitously to decide that Congress could not have authorized such trials if it had done so.
Justice Davis’s decision of this issue in the context of *Milligan* was *obiter dictum*; that is, a
statement of law not relevant to deciding the question presented in the case. The Justices
normally eschew such unnecessary statements because they overshoot the mark and often
have to be retracted when the facts in a future case point up their error or unwisdom. The four Justices concurring in the Court’s decision were of the view that Congress did have the power to establish such military tribunals if it chose. Said Chief Justice Chase: “We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.”

Davis’s overstatement came home to roost when the Court was confronted with the case of the Nazi saboteurs 75 years later in the midst of World War II. That case, Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2 (1942), involved eight members of the German armed forces (one of whom, Haupt, had been born in the United States and was an American citizen) who had landed from a German submarine off Long Island armed with explosives on a mission to destroy certain industries. They had been arrested, convicted, and sentenced to be hanged by a U.S. military tribunal appointed by President Franklin Roosevelt. Substantially agreeing with the concurring Justices in Milligan as to the constitutional foundations of Congress’s power, Chief Justice Stone, writing for a unanimous Court, said:

By the Articles of War *** Congress has explicitly provided *** that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules of law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the President as Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

The Quirin Court found it “unnecessary * * * to determine to what extent the President as Commander in Chief ha[d] constitutional power to create military commissions” in the absence of congressional legislation because, at the time, “Congress ha[d] authorized trial of offenses against the law of war before such commissions.” (Discussion of President George W. Bush’s unilateral action creating military commissions to try “enemy combatants” seized in the course of military action following the 9/11 attacks appears in the last section of this chapter.)

The Supreme Court’s decision in In re Neagle, 135 U.S. 1, 10 S.Ct. 658 (1890), however, supports the contention that the President possesses inherent power to act. In the absence of any statute passed by Congress empowering the President or the Attorney General to assign a federal marshal as a bodyguard to protect a Supreme Court Justice (Stephen Field) whose life had been threatened, the Court concluded that the President is the principal protector of the peace and that his charge to faithfully execute the laws is not restricted to enforcing the express terms of laws passed by Congress, but also extends to vindicating “the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.” Five years later, in In re Debs, 158 U.S. 564, 15 S.Ct. 900 (1895), the Court sustained President Cleveland’s action dispatching federal troops to break up a railway strike, although the injunction it enforced had not been authorized by any federal statute. The Court once again accepted the preservation of peace and order as the grounds for validating the exercise of inherent power.
In 1942, President Franklin Roosevelt acted on his own in issuing an executive order that empowered the military to forcibly relocate tens of thousands of Japanese-Americans from their homes on the West Coast following the attack on Pearl Harbor. This executive action was promptly ratified by Congress and later approved by the Supreme Court in *Korematsu v. United States*. Although Justice Black, speaking for the majority, emphasized the existing threat to national security, the Court’s decision did not escape condemnation by Justice Murphy for its sanctioning of racism and vigorous criticism by Justice Jackson for the dangerous stamp of legitimacy it placed on the government’s action. Recognizing the importance of the Court’s imprimatur of constitutionality in a legalistic political culture like that of the United States, Justice Jackson argued forcefully that it was important for the Court to say “no,” even if its judgment came too late.

**KOREMATSU v. UNITED STATES**

Supreme Court of the United States, 1944
323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194

**BACKGROUND & FACTS**

At the time of the attack on Pearl Harbor, December 7, 1941, approximately 112,000 people of Japanese ancestry lived along the West Coast of the United States. Of these, some 70,000 were U.S. citizens. Large numbers of Japanese-Americans lived close to strategic areas, such as shore installations and war plants. Many had close emotional and family ties to their homeland and Japanese culture: Several thousand Japanese-Americans living on the Pacific Coast had been back to Japan for three or more years of schooling; tinfoil and money had been collected and sent to Japan during its war with China; and many parents had taken steps to ensure dual citizenship for their children.

The destruction of much of the American Pacific Fleet at Pearl Harbor and the swift military success of the Japanese forces throughout the Pacific engendered substantial fear that the West Coast faced imminent invasion. It had been identified as the point of origin for numerous unauthorized radio transmissions that had been intercepted, and every ship departing from there for a period of several weeks following Pearl Harbor had been attacked by enemy submarines. In February 1942, General DeWitt, the commanding officer of the Western Defense Command, recommended the evacuation of “Japanese and other subversive persons from the Pacific Coast.” General DeWitt wrote, “The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects ready to fight and, if necessary, to die for Japan in a war against the nation of their parents.” General DeWitt asserted that there was “no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes.” Despite the fact that there was no proof any Japanese-American committed any act of espionage or sabotage in the weeks following the attack on Pearl Harbor, General DeWitt, in a remarkable bit of reasoning, concluded that “the very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.”

Although the questionable logic, dubious sociology, and racial prejudice reflected in General DeWitt’s assessment now seem incredible, President Roosevelt acted on the recommendation and signed Executive Order 9066, which—declaring that
successful prosecution of the war required “every possible protection against espionage and sabotage”—authorized the Secretary of War or any designated commander to prescribe military areas in such places as may be thought appropriate “from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose at his discretion.” These restrictions ranged from imposition of curfews to forced removal to “relocation centers” much further inland. In March 1942, Congress registered its approval by enacting a law that imposed penalties for the violation of restrictions or directives pursuant to the executive order.

Curfew, “evacuation,” and detention measures taken against Americans of Japanese ancestry were challenged and upheld in three Supreme Court cases: Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943); Ex parte Endo, 323 U.S. 283, 65 S.Ct. 208 (1944); and the Korematsu case. In Hirabayashi, which challenged the imposition of a curfew, the Court unanimously held that the 1942 statute did not unconstitutionally delegate power to the President and did legitimately rest upon the war powers, since the power to wage war is “the power to wage war successfully[,]” [and] is not restricted to the winning of victories in the field and the repulse of enemy forces[,]” [but] embraces every phase of the national defense “**.” Furthermore, the Court held that the curfew imposed on Japanese-Americans did not amount to prohibited racial discrimination. Although “as a matter of policy it might have been wiser for the military to have dealt with these people on an individual basis and through the process of investigation and hearings separated those who were loyal from those who were not[,]” the Court said, “we are [not] warranted where national survival is at stake in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty. ** Peacetime procedures do not necessarily fit wartime needs.”

In the present case, Korematsu was convicted under the 1942 act of violating Exclusion Order No. 34 issued by General DeWitt, which barred all persons of Japanese descent from the “military area” of San Leandro, California. After his conviction was affirmed by a federal appeals court, Fred Korematsu’s refusal to be “evacuated” from his home put the constitutionality of the forced relocation of Japanese-Americans before the Supreme Court.

Mr. Justice BLACK delivered the opinion of the Court.

**

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

**

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one’s home is located is a far greater deprivation than constant confinement to the home from 8 P.M. TO 6 A.M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military
authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. * * *

Here, as in the *Hirabayashi* case, * * * we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

We uphold the exclusion order as of the time it was made and when the petitioner violated it. * * * In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. * * * But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. * * *

* * * After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would
be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

***

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. ***

If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission, within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. *** To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Mr. Justice ROBERTS, dissenting.

***

This is not a case of keeping people off the streets at night as was Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943), nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

***

Mr. Justice MURPHY, dissenting.

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

***
It is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. * * *

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and impending” as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. * * * Yet no reasonable relation to an “immediate, imminent, and impending” public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law. * * *

The military necessity which is essential to the validity of the evacuation order * * * resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals. * * *

Mr. Justice JACKSON, dissenting. Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists
merely of being present in the state whereof
he is a citizen, near the place where he was
born, and where all his life he has lived.

* * *

A citizen’s presence in the locality, however, was made a crime only if his parents
were of Japanese birth. Had Korematsu been
one of four—the others being, say, a German
alien enemy, an Italian alien enemy, and a
citizen of American-born ancestors, con-
victed of treason but out on parole—only
Korematsu’s presence would have violated
the order. The difference between their
innocence and his crime would result, not
from anything he did, said, or thought,
different than they, but only in that he was
born of different racial stock.

Now, if any fundamental assumption
underlies our system, it is that guilt is
personal and not inheritable. Even if all of
one’s antecedents had been convicted of
treason, the Constitution forbids its penal-
ties to be visited upon him, for it provides
that “no Attainder of Treason shall work
Corruption of Blood, or Forfeiture except
during the Life of the Person attained.”

Article 3, § 3, cl. 2. But here is an attempt
to make an otherwise innocent act a crime
merely because this prisoner is the son of
parents as to whom he had no choice, and
belongs to a race from which there is no way
to resign. If Congress in peacetime legisla-
tion should enact such a criminal law, I
should suppose this Court would refuse to
enforce it.

* * *

It would be impracticable and dangerous
idealism to expect or insist that each
specific military command in an area of
probable operations will conform to con-
ventional tests of constitutionality. When
an area is so beset that it must be put under
military control at all, the paramount
consideration is that its measures be suc-
cessful, rather than legal. The armed
services must protect a society, not merely
its Constitution. The very essence of the
military job is to marshal physical force, to
give it every strategic advantage. Defense
measures will not, and often should not, be
held within the limits that bind civil
authority in peace. No court can require
such a commander in such circumstances to
act as a reasonable man; he may be
unreasonably cautious and exacting. Per-
haps he should be. But a commander in
temporarily focusing the life of a community
on defense is carrying out a military
program; he is not making law in the sense
the courts know the term. He issues orders,
and they may have a certain authority as
military commands, although they may be
very bad as constitutional law.

But if we cannot confine military ex-
pedients by the Constitution, neither would
I distort the Constitution to approve all that
the military may deem expedient. That is
what the Court appears to be doing,
whether consciously or not. I cannot say,
from any evidence before me, that the
orders of General DeWitt were not reason-
ably expedient military precautions, nor
could I say that they were. But even if they
were permissible military procedures, I deny
that it follows that they are constitutional.
If, as the Court holds, it does follow, then
we may as well say that any military order
will be constitutional and have done with it.

The limitation under which courts always
will labor in examining the necessity for a
military order are illustrated by this case. How
does the Court know that these orders have a
reasonable basis in necessity? No evidence
whatever on that subject has been taken by
this or any other court. There is sharp
controversy as to the credibility of the DeWitt
report. So the Court, having no real evidence
before it, has no choice but to accept General
DeWitt’s own unsworn, self-serving state-
ment, untested by any cross-examination,
that what he did was reasonable. And thus it
will always be when courts try to look into the
reasonableness of a military order.

In the very nature of things military
decisions are not susceptible of intelligent
judicial appraisal. They do not pretend
to rest on evidence, but are made on
information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.

* * *

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

* * *

[Forty years later, in Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984), a federal district court granted Korematsu’s petition for a writ of coram nobis (a court order correcting an error of fact in the original judgment) and eradicated his conviction. In her opinion, Judge Marilyn Patel noted, “At oral argument the government acknowledged the exceptional circumstances involved and the injustice suffered by petitioner and other Japanese-Americans.” She granted the writ because “there [was] substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court.” She found that this constituted a “compelling circumstance” for issuing the writ. Judge Patel took care to emphasize that the overturning of Korematsu’s conviction rested upon this factual error and not on any error of law in the Supreme Court’s 1944 ruling. She continued, “Thus, the Supreme Court’s decision stands as the law of this case and for whatever precedential value it may still have.” However, she observed, “Justices of that Court and legal scholars have commented that the decision is an anachronism in upholding overt racial discrimination as ‘compellingly justified[,]’ * * * [and] ‘today the decision in Korematsu lies overruled in the court of history.’ ”

In August 1988, Congress enacted legislation, 102 Stat. 903, extending to Japanese-Americans who had been held in wartime detention camps a formal apology “on behalf of the nation” and promised an estimated 60,000 surviving detainees reparations in the amount of $20,000 each. Since, in addition to the loss of their liberty, the
internees lost their homes and most of their other property as well, the effort at financial restitution was widely regarded as completely inadequate. For an excellent discussion of the internment cases, see Peter Irons, Justice at War (1983).

Justice Jackson's Korematsu dissent proved prophetic indeed. Six years after the Court’s ruling, Congress passed as Title II of the Internal Security Act of 1950 the Emergency Detention Act, 64 Stat. 1019. The legislation empowered the President, in a self-proclaimed “internal security emergency,” “to apprehend and by order detain, pursuant to the provisions of this title, each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.” Eighteen years later, a report of the House Un-American Activities Committee recommended the use of such camps for certain categories of persons arrested in urban riots, a proposal which understandably enraged blacks especially. The Emergency Detention Act was eventually repealed by Congress in 1971. The repealer also declared that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 85 Stat. 347.

The issue of inherent executive power was extensively aired when President Harry Truman seized the steel mills so that they could continue operating during the Korean War. In Youngstown Sheet & Tube v. Sawyer (p. 198), a divided Supreme Court rejected President Truman’s claim of inherent power to act. That the President’s position was in for some rough sledding was apparent at trial in the following colloquy between Assistant Attorney General Holmes Baldridge and Federal Judge David A. Pine:

The Court: And you do not assert any express constitutional power.
Mr. Baldridge: Well, Your Honor, we base the President’s power on Sections 1, 2 and 3 of Article II of the Constitution, and whatever inherent, implied or residual powers may flow therefrom.

We do not propose to get into a discussion of semantics with counsel for plaintiffs. We say that when an emergency situation in this country arises that is of such importance to the entire welfare of the country that something has to be done about it and has to be done now, and there is no statutory provision for handling the matter, that it is the duty of the Executive to step in and protect the national security and the national interests. * * *

The Court: So you contend the Executive has unlimited power in time of an emergency?
Mr. Baldridge: He has the power to take such action as is necessary to meet the emergency.
The Court: If the emergency is great, it is unlimited, is it?
Mr. Baldridge: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment. * * *

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.
Mr. Baldridge: That is correct. * * *

Not unexpectedly, the district judge ruled against this exercise of presidential power. Worse yet for the President, Judge Pine sought to rivet the literalist theory of executive power to the Constitution. He wrote:

There is no express grant of power in the Constitution authorizing the President to direct this seizure. There is no grant of power from which it reasonably can be implied. There is no enactment of Congress authorizing it. On what, then, does defendant rely to sustain his acts? According to his brief, reiterated in oral argument, he relies upon the President’s “broad residuum of power” sometimes referred to as “inherent” power under the Constitution, which, as I understand his counsel, is not to be confused with “implied” powers as that term is generally understood, namely, those which are reasonably appropriate to the exercise of a granted power.
This contention requires a discussion of basic fundamental principles of constitutional government, which I have always understood are immutable, absent a change in the framework of the Constitution itself in the manner provided therein. The Government of the United States was created by the ratification of the Constitution. It derives its authority wholly from the powers granted to it by the Constitution, which is the only source of power authorizing action by any branch of Government. It is a government of limited, enumerated, and delegated powers. The office of President of the United States is a branch of the Government, namely, that branch where the executive power is vested, and his powers are limited along with the powers of the two other great branches or departments of Governments, namely, the legislative and judicial.

The President therefore must derive this broad “residuum of power” or “inherent” power from the Constitution itself, more particularly Article II thereof, which contains that grant of Executive power. * * *

Judge Pine then went on to recite the passage from Taft’s book previously quoted (see p. 182) and added, “I stand on that as a correct statement of the law.”

The opinions of the Justices in the Youngstown case seem to reflect a deep ambivalence toward inherent power, not unlike the feeling one gets passing an auto accident: They can’t look at it, and they can’t look away. Would it be accurate to say that the Supreme Court also embraced the literalist view of presidential power? If, as Justice Frankfurter asserted, the case ought to be decided “without attempting to define the President’s powers comprehensively,” what then is the basis for the Court’s decision? The dissenters were quick to point out that each of the six Justices in the majority wrote concurring opinions. With his customary insight and clarity, only Justice Jackson appeared to tackle the constitutionality of the steel seizure in terms of a framework of presidential power. His three categories of action closely resemble the theories of executive power described in this chapter. On balance, though, does the Court’s performance in the Youngstown case augur well for its capacity to constrain the exercise and expansion of presidential power in the future?

**YOUNGSTOWN SHEET & TUBE CO. v. Sawyer**  
*[THE STEEL SEIZURE CASE]*

Supreme Court of the United States, 1952  
343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153

**BACKGROUND & FACTS**  A year and a half into the Korean War, an impasse developed between labor and management in the steel industry after existing collective bargaining agreements expired December 31, 1951. Months of unproductive negotiations followed, during which the union acceded to recurrent pleas from the government not to strike. The union demanded higher wages, the steel companies argued that higher wages could only come from charging higher prices, and the government, concerned that a price increase in steel would only fuel spiraling inflation, maintained that an increase in wages could comfortably be taken out of ample industry profits. When the union finally called a strike, President Truman issued an executive order directing Secretary of Commerce Charles Sawyer to take possession of the steel mills and keep them operating. The President took the action even though he had no statutory authorization for seizure of an industry in peacetime (the Korean War was a self-styled “police action,” not a declared war). He had rejected obtaining a court order suspending the strike under the Taft-Hartley Act, which would have maintained the status quo during further bargaining, on the twin
grounds that months of negotiation had already proved fruitless and the statute could not prevent a strike from occurring at the conclusion of the 80-day cooling-off period. Although President Truman promptly informed Congress of his action, Congress did nothing.

Youngstown Sheet & Tube and the other steel companies filed a complaint in the U.S. District Court for the District of Columbia, seeking to enjoin Sawyer from executing the seizure because, absent just compensation, the taking of private property violated the Fifth Amendment. Although the district court issued a preliminary injunction against the steel seizure, a federal appellate court stayed the district court's order. The steel companies then petitioned the Supreme Court for certiorari.

Mr. Justice BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaker, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. * * *

* * *

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (§ 201(b) of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.

It is clear that if the President had authority to issue the order he did, it must
be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "the executive Power shall be vested in a President" ** *, that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President’s military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers therein granted shall be vested in a Congress of the United States." ** * After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or in any Department or Officer thereof.”

The Founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.
The judgment of the District Court is affirmed.

Affirmed.

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Mr. Justice FRANKFURTER, concurring.

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* * * Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. *

* * *

The issue before us can be met, and therefore should be, without attempting to define the President’s powers comprehensively. I shall not attempt to delineate what belongs to him by virtue of his office beyond the power even of Congress to contract; what authority belongs to him until Congress acts; what kind of problems may be dealt with either by the Congress or by the President or by both; * * * what power must be exercised by the Congress and cannot be delegated to the President. It is as unprofitable to lump together in an indiscriminating hotch-potch past presidential actions claimed to be derived from occupancy of the office, as it is to conjure up hypothetical future cases. The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching of this Court’s rôle in the history of the country.

* * *

* * * Congress has frequently—at least 16 times since 1916—specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards. This body of enactments * * * demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as “time of war or when war is imminent,” the needs of “public safety” or of “national security or defense,” or “urgent and impending need.” *

* * *

* * * Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. * * *

* * *

By the Labor Management Relations Act of 1947, Congress said to the President, “You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation.” *

* * *

Mr. Justice DOUGLAS, concurring.

***

The legislative nature of the action taken by the President seems to me to be clear. When the United States takes over an industrial plant to settle a labor controversy, it is condemning property. The seizure of the plant is a taking in the constitutional sense. United States v. Pewee Coal Co., 341 U.S. 114, 71 S.Ct. 670. A permanent taking
would amount to the nationalization of the industry. A temporary taking falls short of that goal. But though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession.

***

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of checks and balances expounded by Mr. Justice BLACK in the opinion of the Court in which I join.

***

Mr. Justice JACKSON, concurring in the judgment and opinion of the Court.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. [Jackson had been Franklin Roosevelt’s Attorney General in 1940 and 1941]. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In
these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. * * *

In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. * * * [T]his * * * leave[s] Presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

* * *

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President’s paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.
Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a “steward” of the people, of exerting all power save that which is specifically prohibited by the Constitution or the Congress. In my view the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself. As Lincoln aptly said, “is it possible to lose the nation and yet preserve the Constitution?” In describing this authority I care not whether one calls it “residual,” “inherent,” “moral,” “implied,” “aggregate,” “emergency,” or otherwise. I am of the conviction that those who have had the gratifying experience of being the President’s lawyer have used one or more of these adjectives only with the utmost of sincerity and the highest of purpose.

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

Mr. Chief Justice VINSON, with whom Mr. Justice REED and Mr. Justice MINTON join, dissenting.
Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

Accepting in full measure its responsibility in the world community, the United States was instrumental in securing adoption of the United Nations Charter, approved by the Senate by a vote of 89 to 2. The first purpose of the United Nations is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” * * * In 1950, when the United Nations called upon member nations “to render every assistance” to repel aggression in Korea, the United States furnished its vigorous support. For almost two full years, our armed forces have been fighting in Korea, suffering casualties of over 108,000 men. Hostilities have not abated. The “determination of the United Nations to continue its action in Korea to meet the aggression” has been reaffirmed. Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization. * * *

* * *

One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central fact of this case—that the Nation’s entire basic steel production would have shut down completely if there had been no Government seizure. Even ignoring for the moment whatever confidential information the President may possess as “the Nation’s organ for foreign affairs,” the uncontroverted affidavits in this record amply support the finding that “a work stoppage would immediately jeopardize and imperil our national defense.”

Plaintiffs do not remotely suggest any basis for rejecting the President’s finding that any stoppage of steel production would immediately place the Nation in peril. * * *

Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.

* * *

In passing upon the grave constitutional question presented in this case, we must never forget, as Chief Justice Marshall admonished, that the Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs,” and that “[i]t[s] means are adequate to its ends.” Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations. But we are not called upon today to expand the Constitution to meet a new situation. For, in this case, we need only look to history and time-honored principles of constitutional law—principles that have been applied consistently by all branches of the Government throughout our history. It is those who assert the invalidity of the Executive Order who seek to amend the Constitution * * *.

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to “take Care that the Laws be faithfully executed.” With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval.

* * *

The President reported to Congress the morning after the seizure that he acted
because a work stoppage in steel production would immediately imperil the safety of the Nation by preventing execution of the legislative programs for procurement of military equipment. And, while a shutdown could be averted by granting the price concessions requested by plaintiffs, granting such concessions would disrupt the price stabilization program also enacted by Congress. Rather than fail to execute either legislative program, the President acted to execute both.

***

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws—both the military procurement program and the anti-inflation program—has not until today been thought to prevent the President from executing the laws. ***

There is no statute prohibiting seizure as a method of enforcing legislative programs. Congress has in no wise indicated that its legislation is not to be executed by the taking of private property (subject of course to the payment of just compensation) if its legislation cannot otherwise be executed. Indeed, the Universal Military Training and Service Act authorizes the seizure of any plant that fails to fill a Government contract or the properties of any steel producer that fails to allocate steel as directed for defense production. And the Defense Production Act authorizes the President to requisition equipment and condemn real property needed without delay in the defense effort. Where Congress authorizes seizure in instances not necessarily crucial to the defense program, it can hardly be said to have disclosed an intention to prohibit seizures where essential to the execution of that legislative program.

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act. The President’s action served the same purposes as a judicial stay entered to maintain the status quo in order to preserve the jurisdiction of a court. In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.

***

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. ***

*** Presidents have been in the past, and any man worthy of the Office should be in the future, free to take at least interim action necessary to execute legislative programs essential to survival of the Nation. A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must
independently determine for itself whether the President was acting, as required by the Constitution, to “take Care that the Laws be faithfully executed.”

As the District Judge stated, this is no time for “timorous” judicial action. But neither is this a time for timorous executive action. Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.

Presidential Power Under Nixon

President Truman’s seizure of the steel mills was an episode, not a way of life. By contrast, the Nixon administration appeared to be a regime that sought to govern much of the time by prerogative power. Strictly speaking, the term “Watergate” describes only the break-in by several operatives of the Committee to Re-Elect the President (CREEP) at the offices of the Democratic National Committee on June 17, 1972, but, historically, it has become an umbrella reference for a multitude of political activities that occurred during the Nixon administration—unethical and usually lawless as well—including burglary, money laundering, influence buying, campaign dirty tricks, use of agencies like the Internal Revenue Service to strike back at political “enemies,” conspiracy, and obstruction of justice. Even identified in this generic sense, Watergate was not the only extra-constitutional regimen of the Nixon Presidency. The secret bombing of Cambodia, the use of wiretapping to uncover leaks that assertedly threatened national security, the President’s refusal to spend funds duly appropriated by Congress, and the effort to suppress publication of the Pentagon Papers without any authorizing statute, while not elements of the Watergate scandal itself, contributed mightily to the unbounded vista of executive power painted by the Nixon Presidency.

Unlike Lincoln’s actions, which did not require undue imagination to connect them to the preservation of the Nation, many of these acts of the Nixon administration and its operatives demanded a real stretch and often were petty, seemed mean-spirited, and emanated from partisan motives. When asked to justify the administration’s actions, its defenders focused on efforts to stop the leaks of sensitive information to the media, most notably the newspaper publication of the U.S. fallback position in nuclear arms treaty negotiations then underway with the Soviet Union. Defending the President’s non-Watergate actions in the impeachment hearings before the House Judiciary Committee, Special Counsel to the President James St. Clair asserted, “[T]he situation called for action on behalf of the President, and he took such action.” St. Clair continued, “We expect Presidents to do such things. We expect Presidents to take action that he thinks in his

judgment is sound to protect this country. And as I say to you, if he had not done these things, that in turn might well have been a basis for severe criticism of the President. In 1977, the former President discussed his conception of presidential power in a televised interview in which he, too, kept the discussion focused on non-Watergate activities.

NOTE—THE NIXON–FROST INTERVIEW

Following is an excerpt from the third of David Frost’s controversial television interviews with former President Richard Nixon, aired May 19, 1977. The excerpt focuses on the issue of inherent presidential power.

FROST: The wave of dissent, occasionally violent, which followed in the wake of the Cambodian incursion prompted President Nixon to demand better intelligence about the people who were opposing him. To this end, the Deputy White House Counsel, Tom Huston, arranged a series of meetings with representatives of the C.I.A., the F.B.I., and other police and intelligence agencies.

These meetings produced a plan, the Huston Plan, which advocated the systematic use of wiretappings, burglaries, or so-called black bag jobs, mail openings and infiltration against antiwar groups and others. Some of these activities, as Huston emphasized to Nixon, were clearly illegal. Nevertheless, the President approved the plan. Five days later, after opposition from J. Edgar Hoover, the plan was withdrawn, but the President’s approval was later to be listed in the Articles of Impeachment as an alleged abuse of Presidential power.

Q. So what in a sense, you’re saying is that there are certain situations, and the Huston Plan or that part of it was one of them, where the President can decide that it’s in the best interests of the nation or something, and do something illegal.

A. Well, when the President does it, that means that it is not illegal.

Q. By definition.

A. Exactly. Exactly. If the President, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President’s decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they’re in an impossible position.

Q. So, that in other words, really you were saying in that answer, really, between the burglary and murder, again, there’s no subtle way to say that there was murder of a dissenter in this country because I don’t know any evidence to that effect at all. But, the point is: just the dividing line, is that in fact, the dividing line is the President’s judgment?

A. Yes, and the dividing line and, just so that one does not get the impression, that a President can run amok in this country and get away with it, we have to have in mind that a President has to come up before the electorate. We also have to have in mind, that a President has to get appropriations from the Congress. We have to have in mind, for example, that as far as the C.I.A.’s covert operations are concerned, as far as the F.B.I.’s covert operations are concerned, through the years, they have been disclosed on a very, very limited basis to trusted members of Congress. I don’t know whether it can be done today or not.

* * *

Q. Pulling some of our discussions together, as it were; speaking of the Presidency and in an interrogatory filed with the Church Committee, you stated, quote, “It’s quite obvious that there are certain inherently government activities, which, if undertaken by the sovereign in protection of the

5. Brief on Behalf of the President of the United States, Hearings Before the Committee on the Judiciary Pursuant to H. Res. 803, 93rd Cong., 2d Sess., 14 (July 18, 1974).
interests of the nation’s security are lawful, but which if undertaken by private persons, are not.” What, at root, did you have in mind there?

A. Well, what I, at root I had in mind I think was perhaps much better stated by Lincoln during the War between the States. Lincoln said, and I think I can remember the quote almost exactly, he said, “Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation.” Now that’s the kind of action I’m referring to. Of course in Lincoln’s case it was the survival of the Union in war time, it’s the defense of the nation and, who knows, perhaps the survival of the nation.

Q. But there was no comparison, was there, between the situation you faced and the situation Lincoln faced, for instance?

A. This nation was torn apart in an ideological way by the war in Vietnam, as much as the Civil War tore apart the nation when Lincoln was President. Now it’s true that we didn’t have the North and South—

Q. But when you said, as you said when we were talking about the Huston Plan, you know, “If the President orders it, that makes it legal,” as it were: Is the President in that sense—is there anything in the Constitution or the Bill of Rights that suggests the President is that far of a sovereign, that far above the law?

A. No, there isn’t. There’s nothing specific that the Constitution contemplates in that respect. I haven’t read every word, every jot and every title, but I do know this: that it has been, however, argued that as far as a President is concerned, that in war time, a President does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution, which is essential for the rights we’re all talking about.


This line of thinking, however, got Nixon into a world of trouble and culminated in a gripping, publicly televised meeting of the House Judiciary Committee that concluded with votes to report to the House of Representatives three articles of impeachment, focusing respectively on obstruction of justice, abuse of power, and contempt of Congress. Article I charged that President Nixon had “violat[ed] his constitutional duty to take care that the laws be faithfully executed” by “using the powers of his high office, * * * personally and through his subordinates and agents in a course of conduct or plan designed to delay, impede, and obstruct investigations of [the] unlawful entry [of the offices of the Democratic National Committee]”; “to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.” The article identified numerous “means used to implement this course of conduct,” including “[m]aking * * * false or misleading statements to * * * investigati[ng] officers”; “[w]ithholding relevant and material evidence or information”; “[a]pproving, condoning * * * and counseling witnesses with respect to giving false or misleading statements to investigati[ng] officers”; “[i]nterfering * * * with * * * investigations” by the Department of Justice, the FBI, and congressional committees; “[a]pproving or condoning” the “surreptitious payment” of hush money for the purpose of silencing witnesses or participants in the burglary; “[m]aking false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted * * *”; and “[e]ndeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony * * *.”

Article II accused the President of “repeatedly engag[ing] in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the
executive branch and the purposes of these agencies.” The resolution implicitly or explicitly referred to the use of the Internal Revenue Service to harass individuals identified on a list of the Administration’s political “enemies”; the use of the FBI and Secret Service “to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security”; the maintenance of “a secret investigative unit within the office of the president, financed in part with money derived from campaign contributions to him, which * * * engaged in covert and unlawful activities * * *”; “fail[ure] to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee and the cover-up thereof, * * * the break-in into the office of Dr. Lewis Fielding and the campaign financing practices of the Committee to Re-Elect the President”; and “knowingly misus[ing] the executive power by interfering with agencies of the executive branch,” such as the FBI, CIA, and Watergate Special Prosecution Force, “in violation of his duty to take care that the laws be faithfully executed.” Article III accused President Nixon of failing “without lawful cause or excuse, to produce papers and things [tapes of conversations in the Oval Office] as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives * * * and willfully disobey[ing] such subpoenas.”

The House Judiciary Committee, with a membership of 21 Democrats and 17 Republicans, adopted Article I on July 27, 1974 by a vote of 27–11; Article II was agreed to on July 29 by a vote of 28–10; and Article III was accepted on July 30 by a vote of 21–17. The committee’s Democrats unanimously voted for Articles I and II, and all but two voted in favor of Article III. Six of the Republicans voted for Article I, seven for Article II, and only two voted to approve Article III. The Judiciary Committee rejected 12–26 two articles of impeachment dealing with alleged income tax violations and the secret bombing of Cambodia. But reporting these articles to the full House was rendered moot by Nixon’s resignation from the Presidency, effective at noon on August 9, 1974.

Executive Privilege

When the Senate Select Committee on Presidential Campaign Activities, less formally known as the Ervin Committee, learned in the course of its hearings from testimony delivered by former Counsel to the President John Dean that conversations in the Oval Office on specific dates had focused on efforts to obstruct and deflect the investigation of the Watergate break-in and when the committee learned later that the President had installed a taping system to record conversations in his office, these revelations led the Watergate special prosecutor, first Archibald Cox and later Leon Jaworski, to subpoena the tapes of those conversations. A federal grand jury investigating Watergate voted to indict former Attorney General John Mitchell and half a dozen other individuals connected with the administration for obstructing justice. When asked whether they were prepared to indict the President, some members of the grand jury, showing their confidence in the evidence presented to them, raised both hands. Because the special prosecutor had reservations whether a sitting President could be indicted without first being impeached and removed from office, however, Jaworski persuaded the grand jury instead to name the President as an “unindicted co-conspirator.”

When the special prosecutor subpoenaed the Watergate tapes, the President challenged the subpoena on the grounds of executive privilege, a doctrine of constitutional law according to which conversations between the President and his advisers are confidential and not subject to compelled disclosure. After Judge John Sirica upheld the constitutionality of the subpoena (In re Grand Jury Subpoena, 360 F.Supp. 1 (D.D.C. 1973)), the Watergate tapes were introduced in evidence at the impeachment trial of President Nixon.

Despite the President’s challenge, the tape evidence became central to the impeachment trial. Although it is now clear that the President did not engage in a direct or clear plan to obstruct justice according to the tapes, the evidence revealed that the President was aware of efforts by subordinates to hide evidence, and he knew that the efforts were obstructive. The tapes also showed the President’s awareness of—and knowledge of—certain illegal activities, such as the coordination of campaign finances with a non-profit group, that were not the subject of investigations by any criminal enforcement agencies. The tapes did not show that the President directly ordered or led the illegal activities, but they showed that he was aware of and approved of the illegal activities and that he took steps to cover them up. These facts were critical to the impeachment trial, and they underscored the importance of executive privilege in limiting the powers of the President and protecting his ability to carry out the duties of the office.
1973)) and this judgment was affirmed on appeal (Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973)), the President responded with various offers of edited transcripts and truncated versions of the tapes. These piecemeal responses were rejected by the prosecutor, and the district court ordered compliance with the subpoena (United States v. Mitchell, 377 F.Supp. 1326 (D.D.C. 1974)). The constitutional struggle reached the Supreme Court when both parties petitioned for certiorari in advance of judgment by the federal appeals court. Following oral argument in a special session after the close of its October 1973 Term, the Court rendered a unanimous decision in United States v. Nixon, rejecting the President’s claim of executive privilege. This decision sealed Nixon’s fate: Either he could be impeached for obstructing justice, since the tapes amounted to the “smoking gun” (the President could be heard personally helping to plot the cover-up), or he could be impeached for refusing to obey the Supreme Court’s decision.

The Court’s rejection of executive privilege in this case was a personal defeat for a vulnerable President, much as Youngstown had been for Truman. As measured by the Gallup Poll, public approval of both Presidents was very low at the time the Court ruled. When Youngstown was decided, 32 percent of the American people said they approved of the job Truman was doing as President (up from his all-time low of 23 percent in November 1951). When U.S. v. Nixon below was decided, the President’s job approval score was 24 percent (his rock bottom).

The question, however, is whether either case represents a defeat for the institution of the Presidency, as distinguished from a particular incumbent. Seen in this light, although the vote in U.S. v. Nixon was unanimous, many features of the opinion could hardly be thought of as damaging the Presidency in the long run: the elevation of executive privilege from a common law privilege to a constitutional privilege, the recognition that it is a presumptive privilege, the maintenance of absolute secrecy for certain kinds of documents, and the use of in camera procedures in the handling of sensitive materials.

**United States v. Nixon**

Supreme Court of the United States, 1974

418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039

**BACKGROUND & FACTS** On March 1, 1974, a federal grand jury sitting in the District of Columbia returned indictments against former Attorney General John Mitchell and six other individuals, alleging conspiracy to defraud the United States and obstruction of justice, charges growing out of the cover-up of the Watergate Affair. In its findings, the grand jury named President Richard M. Nixon as an unindicted co-conspirator. Following the indictments, Special Prosecutor Leon Jaworski sought and District Judge John Sirica issued on April 18 a subpoena duces tecum directed at the President as a third party to produce certain tape recordings of conversations with specifically named advisers and aides on particular dates and other memoranda then in his possession relevant to the upcoming trials of those indicted. On April 30, the President released to the public edited transcripts of 43 conversations, 20 of which had been subpoenaed. The President declined to release additional material and through his counsel, James St. Clair, moved to quash the subpoena, asserting that the dispute did not properly lie before the district court because the controversy was nonjusticiable (involving what was postulated to be a purely internal dispute between a superior officer and his subordinate within the
executive branch) and because any judicial action in the matter was precluded by the claim of executive privilege.

The district court rejected the first argument made by the President, relying upon a special regulation concerning the independence of the special prosecutor promulgated by the Attorney General. That court also rejected the second argument by citing the ruling of the U.S. Court of Appeals for the District of Columbia in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). Further, the district court denied the President’s motion to expunge the grand jury’s characterization of him as a co-conspirator. The President then appealed to the U.S. Circuit Court of Appeals. At the same time, the special prosecutor petitioned the Supreme Court for certiorari in the interest of facilitating a definitive resolution to the controversy. The Supreme Court granted the writ before any decision could be rendered by the Court of Appeals, and it heard oral argument in a special session, July 8, 1974, following the close of its October 1973 Term.

Mr. Chief Justice BURGER delivered the opinion of the Court.

***

THE CLAIM OF PRIVILEGE

A

[W]e turn to the claim that the subpoena should be quashed because it demands “confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.” *** The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President’s claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena ducem tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President’s counsel *** reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. [Emphasis supplied.] Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), that “it is emphatically the province and duty of the judicial department to say what the law is.” ***

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential presidential communications for use in a criminal prosecution, but other exercises of powers by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. *** In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S. Const. Art. I, § 6. Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018 (1973); Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614 (1973); United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531 (1972); United States v. Johnson, 383 U.S. 169, 86 S.Ct. 749 (1966). ***

Our system of government “requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.” Powell v. McCormack, 395 U.S., at 549, 89 S.Ct., at 1978. And in Baker v. Carr, 369 U.S., at 211, 82 S.Ct., at 706, the Court stated:

“[D]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”
Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47.*** We therefore reaffirm that it is "emphatically the province and the duty" of this Court "to say what the law is" with respect to the claim of privilege presented in this case. Marbury v. Madison, 5 U.S. (1 Cranch) at 177, 2 L.Ed. 60.

B. THE SCOPE OF EXECUTIVE POWER

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, Humphrey's Executor v. United States, 295 U.S. 602, 629–630, 55 S.Ct. 869, 874–875 (1935); Kilbourn v. Thompson, 103 U.S. 168, 190–191, 26 L.Ed. 386–387 (1880), insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It
enjoins upon its branches separateness but interdependence, autonomy but reciprocity."
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870 (1952)
(Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of “a workable government” and gravely impair the role of the courts under Art. III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. United States v. Burr, 25 Fed.Cas. 187, 190, 191–192 (No. 14,694) (CC Va. 1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. [Emphasis supplied.] The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. In Nixon v. Sirica, 159 U.S.App.D.C. 58, 487 F.2d 700 (1973), the Court of Appeals held that such presidential communications are “presumptively privileged,” * * * and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall’s observation, therefore, that “in no case of this kind would a court be required to proceed against the President as against an ordinary individual.” United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14,594) (CCD Va. 1807).

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that “the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.” Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial, “‘that the public * * * has a right to every man’s evidence’ except for those persons protected by a constitutional, common law, or statutory privilege, * * *” Branzburg v. United States, 408 U.S. 665, 668, 92 S.Ct. 2646, 2660 (1972).” The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man “shall be compelled in any criminal case
to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In C. & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 436 (1948), dealing with presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." * * *

In United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528 (1952), dealing with a claimant's demand for evidence in a damage case against the Government the Court said:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution * * * is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in
nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President’s broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a president concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the presidential material was “essential to the justice of the [pending criminal] case.” United States v. Burr, at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption and ordered an in camera examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court’s responsibilities in conducting the in camera examination of presidential materials or communications delivered under the compulsion of the subpoena duces tecum.

E

Enforcement of the subpoena duces tecum was stayed pending this Court’s resolution of the issues raised by the petitions for certiorari. Those issues now having been disposed of, the matter of implementation will rest with the District Court. * * * [The district judge is to examine the subpoenaed material privately in chambers.] Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall, sitting as a trial judge in the Burr case, was extraordinarily careful to point out that: “[I]n no case of this kind would a Court be required to proceed against the President as against an ordinary individual.” United States v. Burr, 25 Fed.Cases 187, 191 (No. 14,694). Marshall’s statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President’s communications and activities, related to the performance of duties under that Article.
Moreover, a President’s communications and activities encompass a vastly wider range of sensitive material than would be true of any “ordinary individual.” It is therefore necessary in the public interest to afford presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to presidential records that high degree of deference suggested in United States v. Burr, and will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed.

Mr. Justice REHNQUIST took no part in the consideration or decision of these cases.

Subsequent federal court rulings have identified two distinct forms of executive privilege: the deliberative process privilege and the presidential communications privilege. The differences between the two were described extensively by a federal appellate court in In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997). At the outset, the appeals court observed, the deliberative process privilege was the form of executive privilege most frequently raised in the judicial arena, ordinarily in Freedom of Information Act litigation. This privilege “allows the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” Unlike the presidential communications privilege, which was accorded constitutional status by the Supreme Court’s decision in United States v. Nixon, the deliberative process privilege is rooted in common law. Its two essential requirements are that “the material must be predecisional and it must be deliberative.” (Emphasis supplied.) The deliberative process privilege “does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.”

As with the presidential communications privilege, the deliberative process privilege “can be overcome by a sufficient showing of need.” But evaluation of a claim invoking this privilege against disclosure is more flexible and requires the weighing of many factors: (1) “the relevance of the evidence,” (2) “the availability of other evidence,” (3) “the seriousness of the litigation,” (4) “the role of the government,” and (5) the “possibility of future timidity by government employees.” The appeals court added, “[W]here there is reason to believe the documents may shed light on government misconduct, ‘the privilege is routinely denied,’ ” because shielding deliberations within the government in that context does not serve “the public’s interest in honest, effective government.”

Probably the best recent example of suits brought under the Freedom of Information Act to challenge secret deliberations of the executive branch were those brought by public-interest and environmental groups to gain access to documents bearing upon the formulation of energy policy by the Energy Task Force of President George W. Bush’s Administration. The plaintiffs also sued under the Federal Advisory Committee Act (FACA) which imposes open-meeting and disclosure requirements on the operation of
consultative bodies that are not, technically speaking, federal agencies. The suits were fueled by speculation that the Administration’s proposals on energy policy had been written by representatives of the oil and gas industries. The Task Force was chaired by Vice President Dick Cheney, a former CEO of the Haliburton oil-drilling corporation, and it was said to have been influenced decisively by top industry contributors to the Bush-Cheney presidential campaign to the virtual exclusion of input from any other source. Apparently, 18 of the top 25 energy-industry contributors to the campaign met with Cheney about the formulation of energy policy (New York Times, Mar. 1, 2002, pp. A1, A15). Lower federal district courts reached different conclusions about forcing the Administration to turn over attendance records of the meetings and to provide an itemized list of Task Force documents in its possession. In Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 124 S.Ct. 2576 (2004), the Supreme Court denied these discovery requests. The Court emphasized that “[t]he need for information for use in civil cases *** does not share the urgency or significance of the criminal subpoena in Nixon.” (Emphasis supplied.) It continued: “Even if FACA embodies important congressional objectives, the only consequence from respondents’ inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress’ policy objectives under FACA. *** This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the [Energy Task Force] to give advice and make recommendations to the President. *** [S]pecial considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated. *** In contrast to Nixon’s subpoena orders that ‘precisely identified’ and ‘specific[ally] . . . enumerated’ the relevant materials, *** the discovery requests here *** ask for everything under the sky ***.” (It should also be noted that no committee of either the House or Senate had subpoenaed the Energy Task Force documents, so—again, unlike Nixon—this was not an inter-branch dispute that threatened to impair the operation of a coordinate branch of government.)

As already noted, the Supreme Court in Nixon anchored the presidential communications privilege in the constitutional principle of the separation of powers. Rarely invoked, its purpose is to maintain the confidentiality of presidential communications. It, too, is a presumptive privilege, but “is more difficult to surmount” and “affords greater protection against disclosure” than the deliberative process privilege. The presidential privilege can be overcome only when the challenging party specifically “demonstrate[s]: first, [why] each discrete group of the subpoenaed materials likely contains important evidence; and second, [why] this evidence is not available with due diligence elsewhere.” Of course, such material “must be directly relevant to the issues that are expected to be central to the trial.” Evaluation of claims of presidential privilege are therefore more structured and less flexible (the factors to be considered are not susceptible to variation on a case-by-case basis).

The invocation of presidential privilege is not limited to direct communications with the President. As the appeals court held, “[C]ommunications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not directly made to the President.” The court continued: “Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. *** In many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.” However, the appeals court identified the outer reaches of those entitled to invoke the privilege, saying
“[T]he privilege should not extend to staff outside the White House.” It does not apply to staff “in executive branch agencies” but “only to communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating advice to be given to the President on the particular matter to which the communications relate.” The court added, “The presidential communications privilege should never serve as a means for shielding information regarding government operations that do not call ultimately for direct decision-making by the President.”

Once the two-part requirement attaching to materials falling within the presidential communications privilege has been met, the editorial process outlined by the Supreme Court in Nixon is triggered: the trial judge examines the documents in camera, excises all matter not directly relevant to the case at hand, keeps the remainder of the material secret, and returns it to the President, turning over only the directly relevant material to the party prevailing on the claim of executive privilege.

Applying this framework for evaluating a claim of presidential communications privilege, another federal appellate court rejected enforcement of a subpoena duces tecum for tape recordings of Nixon’s conversations by the Senate Watergate Committee, which was investigating “illegal, improper or unethical” activities occurring during the 1972 presidential campaign and election. In this case, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), a federal appeals court sitting en banc concluded that the subpoenaed material—tapes of conversations occurring in the Oval Office—were not “critical to the responsible fulfillment of the Committee’s functions.” To be sure, the Senate Watergate Committee had a legitimate interest in writing reform legislation, but drafting legislation, which contains forward-looking rules, does not require first-hand evidence of past criminal activity. By contrast, the House Judiciary Committee was engaged in a function that had “an express constitutional source”—it was considering whether to propose the impeachment of the President. This necessarily involved a determination of the extent to which there had been presidential involvement in the Watergate break-in and cover-up. Functioning rather like a grand jury, the House Judiciary Committee needed the “most precise evidence, the exact text of oral statements recorded in their original form * * *.” The Watergate Committee’s general legislative interest paled in contrast to the House Judiciary Committee’s need to determine “whether there [was] probable cause to believe that certain named individuals did or did not commit specific crimes.” Moreover, since the House Judiciary Committee already had the original tapes in its possession, any need the Senate committee could be said to possess would be only the interest in having two separate investigations operate simultaneously.

The presidential communications privilege was also invoked with respect to control over Nixon’s presidential papers after leaving office. Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777 (1977), dealt with the operation of the privilege asserted in opposition to congressional legislation. The federal appeals court in In re Sealed Case (Espy), previously referred to (p. 217), summed up the Supreme Court’s treatment of the presidential communications privilege in that suit brought by the former President as follows:

Congress enacted the Presidential Recordings and Materials Preservation Act (“PRMPA”), which transferred custody of the Nixon tapes along with a vast number of other presidential documents from the Nixon administration to the custody of the General Services Administrator. President Nixon challenged PRMPA as unconstitutional, in part because it infringed on the presidential privilege. The [Supreme] Court first held that a former President could assert the privilege on his own, but his claim would be given less weight than that of an incumbent President. * * * Moreover, it said the privilege was “limited to communications in performance of [a President’s] responsibilities,” ‘of his office,’ and made ‘in the process of shaping policies and
making decisions." ** The Court then noted that the only intrusion into the confidentiality of presidential communications in the case was the screening of the materials by archivists, since the statute provided that the Administrator would promulgate regulations which allowed claims of privilege to be raised before public access occurred. This screening by government archivists who had performed the same task for past Presidents without any apparent interference with presidential confidentiality was viewed by the Court as "a very limited intrusion," and also as justified in light of the substantial public interests served by the Act. **

The congressional legislation sought to prevent the former President from destroying controversial materials so that an accurate record of events during the Watergate scandal would continue to be available and to preserve evidence possibly necessary to the conduct of criminal trials or civil litigation.

**The Attorney-Client and Protective Function Privileges**

The Nixon Administration may have been more audacious in its assertion of executive privilege, but the Clinton Administration was more imaginative when its claim of executive privilege was rebuffed. In his appearance before the federal grand jury looking into the Lewinsky Affair, Bruce Lindsey, who wore the hat of both Deputy White House Counsel and Special Assistant to the President, had invoked attorney-client privilege as well as executive privilege. Although the Office of the President did not appeal the district court's ruling against executive privilege (see In re Grand Jury Proceedings, 5 F.Supp.2d 21 (D.D.C. 1998)), it did contest the negative reception the district court gave the claim of attorney-client privilege. In In re Lindsey, 158 F.3d 1263 (D.C.Cir. 1998), a divided federal appeals panel wrestled with the recognition of such a privilege when invoked by an attorney who presumably had a duty to apprise federal law enforcement officials of evidence of any criminal wrongdoing by government officeholders.

Observing first that the attorney-client privilege protects only "confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal services," and "shields private relationships from inquiry in either civil litigation or criminal prosecution," the appeals court declared that "competing values arise when the Office of the President resists demands for information from a federal grand jury[,]** the nation's chief law enforcement officer[,]" or his alter ego, the special prosecutor or independent counsel. As the appeals court in *Lindsey* explained:

> When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to "take Care that the Laws be faithfully executed." ** Investigation and prosecution of federal crimes is one of the most important and essential functions within that constitutional responsibility. **

*** The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. **

The appeals court then went on to observe that "nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel. The President has retained several private lawyers, and he is entitled to engage in the completely confidential communications with those lawyers befitting an attorney and a client in a private relationship."
Lindsey had been subpoenaed along with several other White House employees to testify before a federal grand jury after the prosecutorial jurisdiction of Independent Counsel Kenneth Starr was expanded beyond the Whitewater Inquiry (about a failed real-estate venture involving President Clinton when he was Governor of Arkansas) to whether the President had made false statements in his deposition in the sexual harassment lawsuit brought against him by Paula Jones. The grand jury investigation focused on his denial under oath that he had sexual relations with Monica Lewinsky, a 21-year-old White House intern, that White House officials (including the President) may have obstructed justice by trying to conceal evidence of the affair, and that there may have been subornation of perjury in Ms. Lewinsky’s initial denial before the grand jury that she and the President had been intimate.

The appeals court took care to note that the attorney-client privilege could not be invoked to cover any legal advice “rendered in connection with Jones v. Clinton, [because that] lawsuit involv[ed] President Clinton in his personal capacity” (emphasis supplied). Nor could conversations and strategizing regarding the President’s likely impeachment furnish a basis for invoking the attorney-client privilege because, in the appeals court’s words, “Impeachment proceedings in the House of Representatives cannot be analogized to traditional legal processes and even the procedures used by the Senate in ‘trying’ an impeachment may not be like those in a judicial trial.” “[I]mpeachment,” it declared, “is fundamentally a political exercise.” Consequently, “[h]ow the policy and practice supporting the common law attorney-client privilege would apply in such a political context is uncertain.” The attorney-client privilege is limited to legal advice; executive privilege might protect political advice, but the attorney-client privilege did not. Recall that the district court had already rejected the claim of executive privilege and its ruling on that claim had not been appealed.

As the Independent Counsel cast his net ever wider in search of information about President Clinton’s relationship with Monica Lewinsky, Secret Service agents were themselves subpoenaed to testify. The Treasury Department, which houses the U.S. Secret Service, objected that requiring agents to talk about what they saw and heard when guarding the President would undermine their mission to protect him. In In re Sealed Case (Secret Service), 148 F.3d 1073 (D.C. Cir. 1998), the U.S. Court of Appeals for the District of Columbia Circuit confronted the question of whether there was a “protective function” privilege, at least as the Treasury Department had formulated it.

The appeals court began with the version of the “protective function” privilege that had been invoked and then summed up the reasoning behind it. In the words of the appellate court:

As described by the Secret Service, the protective function privilege absolutely protects “information obtained by Secret Service personnel while performing their protective function in physical proximity to the President,” except that the privilege “does not apply, in the context of a federal investigation or prosecution, to bar testimony by an officer or agent concerning observations or statements that, at the time they were made, were sufficient to provide reasonable grounds for believing that a felony has been, is being, or will be committed.” *** The privilege is necessary, according to the Secret Service, in order *** to carry out its statutory duty to protect the President *** because the Secret Service uses protective techniques *** [that depend] upon close physical proximity to the President. *** The Secret Service has a tradition and culture of maintaining the confidences of its protectees. The Service is concerned that “if any President of the United States were given reason to doubt the confidentiality of actions or conversations taken in sight or hearing of Secret Service personnel, he would seek to push the protective envelope away, or eliminate some of its components, undermining it to the point where it could no longer be fully effective.” ***

Noting that the Supreme Court “requires that a party seeking judicial recognition of a new evidentiary privilege *** demonstrate with a high degree of clarity and certainty that the
proposed privilege will effectively advance a public good[* * *][h]ere, the arguments of the Secret Service, apart from the universally shared understanding that the nation has a profound interest in the security of the President, ‘are based in large part on speculation * * *.’” Among the problems raised by the appeals court in the logic of how such a privilege was to function were the following: (1) the lack of clarity with which any agent might recognize a felony when he saw it (since reason to believe a crime was being committed might depend substantially on a retrospective understanding of events rather than what one saw at the time); (2) the obligation the President has to accept protection in the national interest; (3) the divided opinion of former Presidents on the need for the privilege (former President George Bush, for; former Presidents Ford and Carter, against); (4) the failure of the Secret Service to require that agents sign confidentiality agreements when they are hired; and (5) the irony that “the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings.” Concluding that “[t]he Secret Service * * * failed to carry its heavy burden * * * of establishing the need for the protective function privilege it sought to assert in this case[,]” the court left “to * * * Congress the question whether a protective function privilege is appropriate in order to ensure the safety of the President and, if so, what the contours of that privilege should be.”

**Liability of the President for Damages**

Last, but not least, in the parade of Nixon cases that reached the Supreme Court was the issue of whether the former President could be sued for damages. Litigation challenging exercises of presidential power, particularly suits that named the President personally, escalated dramatically in the Nixon years.6

In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867), the Supreme Court held that the President could not be enjoined from enforcing a statute. The Court reasoned that enforcement of the law was committed to the President’s discretion by the Constitution and any lapse in judgment on his part was something for which it prescribed a political remedy, such as defeat in an election or impeachment and removal from office. Indeed, as far back as Chief Justice Marshall’s answer to the second question in *Marbury v. Madison* (see pp. 6–7), the Court had firmly distinguished between ministerial acts, which were properly subject to suit for the enforcement of legal rights, and discretionary acts, for which the President was accountable only by political means. To make any government officer legally answerable for an action legitimately committed to his discretion is thought to foster timidity, infringe his independence, and violate the separation of powers.

Federal and state executive officials, however, can sometimes be subject to liability for damages even when they exercise discretion. In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974), the Court concluded that such officials can be sued and made to pay damages if they knew or had a reasonable basis for knowing that what they did was illegal and a clear abuse of their authority. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982), the Court rejected the proposition that presidential assistants were absolutely immune from damages, as it had rejected the same proposition as applied to cabinet members in *Butz*. All enjoy qualified immunity, consistent with the preceding principle, because immunity attaches to the function the official is performing, not to the office itself.

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The question then becomes whether the President is absolutely immune from the payment of damages or whether he, too, possesses only qualified immunity. This was the issue that closely divided the Court in Nixon v. Fitzgerald. Justice Powell made the case for the President's absolute immunity because of the uniqueness of his position and the unworkability of qualified immunity. Justice White, on the other hand, argued forcefully that there is nothing about the office of President, exalted as it may be, that necessarily should make the occupant absolutely immune for any injury he may cause.

NIXON v. FITZGERALD
Supreme Court of the United States, 1982
457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349

BACKGROUND & FACTS In the waning months of President Lyndon Johnson's administration, Ernest Fitzgerald, a Pentagon management analyst, appeared before a congressional subcommittee and, to the evident embarrassment of his superiors, testified about a $2 billion cost overrun and unanticipated technical difficulties incurred in the development of a new military transport aircraft. Early on in the succeeding Nixon administration, Fitzgerald lost his job ostensibly as part of the new administration's reduction-in-force program. Fitzgerald, however, alleged that his discharge from federal employment was not for purported reasons of governmental efficiency and economy, but as retaliation for his "whistle-blowing" testimony. Although his job was itself not under civil service protection, his status as a former veteran required the government to observe certain procedures and to find him a job of comparable authority elsewhere in the federal bureaucracy. When the administration failed to observe these requirements, Fitzgerald filed a complaint with the Civil Service Commission, where a hearing officer subsequently determined that, while Fitzgerald's firing was not in retaliation for his testimony, his discharge was for "reasons purely personal." Fitzgerald then sued President Nixon and presidential advisers Harlow and Butterfield, all of whom, he contended, conspired to discharge him for personal and political reasons. Lower federal courts denied summary judgment for Nixon and his advisers, rejecting their claims of absolute immunity. (Under terms of an agreement between Fitzgerald and Nixon, the defendant ex-President paid the plaintiff $142,000 and agreed to pay $28,000 more if the Supreme Court rejected his claim of absolute immunity from suit. The Supreme Court subsequently held that this agreement did not moot the controversy, since "[t]he limited agreement between the parties left both * * * [of them] with a considerable financial stake in the resolution of the question presented in this Court.")

Justice POWELL delivered the opinion of the Court.

* * *

We hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

"There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them * * *. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his
person must be deemed, in civil cases at least, to possess an official inviolability.” 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1st ed. 1833).

A

The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States * * *.” This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to “take Care that the Laws be faithfully executed”; the conduct of foreign affairs—a realm in which the Court has recognized that “[t]he President must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. E.g., Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 402, 408 (1979). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President’s office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

B

Courts traditionally have recognized the President’s constitutional responsibilities and status as factors counseling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official’s evidentiary privilege, we have recognized that the Presidential privilege is “rooted in the separation of powers under the Constitution.” United States v. Nixon, 418 U.S., at 708, 94 S.Ct., at 3107. It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. * * * But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. * * *

C

In defining the scope of an official’s absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity’s justifying
purposes. Frequently our decisions have held that an official’s absolute immunity should extend only to acts in performance of particular functions of his office. See Butz v. Economou, 438 U.S., at 508–517, 98 S.Ct., at 2911–2916 * * *.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President’s innumerable “functions” encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U.S.C. § 7211 (1976 ed., Supp.IV) and 18 U.S.C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President’s motives could not be avoided under the kind of “functional” theory asserted both by respondent and the dissent. Inquiries of this kind could be highly intrusive.

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President’s traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President “above the law.” For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the case is remanded for action consistent with this opinion.

So ordered.

Chief Justice BURGER, concurring.

It strains the meaning of the words used to say this places a President “above the law.” * * * The dissents are wide of the mark to the extent that they imply that the Court today recognizes sweeping immunity for a President for all acts. The Court does no such thing. The immunity is limited to civil damages claims. Moreover, a President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties. * * *

***

Justice WHITE, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

We held [in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978)] that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

*** A President, acting within the outer boundaries of what Presidents normally do, may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing
that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other federal officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.

** I do not agree that if the Office of President is to operate effectively, the holder of that Office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

** Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liability. ** The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

** The Court makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the Government.

Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong.

In Marbury v. Madison, 5 U.S. (1 Cranch) at 163, 2 L.Ed. 60, The Chief Justice, speaking for the Court, observed: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” Until now, the Court has consistently adhered to this proposition.

***

** It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

***

First, the majority informs us that the President occupies a “unique position in the constitutional scheme,” including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. ** True as this may be, it says nothing about why a “unique” rule of immunity should apply to the President. The President’s unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

***

Second, the majority contends that because the President’s “visibility” makes him particularly vulnerable to suits for civil damages, ** a rule of absolute immunity is required. The force of this argument is surely undercut by the majority’s admission that “there is no historical record of numerous suits against the President.”

*** There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation.

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Finally, the Court suggests that potential liability “frequently could distract a President from his public duties.” ** Unless one assumes that the President himself makes the countless high-level executive
decisions required in the administration of government, this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. * * * Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. * * * Except for the empty generality that the President should have ‘the maximum ability to deal fearlessly and impartially with’ the duties of his office,” * * * the majority nowhere suggests a particular, disadvantageous effect on a specific Presidential function. * * *

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring “the right of every individual to claim the protection of the laws,” Marbury v. Madison, 5 U.S. (1 Cranch), at 163, 2 L.Ed. 60, in the name of protecting the principle of separation of powers. * * *

The Supreme Court’s decision in Fitzgerald, of course, speaks only to the absence of any civil liability for damages resulting from the President’s official conduct. A President is still liable for any injury caused by his private conduct and his conduct before assuming office. Consequently, Fitzgerald presented no barrier to the sexual harassment suit brought against President Clinton by Paula Jones in May 1994. Her complaint alleged that the then-governor made improper sexual advances to her, which she said she emphatically rebuffed. As a result of rejecting his sexual overtures, she said her work environment became hostile and, after speaking out about the matter following his election as President, she asserted that her reputation was damaged by Administration spokesmen who branded her charges lies. After federal courts, citing Fitzgerald, rejected the argument that he was absolutely immune from liability, President Clinton argued that the suit could not proceed until after his term of office had ended. This contention, too, was rejected both on the theory that any distraction posed to his official responsibilities was minimal and because “delaying the trial would increase the danger of prejudice resulting from the loss of evidence, including the ability of witnesses to recall specific facts, or the possible death of a party.” The President could be required, therefore, to give a deposition (albeit by videotape). He had previously been compelled to give a videotape deposition in the criminal trial of James McDougal that grew out of the special prosecutor’s Whitewater investigation (see United States v. McDougal, 934 F.Supp. 296 (E.D.Ark. 1996)). In so ruling, the federal court followed the practice of permitting former President Ronald Reagan to give videotaped testimony in the trial of his national security advisor on charges flowing from the Iran-Contra Affair, see United States v. Poindexter, 732 F.Supp. 142 (D.D.C. 1990).7

Having failed to thwart the deposition process, President Clinton argued that the case could not go to trial before his term of office finished. On that issue, too, the President lost. In Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636 (1997), the Supreme Court held unanimously that “the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.” The Court rejected contentions that the President “occupies a unique office with powers and responsibilities so

7. What was new in the Lewinsky Affair was compelling President Clinton to testify before a federal grand jury. After Independent Counsel Kenneth Starr subpoenaed the President to appear, rather than invite a constitutional crisis by fighting the subpoena, the President voluntarily agreed to answer questions from members of the special prosecutor’s staff and members of the grand jury on closed circuit television. Thus, President Clinton’s live testimony on August 17, 1998, was the first time a President of the United States had appeared before a grand jury.
vast and important that the public interest demands that he devote his undivided time and attention to his public duties” and “that this particular case * * * may impose an unacceptable burden on the President’s time and energy, and thereby impair the effective performance of his office.” Said Justice Stevens, speaking for the Court, “The fact that a federal court’s exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution.” If and when conduct of the trial becomes unduly burdensome and distracting to the Chief Executive, there would be plenty of time for the district court to adjust the pace of the proceedings accordingly. And, in a line that subsequently seemed at odds with the seemingly endless legal difficulties encountered by the Administration, Justice Stevens observed: “If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency.” It wasn’t.

On remand, in Jones v. Clinton, 990 F.Supp. 657 (E.D.Ark. 1998), the federal district court awarded summary judgment to President Clinton. The court found that Paula Jones’s refusal to submit to unwelcome sexual advances or requests for sexual favors did not result in tangible detriment since her job was subsequently upgraded and she received raises and consistently good evaluations. The court also found insufficient evidence that a hostile or offensive work environment had been created. Although Clinton’s behavior might have been boorish and offensive, there was no evidence of extreme and outrageous conduct such as would have permitted a jury to find the intentional infliction of emotional distress. (After fighting Paula Jones’s sexual harassment lawsuit for four years, President Clinton settled the case out of court in November 1998 for $850,000, of which $200,000 went to Jones and the rest went to pay her lawyers; but the settlement did not include an apology from Clinton.)

**C. EXECUTIVE AUTHORITY IN THE CONDUCT OF FOREIGN AFFAIRS**

In *Federalist No. 64*, John Jay wrote:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate despatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

Thus, from the very outset of constitutional debate in this country, it would seem that the twin strengths of speed and confidentiality were values that commended the conduct of diplomacy and foreign affairs to the care of the President.

**Executive Agreements**

Although Jay makes the case largely in terms of negotiating treaties, in a world where the written instruments used to solidify understandings between nations much more often take the form of executive agreements than treaties, the Court’s decision in *United States v. Belmont* (p. 229) assumes undeniable importance. Unlike a treaty, which requires approval by two-thirds of the Senate, an executive agreement is valid upon the signature of the President, although its technical legal authority to bind the country to the obligations it imposes is presumably much less. In fact, the use of executive agreements far exceeds that of
treaties, and in light of the fact that treaties usually contain escape clauses and also the fact that succeeding administrations do not regularly disown existing executive agreements, the distinction in durability between the two has blurred considerably over the years.

It is not unusual in the case of drastic change in foreign regimes for a claims-settlement mechanism, contained in an executive agreement, to accompany diplomatic recognition of a country when a President exercises his Article II authority “to receive Ambassadors and other public Ministers.” The Belmont case tested the validity of an executive agreement signed by President Franklin Roosevelt, normalizing relations with the Soviet Union. Resolution of the Iranian hostages crisis turned on an executive agreement signed by President Carter in the waning hours of his administration, which explains why, when it was challenged in Dames & Moore v. Regan (p. 232), the Secretary of the Treasury of the incoming Reagan administration was named as the defendant. Although the agreement took effect in the final minutes of the outgoing administration, the President-Elect knew of and approved its terms. And, as discussed in the note in Chapter 1 describing Goldwater v. Carter (p. 71), the President may abrogate a treaty with one country in the exercise of his constitutional power to recognize another. In that instance, President Carter terminated our security treaty with Taiwan as a necessary precondition to recognizing the People’s Republic of China.8

UNITED STATES v. BELMONT
Supreme Court of the United States, 1937
301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134

BACKGROUND & FACTS Prior to 1918, the Petrograd Metal Works had deposited a sum of money with a private banker in New York City, August Belmont & Company. In 1918, the Soviet government nationalized the company and appropriated its assets, thus acquiring title to the deposit in Belmont’s bank. When President Franklin Roosevelt and representatives of the Soviet Union concluded an exchange of diplomatic correspondence in November 1933, establishing diplomatic relations, they also agreed to a settlement of claims between the two countries. In the agreement, it was stipulated that, rather than have each government prosecute claims against citizens of the other, the Soviet Union would assign title to claims in the United States to the United States government and vice versa. Belmont died in the interim, and the executors of his estate refused to honor a request from the United States government for the funds, whereupon the United States sued to recover them. The U.S. District Court, in a judgment affirmed by the U.S. Circuit Court on appeal, ruled against the United States on the ground that the property could not rightly be regarded as falling within Soviet jurisdiction and the United States petitioned for certiorari. Since the bank was located in New York, the policy of that state was controlling, and acquisition of property by confiscation was contrary to that state’s expressed public policy; therefore, the United States could not have title.

8. Even when the recognition of a foreign government was not implicated, the President’s termination of a treaty has been judged to be a “political question,” and objecting congressmen who brought suit to block the President’s action were held to lack sufficient “personalized or particularized” interest necessary to a real case and controversy as required by Article III of the Constitution. See Kucinich v. Bush, 236 F.Supp.2d 1 (D.D.C. 2002). In this case, President George W. Bush gave notice that he was ending the 1972 Anti-Ballistic Missile Treaty with Russia. The legislators contended that the President could no more constitutionally terminate a treaty “without congressional consent * * * than he could repeal a statute.”
Mr. Justice SUTHERLAND delivered the opinion of the Court.

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The case * * * presents a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government. The court below held that the assignment thus effected embraced the claim here in question; and with that we agree.

That court, however, took the view that the situs of the bank deposit was within the state of New York; that in no sense could it be regarded as an intangible property right within Soviet territory; and that the nationalization decree, if enforced, would put into effect an act of confiscation. And it held that a judgment for the United States could not be had, because, in view of that result, it would be contrary to the controlling public policy of the state of New York. The further contention is made by respondents that the public policy of the United States would likewise be infringed by such a judgment. The two questions thus presented are the only ones necessary to be considered.

First. We do not pause to inquire whether in fact there was any policy of the state of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

This court has held, Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, that every sovereign state must recognize the independence of every other sovereign state; and that the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory. The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole
organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (article 2, § 2), require the advice and consent of the Senate.

A treaty signifies “a compact made between two or more independent nations, with a view to the public welfare.” But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations. The distinction was pointed out by this court in the Altman Case [224 U.S. 583, 32 S.Ct. 593 (1912)] which arose under section 3 of the Tariff Act of 1897 (30 Stat. 151, 203), authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a "treaty" within the meaning of the Circuit Court of Appeals Act (26 Stat. 826), the construction of which might be reviewed upon direct appeal to this court.

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. "To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy and involve us in war." And while this rule in respect of treaties is established by the express language of clause 2, article 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

Second. The public policy of the United States relied upon as a bar to the action is that declared by the Constitution, namely, that private property shall not be taken without just compensation. But the answer is that our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens. What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. So far as the record shows, only the rights of the Russian corporation have been affected by what has been done; and it will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceeding, it shall be made to appear that they are so affected as to entitle them to judicial relief. The substantive right to the moneys, as now disclosed, became vested in the Soviet government as the successor to the corporation; and this right that government has passed to the United States. It does not appear that respondents have any interest in the matter beyond that of a custodian. Thus far no question under the Fifth Amendment is involved.

Judgment reversed.
Following the seizure of the American Embassy in Tehran on November 4, 1979, which resulted in the capture and holding hostage of U.S. diplomatic personnel by the Iranians, President Carter ordered a freeze on the removal and transfer of all assets held by the Iranian government or its instrumentalities within American jurisdiction. On the day the Carter Administration left office, the hostages were released by Iran pursuant to an agreement under which the United States was obliged “to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, [and] to prohibit all future litigation based on these claims.” In addition, the United States was to transfer all Iranian assets held in this country by the following July. A billion dollars of these assets were to be transferred to a security account in the Bank of England to be used to satisfy awards rendered against Iran by an Iran–United States Claims Tribunal. The day before his term of office ended, President Carter implemented the terms of the agreement through several executive orders that revoked all licenses permitting the exercise of power over Iranian assets, nullified all non-Iranian interests in the assets, and required banks holding Iranian funds to transfer them to the Federal Reserve Bank of New York to be held or transferred at the direction of the Secretary of the Treasury. Five weeks later, these orders were reaffirmed by the incoming Reagan administration.

In Dames & Moore v. Regan, 453 U.S. 654, 101 S.Ct. 2972 (1981), the Supreme Court upheld the constitutionality of the President’s orders. As to the President’s authority to nullify attachments on the Iranian assets and order the transfer of funds, the Court concluded that such actions were within the plain language of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C.A. §§ 1701–1706. Justice Rehnquist, speaking for the Court, explained:

This Court has previously recognized that the Congressional purpose in authorizing blocking orders is “to put control of foreign assets in the hands of the President.” * * * Propper v. Clark, 337 U.S. 472, 493, 69 S.Ct. 1333, 1345 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a “bargaining chip” to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner’s argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this “bargaining chip” through attachments, garnishments or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.

Because the President’s action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” Youngstown, 343 U.S., at 637, 72 S.Ct., at 871 (Jackson, J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President * * * and that we are not prepared to say.

Turning to “the question of the President’s authority to suspend claims pending in American courts,” the Court could not find specific authorization for such action in either the IEEPA or the Hostage Act, 22 U.S.C.A. § 1732, but it declared:

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President’s suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress’ legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially * * * in the areas of foreign policy and national security,” imply “congressional
disapproval” of action taken by the Executive. * * * At least this is so where there is no contrary indication of legislative intent and when as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. * * *

In addition to congressional acquiescence in the President’s power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States’ relations with a foreign state.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is “of vital importance to the United States.” * * * We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of presidential authority.

The Court emphasized the narrowness of its decision and explicitly warned that it did “not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities.” Rather, “where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.”

Relying on the reasoning of Belmont and Dames & Moore, the Supreme Court struck down a California statute that revoked an insurance company’s license to do business in the state if the insurer had been derelict in disclosing information about any life insurance policies it had sold to Holocaust victims between 1920 and 1945 and whose survivors had filed suit to recover the value or proceeds of the policies. In American Insurance Association v. Garamendi, 539 U.S. 396, 123 S.Ct. 2374 (2003), the Court held that an executive agreement negotiated by President Clinton with the German, Austrian, and French governments, establishing an International Commission on Holocaust Era Insurance Claims, implicitly superseded the exercise of state power. (The agreement contained no explicit preemption clause.) The Court concluded that “the national interest in maintaining amicable relationships with current European allies,” the “survivors’ interests in a ‘fair and prompt’ but non-adversarial resolution of their claims so as to ‘bring some measure of justice . . . in their lifetimes[,]’ and “the companies’ interest in securing ‘legal peace’ ” in settling the claims, justified the preemptive power of the agreement. The Court noted that the President has a degree of “independent authority” to act in the areas of foreign relations and national security, although “Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers * * *.” Quoting from a previous case, Haig v. Agee, 453 U.S. 280, 291, 101 S.Ct. 2766 (1981), the Court noted that, when the President exercises his discretion to act in those areas, “congressional silence is not to be equated with congressional disapproval.” In the absence of action by Congress, the Court said California could not “use an iron fist where the President has consistently chosen kid gloves.”
Presidential Dominance in Foreign Relations

Presidential hegemony over the conduct of foreign policy, constitutionally speaking, probably received its most influential statement in Justice Sutherland’s opinion for the Court in United States v. Curtiss-Wright Export Corp. below. The Court justified President Franklin Roosevelt’s embargo of munitions sales to two South American countries in part by spinning constitutional theory and in part by citing the same practical advantages possessed by the Executive that John Jay cited. The extravagance of Sutherland’s opinion fueled claims by those in the executive branch not only that the President is legitimately entitled to the lion’s share of influence over foreign policy, but more controversially that the President is constitutionally entitled to direct foreign policy all by himself. The Curtiss-Wright opinion has fostered the impression that it justifies executive supremacy, even executive exclusivity, in the conduct of foreign relations. The decision in Curtiss-Wright stands for no such thing. There the President was executing a law passed by Congress. In fact, Curtiss-Wright holds only that Congress has greater latitude to delegate power to the President in foreign affairs than in domestic affairs. Indeed, Justice Sutherland went on to observe elsewhere in the Court’s opinion that, had the joint resolution in that case expired, “[w]e should have had a different case” and that “[i]t was not within the power of the President to repeal the Joint Resolution” passed by Congress.

UNITED STATES v. CURTISS–WRIGHT EXPORT CORP.
Supreme Court of the United States, 1936
299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255

BACKGROUND & FACTS Endeavoring to contain the level of fighting between Paraguay and Bolivia over the disputed land of the Chaco, Congress passed a joint resolution in May 1934, empowering the President to forbid the sale of munitions by American manufacturers to these nations with such limitations and exceptions as he should determine. The President then issued a proclamation, ordering an embargo on the sale of arms and charged the Secretary of State with its enforcement. The embargo was rescinded by executive action approximately a year and a half later.

In January 1936, a federal indictment was returned, charging the Curtiss-Wright Corporation with conspiring to sell 15 machine guns to Bolivia during the embargo period. The United States District Court for the Southern District of New York sustained a demurrer to the indictment (i.e., the court concluded that, had the defendant done what was alleged, no illegal act could result), and the U.S. government appealed.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

* * * It is contended that by the Joint Resolution the going into effect and continued operation of the resolution was conditioned (a) upon the President’s judgment as to its beneficial effect upon the re-establishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President’s will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President’s unfettered discretion; and
(d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. * * * That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, “the Representatives of the United States of America” declared the United (not the several) Colonies to be free and independent states, and as such to have “full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.”

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. * * * That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Britannic Majesty and the “United States of America.” * * *
The Union existed before the Constitution, which was ordained and established among other things to form “a more perfect Union.” Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be “perpetual,” was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted.
The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President’s action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in Mackenzie v. Hare, 239 U.S. 299, 311, 36 S.Ct. 106, 108 [(1915)], “As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.” (Italics supplied.)

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.

***

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. ***

***

The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.

***

*** It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestab-
lishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

Curtiss-Wright is far from being the only case in which the Court has upheld a delegation of discretion to the President in foreign affairs. Delegation of authority to raise and lower tariffs within an identified range, for example, was upheld by the Supreme Court in *Hampton & Co. v. United States* (p. 128) eight years before the Curtiss-Wright decision. The intergovernmental impact of delegating discretion to the President in foreign policy, however, was the focus of a more recent decision by the Court in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288 (2000). In *Crosby*, the Court struck down a Massachusetts law that prohibited any state agency from purchasing goods or services from any company doing business with Burma (renamed Myanmar by the ruling military junta). The purpose of the state act was to exert pressure against a regime that was both undemocratic and abusive to human rights. Later the same year, Congress enacted legislation of its own that imposed sanctions on Burma. That statute banned all aid to the Burmese government, except for humanitarian assistance, counter-narcotics efforts, and the promotion of human rights and democracy. The federal law also empowered the President to prohibit “United States persons” from “new investment” in that country under certain conditions. Moreover, the President was directed to work toward the development of a comprehensive, multilateral strategy for the improvement of human rights and the quality of life in Burma. Additional provisions of the federal law required periodic reports from the President to Congress and authorized him to waive or to temporarily or permanently lift sanctions to advance the security interests of the United States, as he thought necessary.

The Court unanimously concluded that the state law was preempted by the federal statute and thus ran afoul of the Supremacy Clause (Art. VI, cl. 2). Said Justice Souter, speaking for the Court:

> [Congress expressly] invest[ed] * * * the President with statutory authority to act for the United States in imposing sanctions with respect to the government of Burma, augmented by the flexibility to respond to change by suspending sanctions in the interest of national security * * *. Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. * * * [T]he state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate * * * and perpetual, there being no termination

\[Justice McREYNOLDS dissented. Justice STONE did not participate.\]
provision * * *. This unyielding application undermines the President’s intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. * * *

Justice Souter continued: “Congress’s express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government * * * in harmony with the President’s own constitutional powers * * *. This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President’s effective voice to be obscured by state or local action.” In short, the Massachusetts act was “at odds with the President’s intended authority to speak for the United States among the world’s nations in developing a ‘comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.’” Quite simply, “[t]he state [a]ct undermines the President’s capacity * * * for effective diplomacy. * * * [It] compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments * * * [because] the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.”

The Power to Use Military Force

Article I’s commitment to the Congress of the power “To declare War” and Article II’s designation of the President as “Commander in Chief of the Army and Navy” institutionalized a struggle between the legislative and executive branches over who controls the use of military force. Addressing the power of the Executive to make war, in 1793 Madison wrote:

Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received and the fundamental doctrine of the Constitution, that the power to declare war is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite or proper * * *.9

Elsewhere he asserted that “[t]hose who are to conduct a war”—that is, the commander in chief—“cannot in the nature of things be the proper or safe judges whether a war ought to be commenced, continued or concluded.” The clarity of a bygone era, when both time and far simpler technology afforded the luxury of formal declarations of war before the fighting began, helped somewhat to alleviate the interbranch rivalry. But even then, Presidents occasionally dispatched troops without formal authorization, and, for its part, Congress did not shrink from trying to lend a guiding hand in running military operations. In terms of political power, however, the greater swiftness, destructiveness, and centralization of control over military force, indicative of modern warfare, as well as increased occasions for the subtlety of covert operations, have made the President the clear winner in this struggle.

The formalities of actually declaring war were last observed by Congress in December 1941. American interventions in Korea and Vietnam received more casual and, therefore,
more controversial endorsements. The diminution of Congress’s role in controlling the use of military force was not just a function of developing technology or of the Executive’s advantage of a single authoritative decisionmaker; Congress—to use Justice Jackson’s words—had let the “power slip through its fingers.” In the Gulf of Tonkin Resolution, 78 Stat. 384, passed in August 1964, Congress—after reciting a series of provocative occurrences whose existence rested essentially on presidential say-so—declared, rather in the manner of writing a blank check, that “the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.” (Emphasis supplied.) After the secret bombing of Cambodia and the expansion of U.S. military involvement beyond the boundaries of North and South Vietnam, congressional opponents of the widening war tried their hand at several strategies to terminate hostilities—including ultimately the exercise of Congress’s most potent weapon, the power of the purse. In short, Congress terminated the war in Southeast Asia by refusing to appropriate money for it. In that instance, Congress forced the President to end the war on August 15, 1973, by attaching the funding cut-off to a bill authorizing an increase in the national debt limit; if the President had vetoed the legislation, the government would have been forced to start liquidating its assets to pay off the national debt and this would have shut down the government. President Nixon had no choice but to sign the Second Supplemental Appropriations Act of 1973, 87 Stat. 99.

Korea resulted in a stalemate, but when Vietnam turned into a complete debacle, anxiety over the reality of executive assumption of the war power increased substantially. Congress’s conclusion that the Vietnam experience transformed war making from a congressional to an executive prerogative moved it to enact the War Powers Resolution over President Nixon’s veto in the hope of restoring the sort of decision-making control the Constitution intended it to have.

**THE WAR POWERS RESOLUTION**

87 STAT. 555 (1973)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Sec. 1. This joint resolution may be cited as the “War Powers Resolution.”

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in
hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;
(B) the constitutional and legislative authority under which such introduction took place; and
(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

Sec. 5. * * *

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

* * *

[Sections 5(a), 6, and 7 of the Resolution detail the procedural rules according to which the House and Senate may take legislative action and specify how to resolve any disagreement between them.]

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or
into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term “introduction of United States Armed Forces” includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

* * *

Section 10. This joint resolution shall take effect on the date of its enactment.

[Passed over presidential veto November 7, 1973.]

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One of the central problems with the War Powers Resolution is knowing when it is triggered. In light of the disfavor with which the Executive still views it, identifying when the resolution becomes applicable would appear to fall to the judiciary, but as the discussion of justiciability in Chapter 1 disclosed, courts as institutions are not particularly well suited to this task. On two occasions when various representatives sued to enforce the terms of the War Powers Resolution, federal courts held that such a determination presented a political question. In Dellums v. Bush, more than 50 members of Congress sued to invoke the resolution in the Persian Gulf crisis. Although the federal district judge found the plaintiffs had standing and the issue was justiciable, he concluded that the controversy was not ripe for adjudication. He took as his guide to legitimate judicial involvement the test formulated by Justice Powell in Goldwater v. Carter (p. 71).

**Dellums v. Bush**

United States District Court, District of Columbia, 1990

752 F.Supp. 1141

**BACKGROUND & FACTS** On August 2, 1990, Iraq invaded Kuwait, and President Bush immediately sent American military forces to the Persian Gulf area to deter Iraqi aggression and protect Saudi Arabia. The President took other steps from


time to time with congressional concurrence, including imposition of a blockade of Iraq. After he announced a substantial increase in military deployment on November 8, raising troop levels above the 230,000 already in the area, and indicated his objective was to provide "an adequate offensive option," Congressman Ronald Dellums, 52 other representatives, and 1 senator brought suit seeking to enjoin the President from initiating an attack on Iraq without first securing a declaration of war or other explicit congressional authorization.

HAROLD H. GREENE, District Judge.

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POLITICAL QUESTION

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The congressional power to declare war does not stand alone, * * * but * * * is accompanied by powers granted to the President. Article II, Section 1, Clause 1 and Section 2 provide that "[t]he executive powers shall be vested in a President of the United States of America," and that "[t]he President shall be Commander in Chief of the Army and Navy * * *." It is the position of the Department of Justice on behalf of the President that the simultaneous existence of all these provisions renders it impossible to isolate the war-declaring power. The Department further argues that the design of the Constitution is to have the various war- and military-related provisions construed and acting together, and that their harmonization is a political rather than a legal question. In short, the Department relies on the political question doctrine.

That doctrine is premised both upon the separation of powers and the inherent limits of judicial abilities. See generally, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962) * * *. [T]he Department of Justice * * * contend[s] that by their very nature the determination whether certain types of military actions require a declaration of war is not justiciable, but depends instead upon delicate judgments by the political branches. On that view, the question whether an offensive action taken by American armed forces constitutes an act of war (to be initiated by a declaration of war) or an "offensive military attack" (presumably undertaken by the President in his capacity as commander-in-chief) is not one of objective fact but involves an exercise of judgment based upon all the vagaries of foreign affairs and national security. * * * Indeed, the Department contends that there are no judicially discoverable and manageable standards to apply, claiming that only the political branches are able to determine whether or not this country is at war. Such a determination, it is said, is based upon "a political judgment" about the significance of those facts. Under that rationale, a court cannot make an independent determination on this issue because it cannot take adequate account of these political considerations.

This claim on behalf of the Executive is far too sweeping to be accepted by the courts. If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand.

That is not to say that, assuming that the issue is factually close or ambiguous or fraught with intricate technical military and diplomatic baggage, the courts would not defer to the political branches to determine whether or not particular hostilities might qualify as a "war." However, here the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval
is required if Congress desires to become involved.

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[T]he Department goes on to suggest that the issue in this case is still political rather than legal, because in order to resolve the dispute the Court would have to inject itself into foreign affairs, a subject which the Constitution commits to the political branches. That argument, too, must fail.

While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation’s foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs. The court must instead look at “the particular question posed” in the case. Baker v. Carr, 369 U.S. at 211, 82 S.Ct. at 707. In fact, courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy. *** Dames & Moore v. Regan, 453 U.S. 654, 101 S.Ct. 2972 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216 (1936).

The Department’s argument also ignores the fact that courts have historically made determinations about whether this country was at war for many other purposes—the construction of treaties, statutes, and even insurance contracts. These judicial determinations of a de facto state of war have occurred even in the absence of a congressional declaration.

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Given these factual allegations and the legal principles outlined above, the Court has no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a “war” within the meaning of Article I, Section 8, Clause 11, of the Constitution. To put it another way: the Court is not prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority “to declare war.”

The Department of Justice argues next that the plaintiffs lack “standing” to pursue this action.

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The right asserted by the plaintiffs in this case is the right to vote for or against a declaration of war. In view of that subject matter, the right must of necessity be asserted before the President acts; once the President has acted, the asserted right of the members of Congress—to render war action by the President contingent upon a prior congressional declaration of war—is of course lost.

The Department also argues that the threat of injury in this case is not immediate because there is only a “possibility” that the President will initiate war against Iraq, and additionally, that there is no way of knowing before the occurrence of such a possibility whether he would seek a declaration of war from Congress.

***

With close to 400,000 United States troops stationed in Saudi Arabia, with all troop rotation and leave provisions suspended, and with the President having acted vigorously on his own as well as through the Secretary of State to obtain from the United Nations Security Council a resolution authorizing the use of all available means to remove Iraqi forces from Kuwait, including the use of force, it is disingenuous for the Department to characterize plaintiffs’ allegations as to the imminence of the threat of offensive military action for standing purposes as “remote and conjectural” ***.

** REMEDIAL DISCRETION **

The plaintiffs in this case do not have a remedy available from their fellow legislators. While action remains open to them which would make the issues involved more concrete, and hence make the matter ripe for review by the Court, these actions would not remedy the threatened harm plaintiffs
assert. A joint resolution counselling the President to refrain from attacking Iraq without a congressional declaration of war would not be likely to stop the President from initiating such military action if he is persuaded that the Constitution affirmatively gives him the power to act otherwise.

Plaintiffs in the instant case, therefore, cannot gain “substantial relief” by persuasion of their colleagues alone. The “remedies” of cutting off funding to the military or impeaching the President are not available to these plaintiffs either politically or practically. Additionally, these “remedies” would not afford the relief sought by the plaintiffs—which is the guarantee that they will have the opportunity to debate and vote on the wisdom of initiating a military attack against Iraq before the United States military becomes embroiled in belligerency with that nation.

RIPENESS

* * *

It has long been held that, as a matter of the deference that is due to the other branches of government, the Judiciary will undertake to render decisions that compel action by the President or the Congress only if the dispute before the Court is truly ripe, in that all the factors necessary for a decision are present then and there. * * *

In the context of this case, there are two aspects to ripeness, which the Court will now explore.

A. Actions By the Congress

* * * It would be both premature and presumptuous for the Court to render a decision on the issue of whether a declaration of war is required at this time or in the near future when the Congress itself has provided no indication whether it deems such a declaration either necessary, on the one hand, or imprudent, on the other.

For these reasons, this Court has elected to follow the course described by Justice Powell in his concurrence in Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979). * * *

Justice Powell proposed that “a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.” * * * He further explained that in Goldwater there had been no such confrontation because there had as yet been no vote in the Senate as to what to do in the face of the President’s action to terminate the treaty with Taiwan, and he went on to say that the Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict. * * * It cannot be said that either the Senate or the House has rejected the President’s claim. If the Congress chooses not to confront the President, it is not our task to do so.

* * *

Justice Powell’s reasoning commends itself to this Court. The consequences of judicial action in the instant case with the facts in their present posture may be drastic, but unnecessarily so. What if the Court issued the injunction requested by the plaintiffs, but it subsequently turned out that a majority of the members of the Legislative Branch were of the view (a) that the President is free as a legal or constitutional matter to proceed with his plans toward Iraq without a congressional declaration of war, or (b) more broadly, that the majority of the members of this Branch, for whatever reason, are content to leave this diplomatically and politically delicate decision to the President?

It would hardly do to have the Court, in effect, force a choice upon the Congress by a blunt injunctive decision, called for by only about ten percent of its membership * * *.

Similarly, the President is entitled to be protected from an injunctive order respecting a declaration of war when there is no evidence that this is what the Legislative Branch as such—as distinguished from a fraction
thereof—regards as a necessary prerequisite to military moves in the Arabian desert.

*** In short, unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.

B. Actions Taken By the Executive

The second half of the ripeness issue involves the question whether the Executive Branch of government is so clearly committed to immediate military operations that may be equated with a “war” within the meaning of Article I, Section 8, Clause 11, of the Constitution that a judicial decision may properly be rendered regarding the application of that constitutional provision to the current situation.

Plaintiffs assert that the matter is currently ripe for judicial action because the President himself has stated that the present troop build-up is to provide an adequate offensive military option in the area. His successful effort to secure passage of United Nations Resolution 678, which authorizes the use of “all available means” to oust Iraqi forces remaining in Kuwait after January 15, 1991, is said to be an additional fact pointing toward the Executive’s intention to initiate military hostilities against Iraq in the near future.

The Department of Justice, on the other hand, points to statements of the President that the troops already in Saudi Arabia are a peacekeeping force to prove that the President might not initiate more offensive military actions. In addition, and more realistically, it is possible that the meetings set for later this month and next between *** [American and Iraqi officials] may result in a diplomatic solution to the present situation, and in any event under the U.N. Security Council resolution there will not be resort to force before January 15, 1991.

Given the facts currently available to this Court, it would seem that as of now the Executive Branch has not shown a commitment to a definitive course of action sufficient to support ripeness. In any event, however, a final decision on that issue is not necessary at this time.

***

ORDERED that plaintiffs’ motion for preliminary injunction be and it is hereby denied.

Although President Bush was reluctant to seek authorization from Congress because, like his predecessors, he thought the War Powers Resolution infringed upon the Executive’s constitutional powers, he eventually did so for its value as political support. When the new Congress convened January 3, 1991, however, no White House request of that sort was yet pending. Indeed, Senate Majority Leader George Mitchell planned to go ahead with the customary two-week Senate recess until the President was ready to deliver his State of the Union address, despite the fact that January 15 loomed as the date identified in U.N. Security Council Resolution 678 as the point after which member states would be entitled to take action against Iraq if Iraqi forces had not pulled out of Kuwait. Fearing that President Bush on his own would unleash the American military forces standing by in Saudi Arabia and faced with no opportunity at all to vote on our involvement, Senator Tom Harkin (D–Iowa) took the floor to object to the planned recess and to demand a debate and vote on authorizing a potential Persian Gulf War. What bothered Senator Harkin and others was that, if the President were to launch air strikes in the absence of congressional authorization, a “different dynamic takes place.” Because “after the bullets start flying,” the issue instead becomes, “Are you going to support our young men and women who are in combat? Are you going to rally around the flag and support this country in its hour of need?” Senator Brock Adams (D–Wash.) added, “We should vote on whether or not this Nation goes to war, whether or not there shall be casualties, whether or not the Treasury shall be emptied again for purposes of war.” Senator Ernest Hollings (D–S.C.) got right to
the point, “[T]he President does not want our advice, and he knows he cannot get it categorically, so he does not ask for it. * * * The administration ought to be operating with the full support of the national Congress. I cannot imagine a President wanting to go to war without the support of the National Congress. As President he ought to be getting everyone to understand, appreciate, and support his policy. The President ought to seek that concurrence not just because the Constitution requires it.”

On January 12, 1991, the Senate voted 52–47 to adopt Senate Joint Resolution 2, authorizing the President to use military force to carry out the U.N. resolution. Later that day, the House of Representatives by a vote of 250–183 adopted House Joint Resolution 77 (identical to the Senate resolution), approving military action. Both bodies had previously rejected by the same margins joint resolutions that just endorsed continuing the economic sanctions. The Senate and House actions followed receipt of a historic letter from President Bush on January 8 that requested congressional authorization. It was the first such request from a President since the 1964 Gulf of Tonkin Resolution. As adopted, the joint resolution, 105 Stat. 3, authorized the use of armed force, but first required that the President certify to Congress that all appropriate diplomatic efforts had failed. After so notifying Congress on January 16, the President later that day ordered the attack on Iraqi forces.

President Bush’s request for congressional authorization prior to unleashing Operation Desert Storm, however, did not exactly set a precedent. Three and a half years later, President Clinton declined to obtain congressional approval before ordering American troops to Haiti. The deployment of forces was executed peacefully and that substantially defused opposition to his action by two-thirds of the American public and a clear majority in Congress, including members of his own party. When asked the hypothetical question on national television whether the President should honor a nonbinding resolution opposing military intervention should Congress pass one, then-Secretary of State Warren Christopher replied, “[M]y recommendation would be that * * * if he feels there are important U.S. interests to protect, that he should go ahead and indicate those interests by acting. In short, I think the importance of presidential prerogative here is very significant for the United States and very significant for the Executive Branch over the long run.” In response to being asked whether it was “[m]ore important than having the support of * * * Congress * * * for such a military intervention,” the Secretary of State continued, “I think it’s more important to establish and maintain the principle of presidential authority and power.”

This view has predominated in every presidential administration since the enactment of the War Powers Resolution. When Iraq refused to allow U.N. inspectors unimpeded access to documents and sites relating to the development of weapons of mass destruction nearly seven years after Operation Desert Storm, President Clinton did not secure congressional authorization before beginning the second bombing of Iraq, codenamed Operation Desert Fox, on December 17, 1998. Three months later, however, the House insisted on approving (by a vote of 219–191) President Clinton’s order to deploy 4,000 American troops as part of a 28,000-member NATO peacekeeping force in the embattled Serbian province of Kosovo. As the Serbs intensified their massive campaign of ethnic cleansing against the Kosovar Albanians, the President ordered air attacks on Serb ground forces and on Belgrade itself. On March 23, 1999, a divided Senate voted 58–41 to support the aerial bombardment.

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without congressional approval and tied 213–213 on a resolution supporting further air strikes. However, the House declined 139–290 to call for an immediate withdrawal of U.S. forces from the region and rejected 2–427 a formal declaration of war against Yugoslavia.\textsuperscript{16} The White House announced soon afterward that the air campaign would continue.

Getting Congress to support military action certainly wasn’t a problem two years later, after terrorists hijacked airplanes and crashed them into the World Trade Center and the Pentagon. The lengthy debate and close vote that characterized Congress’s authorization to participate in the Gulf War were strikingly absent. Indeed, it would be difficult to imagine a speedier and more enthusiastic response, a phenomenon repeatedly analogized to the attack on Pearl Harbor and Congress’s rapid adoption of the declarations of war that marked official American entry into World War II. A week after the terrorist attack, Congress enacted legislation, pursuant to the War Powers Resolution, authorizing President George W. Bush “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”\textsuperscript{16} The vote in favor of adopting the single-page resolution was 420–1 in the House and 98–0 in the Senate.

With remarkably little debate, Congress proceeded to pass the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, otherwise known as the USA PATRIOT Act, 115 Stat. 272, which was signed into law on October 21, 2001. The law aimed at dramatically increasing the authority of law enforcement agencies to fight terrorism at home and abroad. Among other things, the PATRIOT Act expanded the power of government to search telephone and e-mail communications and medical, financial, and other business records. The statute also eased limitations on foreign intelligence-gathering within the United States and expanded the Treasury Department’s powers to regulate financial transactions involving the international movement of money. The law also stiffened U.S. border protection and the monitoring of resident aliens, provided more adequately for victims of terrorism, and hiked certain criminal penalties for engaging in terrorist-related activities. The 30,000-word statute passed Congress by a vote of 357–66 in the House and 98–1 in the Senate. Perhaps the most controversial provisions of the statute, constitutionally speaking, were those expanding electronic surveillance and the inspection of business records (see Chapter 9 section D for more extended discussion).\textsuperscript{17} In March 2006, Congress extended two provisions of the PATRIOT Act for another four years—that giving the FBI power to secure “roving wiretaps” (surveillance that follows the suspect and is not fixed at one location) and another empowering the agency to seize business records with the approval of a Federal Intelligence Surveillance Court judge; the other provisions of the PATRIOT Act were made permanent.

A little more than a year after authorizing military action in Afghanistan to root out Al Qaeda forces, President George W. Bush sought congressional authorization—without conceding that it was constitutionally required—to conduct military operations in Iraq for the purpose of preventing the alleged further development and use of “weapons of mass destruction” by Saddam Hussein. The Authorization for Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1498, strikingly reminiscent of the 1964 Gulf of Tonkin Resolution in its breadth, authorized “[t]he President *** to use the Armed Forces of the


\textsuperscript{17} For example, the PATRIOT Act vastly expanded FBI use of “national security letters” to obtain digital data and hardcopy business records. These administrative subpoenas were issued with little or no judicial approval and oversight. Official reports subsequently revealed serious abuse of these investigative tools. See footnote 34.
United States as he determines to be necessary and appropriate in order to * * * defend the security of the United States against the continuing threat posed by Iraq; and * * * enforce all relevant United Nations Security Council resolutions regarding Iraq.” (Emphasis supplied.) The House of Representatives passed the joint resolution on October 10, 2002, by a vote of 296–133 and the Senate concurred the next day by a vote of 77–23 (Congressional Quarterly Weekly Report, Oct. 12, 2002, pp. 2671–2679). Section 3(c) explicitly declared that it was “intended to constitute specific statutory authorization” for the use of military force “within the meaning of * * * the War Powers Resolution” and noted that the President was still bound by the reporting requirements spelled out in it if such force was used.

D. GEORGE W. BUSH AND THE CONCEPT OF THE UNILATERAL PRESIDENCY

In his incisive study, Total War and the Constitution, published sixty years ago, Edward S. Corwin, the godfather of modern constitutional scholarship, argued that the acquisition and centralization of power by the executive branch was the most significant constitutional by-product of waging war. Surveying our cumulative experience with executive power since the Civil War, he argued in the wake of World War II that all of the precedents for a dictatorship had been established except one—suspending elections.18 At peril in an unfriendly world, the country had crossed a threshold. There was, Corwin warned, simply “no peacetime Constitution to which we may expect to return.”19 Many actions taken by President George W. Bush have reinforced Corwin’s conclusion.

As Presidents who waged wars of progressively greater scope than their predecessors, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt called forth extraordinary powers; but the imperative of unilateral executive action seemed to end, or at least to subside, with the cessation of hostilities. The wars they waged were conducted against easily-identified enemies on geographically-confined battlefields according to conventional terms of engagement, and they ended when traditional and well-understood goals—such as the capture of the enemy capital and unconditional surrender—had been achieved. The so-called “global war on terror,” pursued in the aftermath of the September 11 attacks on the World Trade Center and the Pentagon, possessed none of those characteristics. Such a radical alteration in the characteristics of war intensified the already-existing constitutional stress resulting from the fact that Congress and the President share the powers of war.20

Since constitutional relations between the coordinate branches of government are so clearly marked by checks and balances, it is certainly unusual for a President to assert that

18. This was suggested several months before the 2004 election by DeForest Soaries, the chairman of the Election Assistance Commission, which was created in 2002 to provide funds to states to replace the punch-card voting systems and provide other assistance in conducting federal elections. Soaries wanted the Department of Homeland Security to ask Congress to enact emergency legislation empowering the commission to postpone the election in the event of a terrorist attack. See “Election Day Worries,” Newsweek, July 19, 2004, p. 8; “If Terror Strikes the Polls,” Newsweek, Oct. 18, 2004, p. 36. Such a proposal was understandably controversial: Would a well-publicized threat of attack also be sufficient to justify calling off the vote? Since the determination that it was too dangerous to proceed with the election would be made by a commission appointed entirely by President Bush, who was then locked in a close race for re-election, could the public be sure the decision to suspend the election was legitimate and not politically motivated? The idea of suspending elections was last proposed, and rejected, in 1944 while World War II was still being fought.


20. Congress has the power “to declare war,” “to make rules concerning captures on land and water,” “to raise and support armies,” “to provide and maintain a navy,” and “to make rules for the government and regulation of the land and naval forces,” among other things (Art. I, § 8, cl. 10–16); but the President “shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States” (Art. II, § 2, ¶ 3).
he alone is “The Decider” of public policy. Precisely because this is a government of separate institutions sharing powers (one that necessarily requires cooperation among its branches) presidential power has conventionally been described as “the power to persuade,” rather than “the power to command.”

George W. Bush’s announcements that he is “The Decision-Maker” reveal an idea of the Presidency clearly at odds with the traditional conception. The result, critics argued, was the creation of a permanent “Emergency State,” where the Executive, enjoying the singular advantages of “secrecy” and “dispatch” long ago identified by Jay (p. 228), could act unilaterally.

The essence of the Bush conception was a “New Paradigm” of executive power, a “strategy that rests on a reading of the Constitution *** that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries, if national security demands it. Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside.***

The view that the President had inherent power to protect the nation was premised on the belief “that a ‘strong national security and defense’ was the first priority, and that without a strong defense, there’s not much expectation or hope of having other freedoms.”

Recall that the Youngstown decision (p. 198) limited the President’s power as Commander-in-Chief to a “theater of war”; thus President Truman could not be said to act in that role when he directed his Secretary of Commerce to seize the steel mills. However, the “global war on terror” was asserted to be so fundamentally unlike past wars that the prevention of future attacks and the protection of the country required a radical redefinition of military context. The Executive was no longer constrained by a scheme of partitioned constitutional powers because war was no longer limited by geographical boundaries. Unlike Truman’s ill-fated steel seizure, unilateral domestic actions taken by the Commander-in-Chief fighting a “war on terror” were no longer off-limits. It recalled the words former President Nixon used in his 1977 interview with David Frost (p. 208): “[W]hen the president does it[,] [when he “approves something because of the national security”] that means that it is not illegal.”

Thus, in the new scheme of things, an inherent power was not simply a power that was asserted to be innate, it was asserted to be unlimited as well. Moreover, unlike Lincoln’s, or Wilson’s, or Roosevelt’s extra-constitutional actions, which ended when the emergency ended, the “war on terror” has no easily-identified, traditional end-point, so the President’s unlimited power continues indefinitely. Each of the following unilateral actions taken by President George W. Bush


22. Jane Mayer, “The Hidden Power: The Legal Mind Behind the White House’s War on Terror,” The New Yorker, July 3, 2006, p. 45. The article argues that the engine behind Bush’s unilateralism was Vice President Cheney. In a remarkable episode that fueled the impression that certain officials thought themselves to be beyond the reach of law, Cheney refused to comply with an executive order directing the National Archives to seek data on how agencies or other entities in the executive branch handled classified data. Cheney’s office argued that, because the Vice President has a role in the legislative branch (presiding over the Senate), his office was not an “agency” or “other entity” covered by the requirement that his office report the number of times it classified material and the number of pages it declassified to the Archives’ Information Security Oversight Office. Some critics, such as Rep. Henry Waxman (chairman of the House Committee on Oversight and Government Reform), chided the Vice President’s unilateral decision to exempt his office from executive-branch regulations as amounting to the claim that somehow Cheney was “his own branch of government.” See “White House Backs Cheney’s Secrecy Stance,” http://www.cbsnews.com/stories/2007/06/23/politics/printable2970772.shtml. See also Maureen Dowd, “A Vice President Without Borders, Bordering on Lunacy,” New York Times, June 24, 2007; and Andrew Cohen, “Is Vice President Cheney’s Office Above the Law?” http://www.cbsnews.com/stories/2007/06/22/opinion/courtwatch/printable2965962.shtml.

23. Ibid., p. 47.

24. Nixon’s use of the double negative would appear to betray some uneasiness about making the claim.
illustrates in some way this “New Paradigm” of executive power. In each instance, it was argued that another branch of government was without competence to act, or without jurisdiction to act, or had already—if ambiguously—ceded its power to act.

One of the best illustrations of unilateral executive action based on the “New Paradigm” was the indefinite detention of the “enemy combatants” captured primarily in Afghanistan and Iraq and held at the Guantanamo Naval Base with the aim of charging and then trying them before U.S. military commissions established by the President. Although the Bush Administration asserted that the executive order authorizing this and the Defense Department regulations implementing it were sufficiently grounded in the President’s Article II power as Commander-in-Chief, the Supreme Court avoided ruling on that claim and held, instead, that the detention of those suspected of being “enemy combatants” was justified under the broad terms of Congress’s Authorization for the Use of Military Force (AUMF) (p. 248). The detainees were to be dealt with in two stages: Combatant Status Review Tribunals (CSRTs) would first decide who was an “enemy combatant” and, therefore, who would continue to be held; “enemy combatants” would then be tried by the military commissions on charges brought against them. In Hamdi v. Rumsfeld, 542 U.S.


26. But in Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), a divided federal appeals court held that the President may not declare civilians in this country “enemy combatants” and have the military hold them indefinitely. Al-Marri was the only known individual remaining within the United States to be detained as a suspected “enemy combatant,” although no CSRT had taken action to label him as such. He was not alleged to have been with the armed forces of any nation or to have taken up arms against the United States on any battlefield; however, he was alleged to have been associated with a terrorist organization. Although the appeals court in Al-Marri held that the government could not use military detention to circumvent the civilian criminal justice system, its ruling was limited to individuals lawfully residing in the United States who had been seized and detained here. Of the two other persons held as enemy combatants on the American mainland since the 9/11 attacks, Yasir Hamdi was freed and sent to Saudi Arabia after the Supreme Court ruling in 2004 allowed him to challenge his detention, and Jose Padilla was transferred to the criminal justice system in 2006 to stand trial on terrorism charges before a federal court in Miami.

27. The executive order was signed on November 13, 2001 and is published at 66 Fed. Reg. 57833. Section 2(a) of the President’s order provides for the detention of anyone he determines is or was a member of the Al Qaeda organization and who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts * * * prepar[ing] * * * [or] threat[ening] to cause * * * injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy,” or anyone who “knowingly harbor[s] such an individual,” and where “it is in the interest of the United States that such individual be subject to this order.”

28. Although the original directive provided that a detainee need be classified only as an “enemy combatant” (or else released), Congress subsequently passed the Military Commissions Act (p. 259), § 948(d) of which required that a detainee first had to be found to be an “alien unlawful enemy combatant” before being charged and tried by a military commission. Presiding officers of two military commissions subsequently ruled that the detainee-defendants had not been determined to be unlawful enemy combatants and that, therefore, the commissions were without jurisdiction to try them. New York Times, June 5, 2007, pp. Al, A21. It was not immediately apparent whether this meant that the status of each of the remaining detainees would have to be reexamined by the CSRTs to certify that the more demanding standard in fact had been met, but it did not mean that the detainees would be released anytime soon because of the lapse in complying with the MCA. The presiding officers’ rulings fueled the arguments of Guantanamo critics that the facility should be shut down and Congress should restore access to habeas corpus. New York Times, June 5, 2007, pp. Al, A21; June 6, 2007, p. A16.
507, 124 S.Ct. 2633 (2004), the Supreme Court held that “due process demands some system for a * * * detainee to refute his classification” as an “enemy combatant,” and that “any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.” By December 2006, “377 Guantanamo detainees, nearly half of the 773 who had been held there, had been released or transferred to other governments”29 (which, in turn, released many of them).

The question that arose with respect to trying the “enemy combatants” who remained was what kind of a hearing a military commission was constitutionally obliged to give them. Would the government be required to try them by court-martial or would something less do? Two years later, in Hamdan v. Rumsfeld, 548 U.S. —, 126 S.Ct. 2749 (2006), Justice Stevens, speaking for the Court, summarized the procedures set down by the Administration for the “trial” of enemy combatants by the military commissions:

Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. **The presiding officer’s job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions.** **The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U. S. citizen with security clearance at the level SECRET or higher.**

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. **These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to “close.” Grounds for such closure “include the protection of information classified or classifiable . . .; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.”**

Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer’s discretion, be forbidden to reveal to his or her client what took place therein. **Another striking feature of the rules is that they permit the admission of any evidence that, in the opinion of the presiding officer, “would have probative value to a reasonable person.” Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses’ written statements need be sworn. Moreover, the accused and his civilian counsel may be denied access to evidence in the form of “protected information” (which includes classified information as well as “information protected by law or rule from unauthorized disclosure” and “information concerning other national security interests,” so long as the presiding officer concludes that the evidence is “probative” and that its admission without the accused’s knowledge would not “result in the denial of a full and fair trial.” Finally, a presiding officer’s determination that evidence “would not have probative value to a reasonable person” may be overridden by a majority of the other commission members.**

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused’s guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). **Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge.** The review panel is directed to “disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before

the Commission.” * * * Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. * * * The President then, unless he has delegated the task to the Secretary, makes the “final decision.” * * * He may change the commission’s findings or sentence only in a manner favorable to the accused. * * *

Justice Stevens continued, “The [Uniform Code of Military Justice (UCMJ)] conditions the President’s use of military commissions on compliance with not only the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the ‘rules and precepts of the law of nations’ * * *. The procedures that the Government has decreed * * * violate these laws.” While Congress could authorize a departure from this, it had not done so up to that point, and the AUMF could not be read to constitute Congress’s authorization for the President to set up military commissions that functioned according to rules that differed substantially from those governing courts-martial.30 Moreover, at least one of the charges on which the Bush Administration proposed to try some of the detainees—conspiracy—was unknown in international law or in foreign countries that did not share the Anglo-American legal tradition, and such a crime was not, therefore, a violation of the laws of war.

Detainees had attacked the legality of their indefinite confinement and their prospective trial by military commissions by seeking writs of habeas corpus from the federal courts. As is recounted in the federal appeals court’s decision in Bounedien v. Bush (p. 254), the Supreme Court initially held that, notwithstanding the fact that the detainees were being held outside the United States, federal courts still had jurisdiction to consider their petitions for habeas corpus. As the appeals court explains, there ensued a legal tug-of-war between Congress and the Court in which Congress passed legislation more than once—the Detainee Treatment Act and the Military Commissions Act—to cut off jurisdiction to file such petitions, allowing the detainees the opportunity to raise any legal objections only on direct appeal—after they had been tried and found guilty. Congress specified that all such appeals were to be funneled through the U.S. District Court for the District of Columbia (then to the U.S. Court of Appeals for the District of Columbia Circuit, and then, upon a grant of certiorari, to the Supreme Court). Without jurisdiction to rule on Hamdan’s habeas corpus petition, the legal effect of the Supreme Court’s procedural and substantive rulings in Hamdan v. Rumsfeld would have the status of mere obiter dicta. The importance of enacting the Military Commissions Act (MCA) (p. 259), abolishing the detainees’ access to habeas corpus, cannot be understated. Petitioning for a writ of habeas corpus is not a sleight-of-hand resorted to by some charlatan lawyer as a trick to free his client on a technicality; it is the ultimate mechanism for guaranteeing constitutional rights. The hearing on a petition to grant the writ before an independent judge forces the government to make the case that the individual is being lawfully held. If the government cannot show it has a lawful reason for detaining an individual, it is habeas corpus that frees him.

Congress overturned the Hamdan decision by enacting the MCA which, with some adjustments, adopted the same military-commissions scheme designed by the Bush Administration. Congress did not share the Court’s view that the detainees had to be tried by a military commission resembling a court-martial as defined by the UCMJ. This sketch of events explains why the federal appeals court’s decision in Bounedien focused exclusively on whether Congress was legally entitled to suspend the habeas corpus right of the detainees until the military commissions had rendered judgment in individual cases and why the

30. Unlike courts-martial, the proceedings of the military commissions could be closed at any time to the detainee-defendant and his counsel to consider especially sensitive materials. Moreover, unlike defendants at a court-martial, detainees could be convicted on the basis of incriminating statements coerced from them.
appeals court said nothing about the procedures to be used by the commissions in reaching their judgments. By subsequently denying the detainees’ petition for a writ of certiorari in *Boumediene* (p. 259), a majority of the Justices appeared to get Congress’s message.

**BOUMEDIENE v. BUSH**

*United States Court of Appeals, District of Columbia, 2007*

476 F.3d 981

**BACKGROUND & FACTS** As succinctly summed up by the federal appeals court, “[i]n these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations.”

Before: SENTELLE, RANDOLPH and ROGERS, Circuit Judges.

RANDOLPH, Circuit Judge.

Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. ***

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In *Al Odah v. United States*, 321 F.3d 1134 (D.C.Cir. 2003), *** we affirmed the district court’s dismissal of various claims—habeas and non-habeas—raised by Guantanamo detainees. With respect to the habeas claims, we held that “no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees.” * * * [At that time, the] habeas statute * * * stated that “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” 28 U.S.C. § 2241 (a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, * * * we determined it was not within the “respective jurisdictions” of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien—enemy or not—held at Guantanamo. ***

The Supreme Court reversed in *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court’s jurisdiction, the Court determined that the district court’s jurisdiction over the detainees’ custodians was sufficient to provide subject-matter jurisdiction under § 2241. * * * The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the *Detainee Treatment Act* of 2005, 119 Stat. 2680 (DTA), which the President signed into law * * *. The DTA added a subsection (e) to the habeas statute. This new provision stated that, “[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge” may exercise jurisdiction over

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.
The “except as provided” referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit.

The following June, the Supreme Court decided Hamdan v. Rumsfeld, 548 U.S. —, 126 S.Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA’s enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 “shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act.” DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress “chose not to so provide . . . after having been presented with the option,” the Court concluded “[t]he omission [wa]s an integral part of the statutory scheme.” * * *

In response to Hamdan, Congress passed the Military Commissions Act of 2006, 120 Stat. 2600 (MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled “Habeas Corpus Matters.” In subsection (a), Congress again amended § 2241(e). The new amendment reads:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

** Subsection (b) states:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001. ** (Emphasis added.)

The first question is whether the MCA applies to the detainees’ habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.

**

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule Hamdan. Everyone, that is, except the detainees. ** To accept [the detainees’ arguments] would be to defy the will of Congress. Section 7(b) could not be clearer. It states that “the amendment made by subsection (a)—which repeals habeas jurisdiction—applies to “all cases, without exception” relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting “When we say ‘all,’ we mean all—without exception!”

**

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees’ habeas petitions, violates the Suspension Clause of the Constitution, U.S. Const., art. I, § 9, cl. 2, which states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
The Supreme Court has stated the Suspension Clause protects the writ “as it existed in 1789,” when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. INS v. St. Cyr, 533 U.S. 289, 301, 121 S.Ct. 2271 (2001) ** *. The detainees rely mainly on three cases to claim that in 1789 the privilege of the writ extended to aliens outside the sovereign’s territory. ** *

None of these cases involved an alien outside the territory of the sovereign. ** *

When agents of the Crown detained prisoners outside the Crown’s dominions, it was understood that they were outside the jurisdiction of the writ. ** * The short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.

Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936 (1950), ends any doubt about the scope of common law habeas. “We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.” ** *

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. ** * [Again,] the controlling case is Johnson v. Eisentrager. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany’s surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition “that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses[.]” ** ** The Court continued: “If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.” ** ** (Shortly before Germany’s surrender, the Nazis began training covert forces called “werewolves” to conduct terrorist activities during the Allied occupation. ** *)

Later Supreme Court decisions have followed Eisentrager. ** *

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in Eisentrager were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903. ** * The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay. ** *

The detainees cite the Insular Cases in which “fundamental personal rights” extended to U.S. territories. See Balzac v. Porto Rico, 258 U.S. 298, 312–313, 42 S.Ct. 343 (1922); Dorr v. United States, 195 U.S. 138, 148, 24 S.Ct. 808 (1904) ** *. But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate “Territory or other Property belonging to the United States,” U.S. Const, art. IV, § 3, cl. 2. These cases do not establish anything regarding the sort of de facto sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction
they asserted in Puerto Rico, the Philippines, and Guam.

* * *

* * * Our only recourse is to vacate the district courts’ decisions and dismiss the cases for lack of jurisdiction.

So ordered.

ROGERS, Circuit Judge, dissenting.

* * *

** Prior to the enactment of the MCA, the Supreme Court [in Rasul] acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. * * * The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The court today concludes that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights. * * * [But] individual rights are merely a subset of those matters that constrain the legislature. * * *

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights. * * * [But] individual rights are merely a subset of those matters that constrain the legislature. * * *

That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney’s original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress’s power in one location. * * * [T]he court must treat the Suspension Clause’s placement in Article I, section 9, as a conscious determination of a limit on Congress’s powers. * * *

* * * The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. * * *

* * *

The question, then, is whether by attempting to eliminate all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. * * * [A]t least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution. This proscription applies equally to
removing the writ itself and to removing all jurisdiction to issue the writ. * * *

***

*** In Eisentrager, the detainees claimed that they were “entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus.” *** The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress’s power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees’ ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court’s reliance on Eisentrager is misplaced.

*** If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention “were subject to any substantial procedural hurdles which mal[k]e his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause].” Sanders v. United States, 373 U.S. 1, 14, 83 S.Ct. 1068, 1076 (1963).

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*** As the Supreme Court has stated, “a[t] its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” St. Cyr, 533 U.S., at 301, 121 S.Ct., at 2280. *** [T]he government is mistaken in contending that the combatant status review tribunals (“CSRTs”) established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

***

“Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts.” Harris v. Nelson, 394 U.S. 286, 298, 89 S.Ct. 1082, 1090 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial, the detainee then must be afforded an opportunity to *** explain why the grounds for detention are inadequate in fact or in law. *** A CSRT works quite differently. *** The detainee bears the burden of coming forward with evidence explaining why he should not be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.31 Moreover, these proceedings occur before a board of military judges subject to command influence ***. Insofar as each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

This court’s review of CSRT determinations *** is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government’s case—even assuming the detainee could learn of its contents—assessing whether the government has more

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31. [T]he Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to obtain evidence to support their claims that they are not enemies of the United States. [Footnote by Judge Rogers.]
evidence in its favor than the detainee is hardly the proper antidote. * * *

More significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. * * *

This basic point has long been recognized by the common law, which “has regarded torture and its fruits with abhorrence for over 500 years.” * * *

Because the MCA * * * exceeds the powers of Congress[, ] * * * [it] therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

* * *

Six weeks after the appeals court’s decision in Boumediene, the Supreme Court denied certiorari. There were three—but not the necessary four—votes to grant cert. (Souter, Ginsburg, and Breyer). Justices Stevens and Kennedy issued a brief statement in which they explained their votes to deny cert. out of respect for the “practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus.” They also indicated that “the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies” and if “the Government * * * unreasonably delayed proceedings” or took “additional steps to prejudice the position of petitioners in seeking review in this Court,” they would “act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.”

On June 29, 2007, the day on which the Justices recessed for summer vacation, the Court did something that had not been seen in decades—it announced that it had voted to grant Boumediene’s petition for rehearing, vacated the existing denial of cert., and now granted cert. in that case and in a companion case, Al Odah v. United States. See 551 U.S. —, 127 S.Ct. 3067, 3078 (2007). (It takes a majority to overturn a decision of the Court.) The Court’s announcement appeared without comment.]

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**Note—The Military Commissions Act**

In October 2006, Congress passed the Military Commissions Act (MCA), 120 Stat. 2600 (most of which is codified as 10 U.S.C.A. §§ 948–950). The law authorizes the creation of military commissions to try “alien unlawful enemy combatants,” sets out the structure and procedures of such tribunals, provides defendants appearing before them with certain protections of the adversary system (with significant limitations), identifies the specific crimes that may be prosecuted, denies defendants the availability of the Geneva Conventions, removes the habeas corpus jurisdiction of federal courts over enemy aliens, and gives the President substantial discretion to fill in the details and operate the system.

An individual seized and initially detained by the government at Guantanamo Bay or elsewhere as a suspected terrorist is either eventually classified as an unlawful enemy combatant by a Combatant Status Review Tribunal and remains in custody or he is released. If determined to be an “unlawful enemy combatant” (that is, “a person who has engaged in hostilities or who has purposely and materially supported hostilities against the United States or its co-belligerents”), he faces prosecution. The MCA identifies the specific crimes for which the accused may be made to stand trial. As provided in the statute, the commission trying him must have at least five members: a nonvoting convening officer, who is a military judge, and four voting members who are drawn from a pool of regular military officers. The convening officer of each tribunal presides and makes all rulings of law (including the admissibility of evidence); the voting officers of each tribunal determine the guilt and punishment of the defendant. The convening officer has the authority to set aside any verdict or reduce the punishment adopted by the voting members, but he may not increase it. He also has the power to grant a rehearing.
Although the statute makes available to the defendants many of the protections that are available to lawful military combatants appearing in a court-martial, the statute makes clear that the Uniform Code of Military Justice (codified as 10 U.S.C.A. §§ 801–946) does not apply to alien unlawful enemy combatants unless the Military Commissions Act says so. (Lawful enemy combatants are to be tried by courts-martial and have all rights granted by the UCMJ.) The result is an adversary system, but one where the rights of the defendant are much more circumscribed than in a court-martial or a criminal trial. For example, the speedy-trial guarantee applicable to a court-martial (and guaranteed by the Sixth Amendment to civilians in a regular criminal trial) does not apply to trial before a military commission.

An alien unlawful enemy combatant appearing before a military commission is entitled to notice of the charges against him (“as soon as practicable”), the right to counsel (whether military or civilian), the right to present evidence, the right to call and cross-examine witnesses, and the presumption of innocence. Guilt must be proved beyond a reasonable doubt and such a determination requires a two-thirds vote in the case of a noncapital offense and a unanimous vote in a capital case. The same vote requirements apply to affixing punishment.

However, hearings before a military commission are different from a regular criminal trial in several important respects. Incriminating statements coerced from the defendant during his detention are admissible (but the use of torture is forbidden). Whether an involuntary statement of guilt is admissible as evidence in any given case depends on its reliability, whether it is of probative value, and whether its admission would best serve “the interests of justice.” Interrogators may use physical and psychological means of extracting information, but the statute precludes the use of torture (defined as “inflicting severe physical or mental pain or suffering”) or subjecting the individual to “cruel, inhuman, or degrading treatment.” The admissibility of physical evidence (for which a search warrant is not required) similarly hinges on a totality-of-the-circumstances, case-by-case determination of the evidence’s probative value. While the accused enjoys the right to be confronted with evidence against him, that right is limited by the paramount interest of “national security.” This means that defense counsel must have a security clearance to examine any classified information and may not reveal any specifics to the defendant, which may impair the attorney’s capacity to consult with his client. The government has an obligation to furnish the defendant with any exculpatory information in its possession, but—just as with classified material showing his guilt—the defendant is furnished only with a summary of the information. Hearsay evidence against the defendant can be considered by the tribunal and its admissibility likewise depends on its reliability and probative value.

The MCA permits the appeal of verdicts and punishments to a Court of Military Commission Review (CMCR), staffed by a minimum of three military judges, but the law allows review of issues of law only, not determinations of fact. (By the same token, the government also is barred from appealing any not-guilty judgments.) An adverse ruling on an issue of law by the CMCR can be appealed to the U.S. Court of Appeals for the District of Columbia and then by certiorari to the Supreme Court. The statute specifically withdraws all federal habeas corpus jurisdiction over any suits challenging circumstances of detention, transfer, treatment, or conditions of confinement brought by, or on behalf of, any alien properly determined by the government to be an unlawful enemy combatant or awaiting such a determination. The statute also explicitly deprives detainees of reliance upon the Geneva Conventions.

While the law prohibits subjecting individuals held in custody to cruel, inhuman, or degrading treatment, it gives the President authority to write the administrative rules and procedures giving effect to this provision. Finally, the MCA makes clear (and it does so at the very beginning) that its provisions “may not be construed to alter or limit the authority of the President under the Constitution * * * and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.”
Not so elsewhere. The CIA, it was learned, had been operating a top-secret program known as “extraordinary rendition,” in which individuals suspected of possessing knowledge that was deemed potentially useful in pursuing terrorists and disrupting their operations were kidnapped by masked men, transported to prison facilities (some of which were located in countries known during the Cold War as members of the Eastern Bloc), and there detained and subjected to interrogation and various forms of torture. “Extraordinary rendition” had been authorized only by executive fiat. When victims of this program of forcible abduction and interrogation sought to compel the government to reveal details that would enable them to bring civil suits (because, they argued, the arbitrary deprivation of their liberty denied due process and because they had been subjected to cruel and degrading treatment), federal courts denied them discovery on grounds that the information was protected by the “state secrets privilege.” Although a state secrets privilege existed at common law, the doctrine in its modern form was established by the Supreme Court in United States v. Reynolds, 345 U.S. 1, 10, 73 S.Ct. 528, 533 (1953), which held that the United States may prevent the disclosure of information in a judicial proceeding if “there is reasonable danger” that such disclosure “will expose military matters which, in the interest of national security, should not be divulged.”

Another war-related program begun solely on executive directive was the secret National Security Agency (NSA) program of examining communications records and monitoring domestic and foreign communications where there supposedly was reason to suspect that one of the parties to the message was a member or an agent of Al Qaeda or other terrorist organization. Whereas the FBI program of searching business records was authorized by § 215 of the PATRIOT Act, the NSA program (details of which are discussed in Chapter 9, section D) operated with neither congressional authorization nor judicial oversight. More often than not, however, the government won suits challenging the operation of the NSA program (officially referred to as the Terrorist Surveillance

32. However, the names of those detained could be kept secret, if the government so chose. In Center for National Security Studies v. U.S. Department of Justice, 331 F.3d 918 (D.C.Cir. 2003), cert. denied, 540 U.S. 1104, 124 S.Ct. 1041 (2004), a federal appeals court held that the law-enforcement exception to the federal Freedom of Information Act meant that the government did not have to release any information pertaining to any of the hundreds of individuals arrested as suspects or detained as material witnesses in the investigation of the 9/11 attacks. The court held that the names of those arrested or detained, the dates and locations of their arrest or detention, the reasons for their arrest or detention, and the names of their attorneys, could all be lawfully withheld.

33. See El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). El-Masri’s “ordeal [was] the most extensively documented case of the C.I.A.’s practice of extraordinary rendition” * * *.” It was also a case of mistaken arrest and jailing. The German government subsequently indicted 13 CIA operatives for their participation in it. Two weeks later, the Italian government indicted 26 individuals accused of involvement in another CIA abduction. Although they had long since fled the country, the defendants in the Italian case were tried in absentia. German law, however, does not allow for trial in the accuseds’ absence.

34. But although authorized by statute, an official review of the program concluded that the FBI had seriously misused the investigative tools it had been given, in particular national security letters. The letters, or administrative subpoenas, were used in cases of suspected terrorism or espionage and compel telephone companies, Internet providers, banks, credit card companies, and other businesses to turn over customer records without requiring that the government first obtain court approval. The FBI significantly underreported to Congress the numbers of letters issued, it requested customer information when there was no pending investigation, and it issued letters over the signatures of officials not authorized to approve them. See Office of the Inspector General, U.S. Department of Justice, “A Review of the Federal Bureau of Investigation’s Use of Section 215 Orders for Business Records” (March 2007). For discussion, see New York Times, Mar. 10, 2007, pp. A1, A10; Congressional Quarterly Weekly Report, Apr. 2, 2007, p. 970. A subsequent preliminary audit by the FBI, based on a 10% sample of the searches conducted since 2002, revealed more than a thousand possible violations of the law or agency rules. See http://seattletimes.nwsource.com/html/politics/2003609811_webfbi09.html.
Program). However, one federal court found that it amounted to a rogue spying operation that violated the separation of powers and the First and Fourth Amendments and was not authorized by the AUMF. In January 2007, President Bush agreed that further operation of the NSA surveillance program would cease and any monitoring would proceed with Foreign Intelligence Surveillance Court (FISC) approval, although the Administration backed legislation that would have made a court order unnecessary following a terrorist attack or when there was an “imminent threat of attack likely to cause death, serious injury, or substantial economic damage to the United States.” Still waiting for materials withheld by the Bush Administration pertaining to the NSA program, Congress was in no rush to act on legislation empowering surveillance without FISC approval. On May 1, 2007, seemingly reversing itself, the Bush Administration said it could not pledge to continue to seek warrants from the FISC. As Michael McConnell, the Director of National Intelligence, put it: “[T]he President’s authority under Article II is in the Constitution. So if the President chose to exercise Article II authority, that would be the President’s call.”

Also illustrative of the Executive’s go-it-alone approach was the reaction of the Bush Administration to congressional efforts to wind down the Iraq war. As public support for the war plunged, contributing substantially to Republican loss of both houses of Congress in the 2006 election, the Administration was confronted by opposition lawmakers much more willing to exert congressional oversight. Democrats in both houses and some dissident Republicans, who had become increasingly sensitive to public distaste for the Iraq war and the high human and financial costs it was exacting, banded together to pass a $124-billion supplemental appropriation bill that would continue to fund the war but would require U.S. troops to begin withdrawing in 2007. The legislation, which passed the House by a vote of

35. See Terkel v. American Telephone & Telegraph Corp., 441 F.Supp.2d 899 (N.D.Ill. 2006); Tooley v. Bush, 2006 WL 3783142 (D.D.C. 2006); People for the American Way v. National Security Agency/Central Security Service, 462 F.Supp.2d 21 (D.D.C. 2006); United States v. Adams, 473 F.Supp.2d 108 (D.Maine 2007). In these suits, telephone subscribers challenged the companies’ cooperation with NSA requests for access or else tried to force disclosure of what the companies had turned over to the agency or details of the agency’s requests. In Hepting v. American Telephone & Telegraph Corp., 439 F.Supp.2d 974 (N.D.Cal. 2006), the court denied the government’s motion to dismiss and the lawsuit continued because, it concluded, the plaintiffs could establish standing to sue without necessarily having to rely on information protected by the state secrets privilege.

36. See American Civil Liberties Union v. National Security Agency, 438 F.Supp.2d 754 (E.D.Mich. 2006), order vacated, 493 F.3d. 644 (6th Cir. 2007). The divided appeals court did not reach the constitutional merits of the case but instead held that the plaintiffs lacked standing to sue since they could not show that the injury alleged was sufficiently direct or concrete.


38. 75 U.S. Law Week 2423–2424.

39. James Risen, “Administration Pulls Back on Surveillance Agreement,” New York Times, May 2, 2007, p. A16. In testimony before the Senate Judiciary Committee two weeks later, it was disclosed that President George W. Bush intervened personally to avert a crisis when the Deputy Attorney General James Comey (then-Acting Attorney General) refused to authorize the NSA program. So intent was the Administration on getting the Department of Justice to sign-off on the program, that then-presidential counsel Alberto Gonzales and others tried to pressure Attorney General John Ashcroft to overrule his Deputy while Ashcroft was still in intensive care recovering from anesthesia for surgery he had just undergone. Ashcroft declined to do so. President Bush intervened to let the NSA program go forward without department approval because of threatened resignations by many senior DOJ officials, including the Attorney General and FBI Director. New York Times, May 16, 2007, pp. A1, A15.

40. For example, on February 16, 2007, the House voted 246–182 to pass a resolution disapproving President Bush’s decision to send at least 20,000 additional U.S. troops to Iraq in the hope that a “surge” would quell the rising tide of violence. Five weeks later, on March 27, 2007, the House voted by a much narrower margin, 218–212, to impose an August 2008 deadline for withdrawing the troops. On March 15, 2007, a March 2008 deadline on the redeployment of troops from Iraq was barely defeated in the Senate 48–50.
218–208 and the Senate by a vote of 51–46, was promptly vetoed by President Bush. As the text of his veto message (p. 263) shows, he reaffirmed his oft-expressed view that conducting a war was exclusively the prerogative of the President. Critics found it more than a little odd that lawmakers, who had little say over the war for years, now stood accused of attempting to “micro-manage” it merely by identifying a target date for the departure of troops, and criticism of congressional participation in the war-making process rang particularly hollow since the war had been so badly managed when left entirely to the Executive. Congress responded by offering a three-month extension of funding with no conditions; appropriations after that, however, would be subject to certification on the progress of the war by the commanding general in Iraq. Thus, as the lack of American success became increasingly apparent, time appeared to be running out on both the war and deference to the Executive’s single-handed control of it.

NOTE—PRESIDENT GEORGE W. BUSH VETOES CONDITIONS ON FUNDING THE IRAQ WAR

Following is the text of President George W. Bush’s veto message of May 1, 2007, returning to the House of Representatives a supplemental appropriation bill funding the Iraq War which contained some timetables for the reduction of American troops in that country:

I am returning herewith without my approval HR 1591, the “U.S. Troop Readiness, Veterans’ Care, Katrina Recovery and Iraq Accountability Appropriations Act, 2007.”

This legislation is objectionable because it would set an arbitrary date for beginning the withdrawal of American troops without regard to conditions on the ground; it would micro-manage the commanders in the field by restricting their ability to direct the fight in Iraq; and it contains billions of dollars of spending and other provisions completely unrelated to the war. Precipitous withdrawal from Iraq is not a plan to bring peace to the region or to make our people safer here at home. The mandated withdrawal in this bill could embolden our enemies—and confirm their belief that America will not stand behind its commitments. It could lead to a safe haven in Iraq for terrorism that could be used to attack America and freedom-loving people around the world and is likely to unleash chaos in Iraq that could spread across the region. Ultimately, a precipitous withdrawal could increase the probability that American troops would have to one day return to Iraq—to confront an even more dangerous enemy.

The micromanagement in this legislation is unacceptable because it would create a series of requirements that do not provide the flexibility needed to conduct the war. It would constrict how and where our Armed Forces could engage the enemy and defend the national interest, and would provide confusing guidance on which of our enemies the military could engage. The result would be a marked advantage for our enemies and greater danger for our troops, as well as an unprecedented interference with the judgments of those who are charged with commanding the military.

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Finally, this legislation is unconstitutional because it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the presidency by the Constitution, including as commander in chief of the armed forces. For these reasons, I must veto this bill.

The day after the President rejected the bill, the House override attempt failed on a vote of 222–203; a two-thirds majority was required (in this instance, 284 votes). In a parting shot at President Bush during the override debate, House Speaker Nancy Pelosi took particular exception to the statement above that Congress was trying to substitute its judgment for that of military commanders on the
scene, saying: “Wrong again, Mr. President. We’re substituting our judgment for your judgment 16 blocks down Pennsylvania Avenue in the White House.” Congressional Quarterly Weekly Report, May 7, 2007, pp. 1348–1350. The House and Senate subsequently retreated from attaching any conditions in this round of the dispute over funding for the Iraq war, but there was clearly a feeling that the next funding measure, which would likely be needed by fall 2007, might well contain a congressionally specified timetable for the withdrawal of troops.

Instructive, perhaps, is Congress’s experience with ending the Vietnam war over the opposition of another adamant president, Richard Nixon. After Congress failed repeatedly to muster the two-thirds majorities in each house necessary to override presidential vetoes of measures ending the war (despite the support of a majority of lawmakers and clear public sentiment to do so), it administered a double blow by waiting until near the very end of the 1972–1973 Fiscal Year: It attached anti-bombing amendments to two crucial bills that required only a majority vote to pass—one raising the federal debt limit and another funding operation of the federal government for the first three months of the next fiscal year. When Congress passed the Second Supplemental Appropriations Act of 1973, 87 Stat. 99, with only hours to spare, Nixon either had to accept the amendments’ deadline terminating military action on August 15, 1973 or veto the bill. But Nixon didn’t really have a choice: Failure to sign the bill, in the words of then-House Appropriations Committee chairman George Mahon, would have brought “the U.S. Government to a screeching, grinding, unacceptable halt at midnight on June 30, [1973]” because the Treasury would have been forced to start liquidating its assets to pay off the debt, and the federal government would no longer have been able to meet its payroll. It was the first time in history that Congress had used its power of the purse to force a President to terminate military operations.

Although the so-called “global war on terror,” in general, and the 9/11 attacks, in particular, furnished the justification for his “New Paradigm” of presidential power, President George W. Bush’s practice of rule-by-decree was not confined by those events. Two other examples of executive unilateralism seemed poised, at best, only at the very margins of what could be justified in the name of wartime necessity: the President’s widespread use of signing statements and the firing of nine U.S. attorneys. As the following note on the signing statements indicates, Bush’s self-proclaimed role as “The Decider” extended to the manner of enforcing all statutes passed by Congress, not just war-related legislation.

NOTE—President George W. Bush’s Use of Signing Statements

A “signing statement” is an official document in which the President sets out his understanding of how a law will be enforced by the executive branch. As of July 2006, George W. Bush had issued signing statements over 800 times (compared with a total of 600 for all the other presidents combined) to indicate his disagreement with the text of a law duly passed by Congress and to direct subordinates about its enforcement. By issuing these statements as he signed bills into law, Bush claimed a prerogative not to enforce parts of an act that, he asserted, encroached on executive authority. Among the provisions of laws he quietly refused to be bound by were the requirement in the renewal of the PATRIOT Act that he provide detailed reports to Congress on the Administration’s use of search-and-seizure powers and on implementing the congressional ban on the use of torture contained in the Detainee Treatment Act.

Since Bush had not vetoed any bill sent to him by Congress during his first six years in office, but used signing statements to nullify what he didn’t like, Congress did not have an opportunity to mount a legal challenge to this assertion of power. The use of signing statements appears to be a unilateral attempt by the Chief Executive to secure a kind of line-item veto that contradicts the clear
rules of the Constitution in Article I, section 7, paragraph 2, governing how a bill becomes a law. At any rate, that was the conclusion of an 11-member bipartisan task force appointed by the American Bar Association to look into the constitutionality of the use of signing statements. New York Times, July 24, 2006, p. A12. At its subsequent convention, the ABA adopted the committee’s report. 75 United States Law Week 2063–2064. Even before party control of Congress changed hands after the 2006 election, there was sentiment favoring legislation that would authorize a suit to challenge the legality of signing statements. The ABA task force recommended that Congress enact legislation requiring the President to promptly submit an official copy of every signing statement he issues and report the reasons and legal basis of his position of not enforcing provisions of duly-enacted laws with which he disagrees. The task force concluded that the signing statements were “particularly adamant about preventing any of his subordinates from reporting directly to Congress” because the President insisted he had the right to withhold information whenever he deemed it necessary. For a comprehensive discussion, see T. J. Halstead, “Presidential Signing Statements: Constitutional and Institutional Implications,” Congressional Research Service, April 13, 2007.

At least as controversial was the firing of nine U.S. attorneys in December 2006. The U.S. attorneys, who have the responsibility for prosecuting federal crimes in the 94 federal districts, are nominated by the President and confirmed by the Senate, just as federal judges are. Political party affiliation understandably and legitimately figures in their selection, just as it does with federal judges (or any other presidential nominees). U.S. attorneys, like federal judges, are also under an obligation to serve justice. Clouding a prosecutor’s decision about whether to prosecute someone, like clouding a judge’s decision about how to rule, by taking into account the affected party’s political affiliation understandably crosses the line; it violates the official’s oath of fidelity to the office and the values it is supposed to serve. When it was disclosed in December 2006 that, in fact, nine U.S. attorneys had been fired, not for the proffered reason that their performance was deficient, but because they were insufficiently aggressive in advancing partisan political interests of the Bush Administration or certain Republican members of Congress, it set off a firestorm. The situation worsened when it was learned that the Administration originally had as many as 26 of them in its sights—more than a quarter of all the U.S. attorneys—and that the impetus for the firings had come from White House political advisors and operatives. Yet, when the performance-related justification was exposed as a ruse, President Bush still continued to insist that nothing wrong had been done because U.S. attorneys “serve at the pleasure of the President.” The scandal deepened further when top Justice Department officials, who had been implicated in the firings, told contradictory stories and then resigned; when Alberto Gonzales (the Attorney General and former Counsel to the President) repeatedly claimed during sworn testimony before congressional committees that he couldn’t recall, or didn’t know, what had happened; and when many of the e-mails between the White House and the Justice Department about the firings could not be found. “Attorneygate,” as the scandal came to be dubbed, began to smack of executive unilateralism when it was revealed that the Bush Administration

41. More than simply unwise, it has been argued that “if the attorneys were fired to interfere with a valid prosecution, or to punish them for not misusing their offices, that may well have been illegal.” See Adam Cohen, “It Wasn’t Just a Bad Idea—It May Have Been Against the Law,” New York Times, Mar. 19, 2007, p. A18.
42. Invoking the removal power, however, doesn’t mean Congress can’t investigate and expose any misuse of power. A clash over executive privilege loomed when executive-branch officeholders were called before the Senate Judiciary Committee to testify about their part in the scandal. See “Bush and Senate Clash in Inquiry on Prosecutors,” New York Times, Mar. 21, 2007, pp. A1, A16.
intended to avail itself of a little-noticed provision that had quietly crept into the statute renewing the PATRIOT Act. This provision allowed the attorney general to fill any vacant U.S. attorney post with an “interim” appointee who would enjoy indefinite tenure, which meant the appointee would never have to face confirmation.45 Incensed at this attempt to do an end-run around the Senate’s power to advise and consent, Congress repealed the provision and returned the state of the law to what had existed previously: The attorney general would appoint an interim U.S. attorney who could serve for a maximum of 120 days; if the Senate had not confirmed the nominee by then, the local federal judge would fill the position with an interim appointee who would serve until a nominee was confirmed.46

The other branches of government, so far at least, have not functioned as an impenetrable bulwark to constrain the exercise of executive power during the first decade of the 21st century. As worrisome, constitutionally speaking, as many observers found these displays of power, others, such as former Vice President Al Gore, were at least as alarmed about the overbearing tone in which presidential unilateralism repeatedly had been voiced. The conduct of the executive branch, he concluded, smacked of “a culture of impunity” and our experience with Iraq epitomized it.47 Whether George W. Bush’s legacy of unilateral action will endure, and thereby confirm Corwin’s prediction about the passing of the peacetime Constitution, may ultimately depend less on what Congress and the courts do than on what the next President does.

45. Hanging over the controversy was evidence that prosecutions of political corruption by U.S. attorneys during the Bush Administration had been one-sided—most of the prosecutions had been against Democrats. Political animosity in the scandal intensified, too, because there was considerable evidence that U.S. attorneys particularly loyal to the Administration had been involved in conducting sham campaigns to prevent so-called “vote fraud” in a concerted attempt to damp-down or discourage the turnout of Democratic voters in elections. Critics argued that one factor common to so many of the U.S. attorneys on the Administration’s hit-list had been a lack of interest in this priority. Others were in trouble because of their effective prosecution of Republican officeholders.


47. Al Gore, The Assault on Reason (2007), p. 157. Although Gore used the phrase specifically to describe the Bush Administration mindset that gave rise to evading the Geneva Conventions and invited the sort of prisoner abuse that occurred at Abu Ghraib, as the entire book makes clear the expression can also be used to characterize the administration’s general attitude of contempt toward individuals, groups, and institutions that stood in the way of implementing the President’s policies.
CHAPTER 5

POWERS OF THE NATIONAL GOVERNMENT IN THE FEDERAL SYSTEM

Federalism is one of the hallmarks of the American political system. Briefly put, it can be defined as a principle of government that provides for the division of powers between a national government and a collection of state governments operating over the same geographical area. As a design for the operation of government, this concept is as fraught with conflict as would be the game plan of a football team with two quarterbacks. If we are not to be subjected to the kind of turmoil and paralysis that surfaced during the era of the Articles of Confederation, some sorting and allocation of governmental functions must occur, and that is the principal focus of this and the succeeding chapter.

Several practical arguments can be made on behalf of the federal arrangement. The states furnish a convenient structure through which to administer public policies. The states also provide plentiful opportunities to experiment with different kinds of responses to public problems. In the words of Justice Brandeis, dissenting in New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386–387 (1932), “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Also there is no denying the sense of legitimacy that is afforded public policies that are chosen and implemented by the people who are most affected by, and presumably most knowledgeable about, the problems. Although these are important points to be made in its favor, the crux of the argument for a federal system comes down to the asserted relationship between the dispersion of governmental power and the preservation of personal freedom. As such, federalism shares the same justification as does the concept of checks and balances, which was the primary focus of attention in the preceding four chapters.

The argument goes something like this: The centralization of governmental power breeds tyranny, where tyranny is essentially defined as the systematic exploitation of most of
the populace by a narrow self-serving few. To avoid this possibility, governmental power is diffused—on several levels of government (as well as among various branches on each of the levels) operating over large areas of land. This dispersion of power multiplies the points of government by which people can influence and control the coercive power that is government’s by electing and lobbying legislators and executive officers. Broadly diffusing power minimizes the possibility that any faction or narrow interest group can go around and sew up enough of these access points so as to push through the kind of policy that would exploit others. This diffusion of power forces groups to engage in coalition building, since only a substantial coalition would be large enough to control enough access points to enact and sustain policy. As the size of the coalition grows, the narrow interest of factions comprising it must broaden to accommodate other groups. As the coalition grows, compromise increases the breadth of its interests until, at the point it is large enough to capture government, it represents something broad enough to approximate the public interest.

But criticisms of at least equal importance can be leveled at federalism. The argument for allowing experimentation assumes that the states are of a mind to act when the need arises, yet much of modern American history is marked by the general unresponsiveness of many state governments to pressing public problems. Unfortunately, in a political system that requires several institutions to approve a policy before it can be adopted, each of these points of access to government decisions can become a veto point that prevents any action at all from being taken. Increasingly, too, many needs of an urbanized, technologically advanced, and economically interdependent society transcend state boundaries and render state-level responses ineffective. Variation among the states in their treatment of citizens, particularly in their respect for civil rights and liberties, heightens the perception that federalism fundamentally conflicts with justice, a principle that is necessarily thought to be unbounded by geographical configurations. Finally, although the Founders argued that the reserved powers retained by the states were essential to prevent tyranny, state governments have frequently been captured by narrow interests bent on exploiting vulnerable minorities and excluding them from the political process. Despite frequent protestations to the contrary, state government is often low-visibility government, and the defense of states’ rights has often served to cloak morally dubious public policies.

From the birth of the Constitution to the present, two broad schools of thought have dominated the discussion of the nature and scope of the federal relationship. For our purposes, we designate these views as the schools of dual and cooperative federalism. It goes without saying, of course, that an endless variety of both positions has been articulated since and before 1787, but we mean to focus only on the general contours of the dispute, not a cataloging of all the different views espoused.

**Dual Federalism**

The philosophy of dual federalism is essentially the exposition of the states’ rights position. It is that conception of the federal system that views the powers of the national government and the states as mutually exclusive, conflicting, and antagonistic. It finds James Madison’s observation on the purpose of the federal system in helping to diffuse power best served by adopting a mode of constitutional interpretation that sets the powers of national and state governments in conflict. This tension, which is desirable for its assumed capacity to check tyranny, is made possible by the supposition that the functions of national and state governments are distinct and separable. There is thought to be no confusion if the national government confines itself to those powers enumerated in Article I, section 8 of the Constitution; those not so enumerated are reserved to the states. In the words of the late Professor Morton Grodzins, such a philosophy pictures the federal system
as “a layer cake”—with the two levels of government clearly separate from one another. James Bryce, writing in the late nineteenth century, relied upon a different analogy. Said Bryce, “The system is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other.” Regardless of which analogy you prefer, the point is the same: In terms of the divisibility of governmental functions, everything had a place, and the Constitution put everything in its place.

From time to time, this view of the federal system was buttressed by its own interpretation of the contractual origins of the Constitution. This could be summed up by the view that the national government and the states were dual sovereigns. This was so because the Constitution was a compact among the states, which, on certain enumerated issues, ceded a portion of their sovereignty to the national government. That portion of their sovereignty not ceded was retained. Proponents of this view of the Constitution could point to the language of Article VII, for example, which provides that ratification by conventions in nine of the states “shall be sufficient for the Establishment of this Constitution between the States * * *.”

The legal application of the dualist theory found several outlets. First and foremost was a strict interpretation given the enumerated powers of the national government and an extraordinarily limited reliance on any amplification that these powers received from the Necessary and Proper Clause contained in Article I, section 8. In sum, the dual federalists came to read Article I, section 8 much as one would read a statute—closely. Unless the national government were granted a power specifically, the assumption was against the exercise of power. Secondly, the dual federalists saw the Tenth Amendment as a viable base of support, which could be used to rule actions of the national government unconstitutional. Congress, in their view, may not invade the reserved powers of the states. In their heyday, advocates of dual federalism took the position that if, in the exercise of its enumerated powers, the national government happened to touch upon the functions reserved to the states, then the action of the national government was unconstitutional.

An extreme manifestation of this philosophy was unilateral action by the states, severally or individually, invalidating either single acts of the national government (as, for example, South Carolina’s response to the national tariff in 1833) or the constitutional contract itself. The Civil War, of course, settled the argument by force. Rejecting the contention that states ever had or ever could secede as a matter of law, the Court’s opinion in Texas v. White, 74 U.S. (7 Wall.) 700, 724–725, 19 L.Ed. 227, 237 (1869), summed up the role of the states in the federal Union in the following sometimes-eloquent passage:

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to “be perpetual.” And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained “to form a more perfect Union.” It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom and independence, and every

power, jurisdiction and right not expressly delegated to the United States. Under the
Constitution, though the powers of the States were much restricted, still all powers not delegated
to the United States, nor prohibited to the States, are reserved to the States respectively, or to
the people. And we have already had occasion to remark at this term, that “the people of each
State compose a State, having its own government, and endowed with all the functions essential
to separate and independent existence,” and that “without the States in union, there could be no
such political body as the United States.” * * * Not only, therefore, can there be no loss of
separate and independent autonomy to the States, through their union under the Constitution,
but it may be not unreasonably said that the preservation of the States, and the maintenance of
their governments, are as much within the design and care of the Constitution as the
preservation of the Union and the maintenance of the National Government. The Constitution,
in all its provisions, looks to an indestructible Union, composed of indestructible States.

While the more virulent expressions of states’ rights philosophy have never been
countenanced by the Court, a majority of the Justices have entertained a somewhat dualist
position during two periods, the first coinciding roughly with the tenure of Chief Justice
Roger Taney (1835–1864) and the second covering the four decades between 1895 and
1937. In this and the next chapter, you will be examining Court opinions of these periods
that utilize dualist approaches to constitutional interpretation, particularly in striking down
congressional legislation aimed at business regulation. Suits brought by states in opposition
to federal mandates, discussed in the next chapter (see pp. 373 and 378), provide a
contemporary illustration of the dualist theory. More extreme statements have come
from outside the judicial arena: Madison and Thomas Jefferson’s authorship of the Virginia
and Kentucky Resolutions, Hayne’s side of the 1830 nullification debate with Daniel
Webster, John Calhoun’s arguments on the state of the Union, and the efforts of southern
Governors Orval Faubus and George Wallace to interpose state authority against federal
court desegregation rulings in the 1950s and 1960s. All share a common heritage in the
dualist position.

National Supremacy and Cooperative Federalism
An alternative view of the national-state relationship is offered by the philosophy of
cooperative federalism. Although the phrase is of fairly recent origin and has been used by
some scholars to denote merely a meshing of national and state interests and policies, we
use the term here in a more expansive and inclusive sense. Cooperative federalism, in our
view, is a concept of partnership between the national and state governments that
acknowledges the fact of national supremacy and the reality that the terms of the
partnership are almost entirely fixed by the strength and power of the central government.
The crush of modern-day conditions, generated by industrialism and war, has created
conditions of nationwide and world interdependence, which have moved groups to demand
more and more of government. The role of positive government in the life of a developed
nation has made the negative assumption of the dualist view (namely, that government
governs best which governs least) increasingly inappropriate. The long and short of it is that
the industrialism and commercial development that we have achieved, and that were
anticipated by Alexander Hamilton, simply overtook and rendered obsolete the agrarian
democracy envisioned by Jefferson, which substantially motivated the earliest expression of
the dual federalist view.

Despite the acceptance of the primacy of the central government in the federal
relationship, the cooperative federalist approach searches for ways to maintain and exploit
the utility of the states in serving the general populace. This has led, most notably, to
efforts at dovetailing the superior experimental and administrative capacities of the states with the greater financial resources of the national government. These efforts, which date from the Northwest Ordinance to the contemporary grant-in-aid programs for highway and mass transit construction, housing, health, education, worker’s compensation—to name only a few—epitomize the cooperative joining of national money and guidelines with the administrative organization of the states. Thus, the central government seeks to coordinate attacks on problems that lie traditionally within the purview of the states but that, because states cannot or will not eradicate them, have cumulatively assumed national proportions. More recently, the ineffectiveness or unresponsiveness of the states in treating these ills, which have centered increasingly in urban areas, has led to the emergence of a newer and competing federal relationship—that between the national government and the cities.

In the nationalistic outlook of cooperative federalism, the Constitution is seen not as a contract among the states, but as a compact whose preamble declares that “We the People of the United States” have taken from the states certain powers and vested them in a national government “in Order to form a more perfect Union * * *.” The Union, then, is comprised not of dual sovereigns, but of only one—the ultimate sovereign—the people. When proponents of cooperative federalism read the passage from Texas v. White quoted earlier, the part that makes them cheer loudest is “the indestructibility of the Union.”

Their approach to constitutional interpretation follows logically enough from these premises. Where dualists rely consistently on a literal or strict reading of the powers enumerated in Article I, section 8, advocates of cooperative federalism have long championed a broad and expansive view. As Chief Justice Marshall made clear in his opinion for the Court in McCulloch v. Maryland (p. 106), the enumerated powers of the national government are to be read not solely as the only means by which the national government is capable of acting, but as means that carry with them the power to achieve certain ends. Unlike the dualists, then, who read the Constitution rather like a statute, Marshall warned, “[W]e must never forget that it is a constitution we are expounding.” These enumerated powers must be considered, as McCulloch makes clear, in the light of an amplifying Necessary and Proper Clause.

A second tool of constitutional interpretation relied upon by cooperative federalism, in conjunction with broad construction, is the Supremacy Clause (Art. VI, ¶ 2). In its sphere, regardless of what state powers and functions it may touch or what spillover effects it may create by its actions, the national government is supreme, and its policies are of exclusive effect when it uses its combination of enumerated and implied powers. In answering the second question to be considered in McCulloch, namely, “Whether the State of Maryland may, without violating the constitution, tax that branch [bank of the United States],” Marshall observed:

In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it that the expression of it could not make it more certain.

It follows, then, that the answer to the question must be “No”:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with
respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

A final and correlative tool in the application of the cooperative federalist view is an emasculative interpretation of the Tenth Amendment. The manner of doing so is to deny that the amendment constitutes any affirmative base of power from which the states may challenge the wide-ranging effects of national legislation. Part of this interpretation was achieved by Marshall in *McCulloch* when, with regard to the Tenth Amendment (which reads: “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.”), he observed, “Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited [by the adoption of the Constitution], omits the word ‘expressly’ * * *.” The point was driven home again more than a hundred years later by Justice Stone, speaking for the Court in the *Darby* case, which you will encounter later in this chapter:

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.

The nationalistic tenor of the cooperative view is superbly illustrated not only by the opinions of the Marshall Court (1801–1835), but also by Hamilton’s financial plan, Webster’s reply to Hayne in the nullification debate, Abraham Lincoln’s view of the Union, the “New Nationalism” of Theodore Roosevelt, and the “New Deal” of Franklin Roosevelt.

So accustomed have we become to the fact that the national government plays such a dominant role in the federal system that we ordinarily say “the federal government” when “the national government” is what we really mean. In our everyday use of language, “federal” and “national” have become synonymous. Inasmuch as the concept of cooperative federalism has come to have controlling effect, it makes sense, then, to begin a more detailed consideration of the federal relationship by looking at the exercise of power by the national government. As you will find, perhaps the most significant power possessed by the central government is its power to regulate interstate and foreign commerce. From the clause granting this power flows the authority of the national government to supervise interstate traffic, regulate production, and control navigation. Another national power that has come to have considerable importance within the federal system is the taxing and spending power. Taken together, the commerce power and the taxing and spending power give the national government commanding influence in orchestrating public policy in the American political system, but, as you will also see, it has not always been so. The Court’s decisions interpreting the Commerce Clause and the taxing and spending power reflect alternating periods during which one of these paradigms of the federal system has usually dominated. The burst of national supremacy that was the hallmark of the Marshall Court gave way to a period of greater state regulatory power under Chief Justice Taney; the dual federalism that marked many of the important Court decisions from 1895 to 1936 was abruptly terminated in the Constitutional Revolution of 1937, which left a legacy of cooperative federalism that has held sway for the last seven decades, despite recent dualist stirrings. These pendular swings in the Court’s view of national and state powers are a natural reflection of the fact that the Court eventually follows the tides of domestic politics.
A. THE GENERAL SCOPE OF CONGRESS’S POWER TO REGULATE INTERSTATE COMMERCE

It soon became readily apparent to anyone even remotely connected with the buying and selling of goods—which meant just about everyone—that one of the most serious difficulties plaguing the economic life of the Nation in the days following the Revolutionary War was the absence of any stabilizing system of interstate commercial regulation. Because supervisory power over commerce inhered in the sovereignty of each state, regulation was spotty at best and most often was laden with attempts by states to secure every conceivable competitive advantage. Obstacles to the free flow of trade, particularly in the form of high interstate tariffs, abounded. The Articles of Confederation furnished a notoriously weak answer to the problem, and the mounting chaos, unchecked by the debilitated power of the central government, loomed as one of the principal motivations for convening the convention that gathered in Philadelphia in the summer of 1787 to draft the Constitution. It was with vivid remembrances of the commercial anarchy in those post-Colonial days that Chief Justice Marshall confronted the Court’s first opportunity to articulate the scope of the new national government’s power to regulate interstate commerce.

Gibbons v. Ogden (p. 274) presented the Court with an ideal occasion to hand down a precedent-setting decision that would come to grips with the question of just how far the interstate commerce power could be taken into geographical areas that would customarily be regarded as lying within the bailiwick of the state police power. When the New York legislature granted Robert Fulton a monopoly on all of the state’s steamboat traffic, including that on interstate waterways, the stage was set.

In the manner that it deals with the concept of interstate commerce, Marshall’s opinion is significant in two respects. First, he endeavored to define “commerce” in expansive terms. He interpreted the term to connote commercial intercourse generally and certainly the express power to regulate navigation. Secondly, the control of interstate carriers was not limited to their operation in those geographical areas between states, but national regulatory power could cross state lines and follow into the interior of the states in order to protect the free flow of interstate commerce.

As if it were not already apparent, the cooperative federalist quality of Marshall’s opinion becomes obvious in his treatment of the status of such a national power vis-à-vis any state authority. As with the currency power interpreted in McCulloch, where the national government legislates pursuant to the Commerce Clause of the Constitution (as it did in granting a federal license to Gibbons), the central government’s authority is supreme and absolute. Because it has these characteristics, we say that the national government exercises a “plenary” or exclusive power. Note, however, that Marshall’s decision in this case is conditioned by the fact that here the national government has already acted, unlike Justice Johnson’s concurrence, which places little weight on the existence of Gibbons’s federal license. Marshall does not say that when the national government has not acted, then, too, all state legislation must fall. This was left an open question, and later, in Willson v. Black–Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 7 L.Ed. 412 (1829), Marshall intimated that there might well be a limited role for the states in filling such gaps, provided they do not infringe interstate interests. This topic, however, will be taken up in the next chapter.
Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The appellant contends that the injunction is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant:

* * * To that clause in the constitution which authorizes Congress to regulate commerce.

* * *

[The Constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? * * * What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. * * * We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: “Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

The subject to be regulated is commerce; and our constitution being one of enumeration, and not of definition, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation.

Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is
regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet *** all America understands, and has uniformly understood, the word “commerce” to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

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The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word “commerce.”

To what commerce does this power extend? The constitution informs us, to commerce “with foreign nations, and among the several states, and with the Indian tribes.”

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. ***

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, *** unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce “among the several states.” The word “among” means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose ***.

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the
means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

***

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. ***

The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with “commerce with foreign nations, or among the several states, or with the Indian tribes.” It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

***

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not *** similar in their terms or their nature. *** In imposing taxes for state purposes, [the states] are not doing what Congress is empowered to do. Congress is not empowered to tax for th[e] purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

***

*** [The power of regulating commerce granted to Congress] has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the state, while Congress is regulating it?

***

[In exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution.] [As a consequence,] the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress ***. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent
power “to regulate commerce with foreign nations and among the several states,” or ***
to regulate their domestic trade and police. In *** [both cases] the acts of New York must yield to the law of Congress ***.

*** In argument, however, it has been contended that if a law, passed by a state *** comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. *** In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

*** In the exercise of this power, Congress has passed “an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.” ***

*** To the court it seems very clear, that the whole act on the subject of the coasting trade [that is, transporting things to neighboring ports of the same country], according to those principles which govern the construction of statutes, implies, un-equivocally, an authority to licensed vessels to carry on the coasting trade.

***

The license must be understood to be what it purports to be—a legislative authority to the steamboat Bellona, “to be employed in carrying on the coasting trade, for one year from this date.”

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but *** the words used *** confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. *** The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations.

***

If *** the power of Congress has been universally understood in America to comprehend navigation, *** [a] coasting vessel employed in the transportation of passengers, is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. ***

***

*** The laws of New York, which grant the exclusive privilege *** take no notice of the employment of vessels, and relate only to the principle by which they are propelled [***] whether they are moved by steam or wind. If by the former, the waters of New York are closed against them ***. If by the latter, those waters are free to them ***.

*** The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a [federal] license.

[T]he laws of Congress, for the regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water ***. [E]very act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. ***

***

[S]teamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they
were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

[Reversed.]

Mr. Justice JOHNSON [concurring].

The “power to regulate commerce,” here meant to be granted, was that power to regulate commerce which previously existed in the states. But what was that power?

*** The power of a sovereign state over commerce *** amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the state to act upon.

*** *** Power to regulate foreign commerce is given in the same words, and in the same breath, as it were, with that over the commerce of the states and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The states are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them ***.

[T]he language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

*** *** If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license. *** ***

[Mr. Justice THOMPSON did not participate.]

The controlling effect of Marshall’s position in Gibbons, particularly as it applied to interstate carriers, is amply illustrated by succeeding opinions of the Court—some of them written at times when the Court on other matters was demonstrating considerable enthusiasm for a dualist perspective. Concluding, in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. (6 Otto) 1, 9, 24 L.Ed. 708, 710 (1878), that “[t]he powers *** granted are not confined to the instrumentalities of commerce *** known or in use when the Constitution was adopted, but keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances[,]” the Court extended the principles of Gibbons as well to federal regulation of telegraph companies and the communications field generally.

The expansive definition given the term “commerce” and the principles of national supremacy in regulating it constituted building blocks for subsequent Court decisions. In Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827), the second Commerce
Clause case decided by the Marshall Court, the Justices turned their attention to the constitutionality of a state statute imposing a license tax on importers of goods being transported into Maryland. Although the Constitution barred states from levying a tax on imports without Congress’s consent, except as “may be absolutely necessary for executing its inspection Laws” (Art. I, § 10, ¶ 2), still at some point goods brought into a state and left there do become subject to levies such as a state property tax. The problem, of course, is in identifying the point at which something ceases to be in interstate or foreign commerce and has come to rest in a state. In Brown, Marshall drew that line at the point where the original package—such as a bale—had been broken open. For decades to come, the Court utilized this “original package rule” as a rule of thumb to mark the boundary between the legitimate exercise of the state taxing power and federal authority over interstate commerce. It was in this spirit of preserving federal dominance over the flow of interstate commerce that the Court upheld congressional regulation of the stockyards in Stafford v. Wallace. According to the Court in that case, so long as the cattle continued in the “stream of commerce,” federal authority over them had not come to an end.

**Stafford v. Wallace**

Supreme Court of the United States, 1922
258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735

**BACKGROUND & FACTS** After investigations disclosed fraud, price fixing, and manipulation rampant in the livestock and meat-processing industry by the “Big Five” meatpackers (Swift, Armour, Cudahy, Wilson, and Morris), Congress enacted the Packers and Stockyards Act of 1921. Among other things, it sought to regulate the exploitive practices that characterized the wholesale meat market by empowering the Secretary of Agriculture to regulate prices and oversee business methods in the stockyards. Stafford, who was engaged in buying and selling livestock, sued to enjoin Wallace, the Secretary of Agriculture, from such regulation, contending that the statute was an unconstitutional use of the commerce power by Congress. The federal district court denied the injunction, and Stafford appealed to the Supreme Court.

Mr. Chief Justice TAFT * * * delivered the opinion of the Court.

* * *

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to

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2. This doctrine was originally formulated by Justice Holmes, speaking for a unanimous Court in Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276 (1905): “When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.”
increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose live stock are being cared for and sold in the stockyards market, is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers, who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner in the neglect of the live stock, in the mala fides of the sale, in the exorbitant prices obtained, and in the unreasonableness of the charges for services rendered.

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877). Nor is there any doubt that in the receipt of live stock by rail and in their delivery by rail the stockyards are an interstate commerce agency. The only question here is whether the business done in the stockyards, between the receipt of the
live stock in the yards and the shipment of them therefrom, is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. * * *  

* * *  

As already noted, the word “commerce,” when used in the act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the act clearly within Congressional power and valid. * * *  

The cattle in Stafford, of course, had been in the stream of interstate commerce and would cease to be in it at some point. But could federal authority ever touch goods or carriers that had not traveled outside a state? The Court addressed this question in the Shreveport Rate Case. By what reasoning does the Court find the basic principles of Gibbons v. Ogden applicable here? What authority does the Interstate Commerce Commission have to compel the Texas Railroad Commission to modify the structure of transportation rates over routes entirely within Texas?

HOUSTON, EAST & WEST TEXAS RAILWAY CO. v. UNITED STATES  
[THE SHREVEPORT RATE CASE]  
Supreme Court of the United States, 1914  
234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341  

BACKGROUND & FACTS The Louisiana Railroad Commission initiated proceedings before the Interstate Commerce Commission against three railroads, including the Houston Railway Company, for discriminating against interstate commerce between Louisiana and Texas. The gist of the complaint was that these railroads charged lower rates for intrastate shipments among east Texas locations than for interstate shipments over similar distances and territory. The impact of this preferred rate structure—a scheme sanctioned by the Texas Railroad Commission in the maximum rates it allowed on intrastate transport—was to encourage trade among east Texas cities at the expense of trade with Shreveport, Louisiana, a natural focal point of commerce for such Texas cities as Dallas. After hearings, the ICC set reasonable maximum rates for both interstate and intrastate hauls and ordered the railroads to cease their discriminatory practices. The railroads were thus obliged to raise their rates for intrastate transport to a level equal with the interstate rates, despite the fact that this increase conflicted with the maximum rates set for intrastate hauls by the Texas Railroad Commission. The Houston Railway unsuccessfully appealed the ICC order to the Commerce Court. On subsequent appeal to the U.S. Supreme Court, the company asserted that (1) Congress or an agency created by it could not regulate intrastate traffic, and (2) if Congress could, it had chosen not to do so, and the ICC had, therefore, exceeded its authority.
Mr. Justice HUGHES delivered the opinion of the court:

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The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission’s power. Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the commerce court was that the order relieved the appellants from further obligation to observe the intrastate rates, and that they were at liberty to comply with the Commission’s requirements by increasing these rates sufficiently to remove the forbidden discrimination. ***

***

*** It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring “uniformity of regulation against conflicting and discriminating state legislation.” By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. ***

***

*** It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.

***

The decree of the Commerce Court is affirmed in each case.

Affirmed.

Mr. Justice LURTON and Mr. Justice PITNEY dissent.
The “Federal Police Power”

In the American constitutional system, the states are the authors of most of the criminal law. Their authority over criminal legislation is an aspect of what is called the “police power.” Since that concept is explained more fully later (see pp. 362–363) and its scope is examined thoroughly in the next chapter, it is sufficient here to say that by the police power we mean the authority of the states to write laws that protect the public health, safety, welfare, and morals. This broad authority to legislate for the general welfare was retained by the states in the Tenth Amendment and thus is also commonly referred to under the heading “reserved powers.” Since the federal government is said to possess only enumerated powers and since all those powers not enumerated in Article I of the Constitution are reserved to the states, it is legally correct to say that the national government does not possess a police power. That has not stopped the federal government from writing criminal laws. Congress has simply written criminal statutes under the authority of its enumerated powers, most often the commerce power. The Packers and Stockyards Act that was at issue in Stafford v. Wallace is a good example. The Court’s decision in Champion v. Ames below, decided well before Stafford, validated the practice when the Court upheld federal legislation banning the distribution of lottery tickets. By defining the movement of people, goods, or services that cross state lines as a variety of “commerce,” Congress has responded with the most extreme form of “regulation”—prohibition. Examples abound. Congress enacted the Mann Act to deal with the problem of what was then called “white slavery”—the interstate transportation of prostitutes. It has since enacted legislation aimed at the interstate transportation of kidnapped persons (the so-called Lindbergh Act) and the interstate flight of fugitives. Under Title I of the Civil Rights Act of 1968, it is a federal crime to travel interstate for the purpose of inciting, organizing, or participating in a riot or civil disorder (and the Court did not find it to be unconstitutional, see United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443 (1973)). The invention and subsequent widespread ownership of motor vehicles gave rise to the crime at issue in Brooks v. United States (p. 287), the interstate transportation of stolen automobiles. Indeed, technological development was a catalyst in many other exercises of the “federal police power” mentioned by the Court in Brooks.

CHAMPION V. AMES
[THE LOTTERY CASE]
Supreme Court of the United States, 1903
188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492

BACKGROUND & FACTS Charles Champion deposited lottery tickets with the Wells-Fargo Express Company in Texas to have them sent to California where they would be sold. The tickets were for an alleged lottery run by the Pan American Lottery Company, which held monthly drawings for prizes in Asuncion, Paraguay. John Ames, a United States marshal, arrested Champion in Chicago to bring him to Texas to stand trial for violating an 1895 act of Congress that made it unlawful to transport lottery tickets across state lines. Champion petitioned a federal court sitting in Chicago for a writ of habeas corpus, contending that the statute was unconstitutional, since it attempted to regulate what he argued was not an interstate commercial activity. The federal court dismissed Champion’s application, and he appealed to the Supreme Court.
Mr. Justice HARLAN delivered the opinion of the court:

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[Previous decisions] show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.

***

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895.

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that the statute in question does not regulate the carrying of lottery tickets from state to state, but in effect prohibits such carrying; [and that] the authority given Congress was not to prohibit, but only to regulate.

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***

If lottery traffic, carried on through interstate commerce, is a matter over which Congress's power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? May not Congress, for the protection of the people of all the states, drive that traffic out of commerce among the states?

In determining whether regulation may not properly take the form of prohibition, the nature of the interstate traffic which it sought to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen v. Virginia, 49 U.S. (8 How.) 163, 12 L.Ed. 1030 (1850), after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: “Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.”

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that
the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? * * * We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one’s 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.” Allgeyer v. Louisiana, 165 U.S. 578, 589, 17 S.Ct. 427, 431 (1897). But surely it will not be said to be a part of anyone’s liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the 10th Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.

Besides Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. * * * As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the “widespread pestilence of lotteries” and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. * * *

***

It is said * * * that if * * * Congress may exclude lottery tickets from [interstate] commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, * * * however useful or valuable * * *.

* * * But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons v. Ogden, when he said: “The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.”

***

The judgment is affirmed.

Mr. Chief Justice FULLER, with whom concur Mr. Justice BREWER, Mr. Justice SHIRAS, and Mr. Justice PECKHAM, dissenting:

***

* * * That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and
is its natural and reasonable effect, and by
that its validity must be tested. * * *

The power of the state to impose restraints
and burdens on persons and property in
conservation and promotion of the public
health, good order, and prosperity is a power
originally and always belonging to the states,
not surrendered by them to the general
government, nor directly restrained by the
Constitution of the United States, and
essentially exclusive, and the suppression of
lotteries as a harmful business falls within this
power, commonly called, of police. * * *

It is urged, however, that because Con-
gress is empowered to regulate commerce
between the several states, it, therefore, may
suppress lotteries by prohibiting the carriage
of lottery matter. * * * [The] power to
suppress lotteries * * * belongs to the states
and not to Congress. To hold that Congress
has general police power would be to hold
that it may accomplish objects not intrusted
to the general government, and to defeat the
operation of the 10th Amendment. * * *

* * *

[T]his act cannot be brought within the
power to regulate commerce among the several
states, unless lottery tickets are articles of
commerce, and, therefore, when carried across
state lines, of interstate commerce; or unless
the power to regulate interstate commerce
includes the absolute and exclusive power to
prohibit the transportation of anything or
anybody from one state to another.

* * *

Is the carriage of lottery tickets from one
state to another commercial intercourse?

The lottery ticket purports to create
contractual relations, and to furnish the
means of enforcing a contract right.

This is true of insurance policies, and
both are contingent in their nature. Yet this
court has held that the issuing of fire,
marine, and life insurance policies, in one
state, and sending them to another, to be
there delivered to the insured on payment
of premium, is not interstate commerce.
Paul v. Virginia, 75 U.S. (8 Wall.) 168, 19
L.Ed. 357 (1869). * * *

* * *

If a lottery ticket is not an article of
commerce, how can it become so when
placed in an envelope or box or other
covering, and transported by an express
company? To say that the mere carrying of
an article which is not an article of
commerce in and of itself nevertheless
becomes such the moment it is to be
transported from one state to another, is to
transform a non-commercial article into a
commercial one simply because it is trans-
ported. I cannot conceive that any such
result can properly follow.

It would be to say that everything is an
article of commerce the moment it is taken
to be transported from place to place, and of
interstate commerce if from state to state.

An invitation to dine, or to take a drive,
or a note of introduction, all become articles
of commerce under the ruling in this case, by
being deposited with an express company for
transportation. This in effect breaks down all
the differences between that which is, and
that which is not, an article of commerce,
and the necessary consequence is to take
from the states all jurisdiction over the
subject so far as interstate communication is
concerned. It is a long step in the direction of
wiping out all traces of state lines, and the
creation of a centralized government.

* * *

The power to prohibit the transportation
of diseased animals and infected goods over
railroads or on steamboats is an entirely
different thing, for they would be in
themselves injurious to the transaction of
interstate commerce, and, moreover, are
essentially commercial in their nature. And
the exclusion of diseased persons rests on
different ground, for nobody would pretend
that persons could be kept off the trains
because they were going from one state to
another to engage in the lottery business.
However enticing that business may be, we
do not understand these pieces of paper
themselves can communicate bad principles
by contact.

* * *
Chief Justice Taft, speaking for a unanimous Court in Brooks v. United States, 267 U.S. 432, 45 S.Ct. 345 (1925), upheld the validity of the National Motor Vehicle Theft Act. The act levied a $5,000 fine or a maximum of five years imprisonment for “whoever shall receive, conceal, store, barter, sell or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen.” Said the Court in sustaining the constitutionality of the legislation:

It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other state and their sale or other disposition far away from the owner and his neighborhood have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the body at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.

The Court also noted other cases that, like Brooks, sustained the use of the commerce power for purposes of criminal regulation in a manner like that originally approved by the Court in Champion v. Ames, supra:

* * * Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. * * * In Reid v. Colorado, 187 U.S. 137, 23 S.Ct. 92 (1902), it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other states. * * * In Hipolite Egg Co. v. United States, 220 U.S. 45, 31 S.Ct. 364 (1911), it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which if sold in other states from the one from which they were transported would deceive or injure persons who purchased such articles. In Hoke v. United States, 227 U.S. 308, 33 S.Ct. 281 (1913), and Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917), the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one state to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage and other forms of immorality. In Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311, 37 S.Ct. 180 (1917), it was held that Congress had power to forbid the introduction of intoxicating liquors into any state in which their use was prohibited in order to prevent the use of interstate commerce to promote that which was illegal in the state. In Weber v. Freed, 239 U.S. 325, 36 S.Ct. 131 (1916), it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition because of the demoralizing effect of such exhibitions in the state of destination.
Given the breadth of the holding in *Gibbons* and the support given that scope of the commerce power by subsequent cases, it is both surprising and puzzling to discover that there were some exceptions to the expectation that commercial enterprises doing business interstate would be liable to regulation by the national government. For years, one of the exceptions was the insurance business. In *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1869), the Court held that insurance companies were local enterprises not liable to national regulation even though contracts were negotiated across state lines. The Court’s decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162 (1944), overturned that ruling. Insurance companies were at last recognized as interstate businesses that could not logically be excluded from the application of federal antitrust legislation. Insurance, once perhaps the trade of small companies on pretty much a local basis, had increasingly grown to become a big business dominated by sprawling interstate corporations. More recently, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004 (1975), the Court also extended the application of the Sherman Act to prohibit price setting by the state bars. The Court reasoned that bar enforcement of a schedule of minimum fees that lawyers could charge operated as a restraint on trade.

Still, funny little exceptions persist. Unlike the about-face it executed in *South-Eastern Underwriters*, in *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099 (1972), the Court refused to overturn the judicially created exemption of major league baseball from the antitrust laws—now well embedded in precedent—because Congress “by its positive inaction” allowed the prior decisions to stand. In light of the fact that “[b]aseball is today big business that is packaged with beer, with broadcasting, and with other industries”—to use the words of Justice Douglas’s dissent—sustaining an antitrust exception for baseball on the theory that it is “the national pastime” is about as quaint as characterizing the insurance industry as “a local business.”

Traveling across state lines with the intent to participate in or cause a riot seems to be stretching the notion of commerce. But, as we saw in the *Shreveport Rate* Case, state lines do not have to be crossed to permit federal regulation of intrastate activities. Sufficient economic impact is enough. What happens, then, when the expanded definition of commerce in the *Lottery* Case is married with the reasoning adopted by the Court in *Shreveport Rate*? In Title II of the Consumer Credit Protection Act, 82 Stat. 159, Congress parlayed these two concepts into federal legislation punishing “loan sharking.” In *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357 (1971), the Court upheld it on the grounds that loan sharking was closely associated with organized crime, a form of illicit business organization that transcends state borders.

Congress has been writing ever-increasing amounts of criminal legislation (see p. 330) and justifying it by reciting the conclusion that interstate commerce is affected. In the past, most federal courts have simply accepted these recitations at face value. In some instances, Congress has not even stopped to cite the Commerce Clause, or, when it has, it hasn’t bothered to include in its committee reports evidence that shows some connection between the legislation and interstate commerce. Its cavalier drafting of the Gun Free School Zones Act of 1990, for example, eventually caught up with Congress, as the Court’s decision in *United States v. Lopez* (p. 322) demonstrates. But more diligent congressional effort in building a supporting record has not necessarily saved legislation, as the decision in *United States v. Morrison* (p. 326) shows. The Rehnquist Court has also insisted that a close connection to, and substantial economic effect on, interstate commerce be demonstrated.

The Commerce Power and Racial Discrimination

The use of the commerce power for broader purposes than customary commercial regulation is well illustrated by three Supreme Court decisions upholding and applying...
the public accommodations provisions of the 1964 Civil Rights Act. It may seem puzzling and perhaps dehumanizing that, in its efforts to eradicate racial discrimination throughout the United States, Congress turned to the commerce power rather than the seemingly more appropriate provisions of the Thirteenth or Fourteenth Amendment. As you will see later, when you read the Court’s decision in the Civil Rights Cases of 1883 in Chapter 14, private discrimination was held to lie outside the Thirteenth Amendment because that amendment was interpreted to do nothing more than end slavery. The Fourteenth Amendment also was ruled inapplicable, since it prohibited discrimination only by a state, its agencies, and local government. Rather than risk invalidation of the legislation because of this precedent and lacking the broad police powers like those of the states, Congress relied upon the Commerce Clause in its sweeping attack on racial discrimination in public accommodations. The Court had little difficulty accepting Congress’s argument that refusal by private businesses to serve African-Americans obstructed and depressed interstate commerce. What features of the businesses in Heart of Atlanta Motel v. United States below and Katzenbach v. McClung (p. 292) brought them within the reach of the 1964 Civil Rights Act? Concurring in Heart of Atlanta, Justice Black “recognize[d] * * * that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce * * *.” The Lake Nixon Club in Daniel v. Paul (p. 295), he thought, was just such a place. Would you agree? Or does the reasoning employed by the Court in Heart of Atlanta and McClung make it impossible to draw such a line?

HEART OF ATLANTA MOTEL v. UNITED STATES
Supreme Court of the United States, 1964
379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258

BACKGROUND & FACTS The facts are set out in the following opinion.
For an excellent in-depth study of this and the McClung case see Richard C. Cortner,

Mr. Justice CLARK delivered the opinion of the Court.

This * * * [suit] attack[s] the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat. 241, 243. * * * A three-judge court * * * sustained the validity of the Act and issued a permanent injunction * * * restraining appellant from continuing to violate the Act which remains in effect. * * * We affirm the judgment.

* * * Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41.

Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

* * *

It is admitted that the operation of the motel brings it within the provisions of
§ 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” At the same time, however, it noted that such an objective has been and could be readily achieved “by congressional action based on the commerce power of the Constitution.” * * * Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. * * *

* * *

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. * * * This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; [and] that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight * * *. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes[* * * the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging. * * * There was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. * * *

* * *

That Congress was legislating against moral wrongs in many * * * areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, “[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” United States v. Women’s Sportswear Mfg. Ass’n, 336 U.S. 460, 464, 69 S.Ct. 714, 716 (1949). * * *

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving
travelers, however “local” their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no “right” to select its guests as it sees fit, free from governmental regulation.

**

It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a “member of the class which is regulated may suffer economic losses not shared by others * * * has never been a barrier” to such legislation. Bowles v. Willingham, [321 U.S.] at 518, 64 S.Ct. at 649. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. **

**

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

Mr. Justice BLACK, concurring.

***

Congress in § 201 declared that the racially discriminatory “operations” of a motel of more than five rooms for rent or hire do adversely affect interstate commerce if it “provides lodging to transient guests” *** and that a restaurant’s “operations” affect such commerce if (1) “it serves or offers to serve interstate travelers” or (2) “a substantial portion of the food which it serves * * * has moved in [interstate] commerce.” *** There can be no doubt that the operations of both the motel and the restaurant here fall squarely within the measure Congress chose to adopt in the Act and deemed adequate to show a constitutionally prohibitable adverse effect on commerce. The choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court. I agree that as applied to this motel and this restaurant the Act is a valid exercise of congressional power, in the case of the motel because the record amply demonstrates that its practice of discrimination tended directly to interfere with interstate travel, and in the case of the restaurant because Congress had ample basis for concluding that a widespread practice of racial discrimination by restaurants buying as substantial a quantity of goods shipped from other States as this restaurant buys could distort or impede interstate trade.

***
*** I recognize *** that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act. But in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow. *** There are approximately 20,000,000 Negroes in our country. Many of them are able to, and do, travel among the States in automobiles. Certainly it would seriously discourage such travel by them if, as evidence before the Congress indicated has been true in the past, they should in the future continue to be unable to find a decent place along their way in which to lodge or eat. *** And the flow of interstate commerce may be impeded or distorted substantially if local sellers of interstate food are permitted to exclude all Negro consumers. Measuring, as this Court has so often held is required, by the aggregate effect of a great number of such acts of discrimination, I am of the opinion that Congress has constitutional power under the Commerce and Necessary and Proper Clauses to protect interstate commerce from the injuries bound to befall it from these discriminatory practices.

Mr. Justice DOUGLAS, concurring.

Though I join the Court’s opinions, I am somewhat reluctant here, *** to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the “right of persons to move freely from State to State” (Edwards v. People of State of California, 314 U.S. at 177, 62 S.Ct. at 169), “occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.” ***

Hence I would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment which states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article”—a power which the Court concedes was exercised at least in part in this Act.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.

***

KATZENBACH V. MCCLUING
Supreme Court of the United States, 1964
379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290

BACKGROUND & FACTS The facts are set out in the following opinion.

Mr. Justice CLARK delivered the opinion of the Court.

This case was argued with *** Heart of Atlanta Motel v. United States, decided this
date, * * * in which we upheld the constitutional validity of Title II of the Civil Rights Act of 1964 against an attack by hotels, motels, and like establishments. This complaint for injunctive relief against appellants attacks the constitutionality of the Act as applied to a restaurant. The case was heard by a three-judge United States District Court and an injunction was issued restraining appellants from enforcing the Act against the restaurant. * * * We now reverse the judgment.

***

Ollie’s Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restaurant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its opening in 1927, and since July 2, 1964, it has been operating in violation of the Act. The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.

[As to the Commerce Clause,] the District Court held * * * [that] [t]here must be * * * a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter. The court concluded, however, that the Congress, rather than finding facts sufficient to meet this rule, had legislated a conclusive presumption that a restaurant affects interstate commerce if it serves or offers to serve interstate travelers or if a substantial portion of the food which it serves has moved in commerce. This, the court held, it could not do because there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce.

The basic holding in Heart of Atlanta Motel, answers many of the contentions made by the appellees. * * * In this case we consider its application to restaurants which serve food a substantial portion of which has moved in commerce.

*** Sections 201(b)(2) and (c) place any “restaurant * * * principally engaged in selling food for consumption on the premises” under the Act “if * * * it serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce.”

Ollie’s Barbecue admits that it is covered by these provisions of the Act. The Government makes no contention that the discrimination at the restaurant was supported by the State of Alabama. There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress. * * *

As we noted in Heart of Atlanta Motel both Houses of Congress conducted prolonged hearings on the Act. And, as we said there, while no formal findings were made, which of course are not necessary, it is well that we make mention of the testimony at these hearings the better to understand the problem before Congress and determine whether the Act is a reasonable and appropriate means toward its solution. The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. A comparison of per capita spending by Negroes in restaurants, theaters, and like
establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. * * * This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. * * * In addition, the Attorney General testified that this type of discrimination imposed "an artificial restriction on the market" and interfered with the flow of merchandise. * * * In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities. * * *

Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there. * * *

We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. Hence the District Court was in error in concluding that there was no connection between discrimination and the movement of interstate commerce. The court’s conclusion that such a connection is outside “common experience” flies in the face of stubborn fact.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie’s Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 (1942):

“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” * * *

We noted in Heart of Atlanta Motel that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. Against this background, we must conclude that while the focus of the legislation was on the individual restaurant’s relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but “representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.” Polish National Alliance of U.S. v. National Labor Relations Board, 322 U.S. 643, 648, 64 S.Ct. 1196, 1199 (1944).

With this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce. * * *

Article I, § 8, cl. 3, confers upon Congress the power “[t]o regulate Commerce * * * among the several States” and Clause 18 of the same Article grants it the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” * * *

This grant, as we have pointed out in Heart
of Atlanta Motel “extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.” United States v. Wrightwood Dairy Co., 315 U.S. 110, 119, 62 S.Ct. 523, 526 (1942). Much is said about a restaurant business being local but “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” * * * Wickard v. Filburn, supra, at 125, 63 S.Ct. at 89. * * *

* * *

* * * Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. * * *

* * *

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. * * * We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

The judgment is therefore * * * Reversed.

NOTE—DANIEL v. PAUL

In Daniel v. Paul, 395 U.S. 298, 89 S.Ct. 1697 (1969), the Supreme Court was confronted with a more remote application of Title II of the 1964 Civil Rights Act. Daniel, a Negro resident of Little Rock, Arkansas, brought suit in federal district court to enjoin Euell Paul, the owner of the Lake Nixon Club, a recreational facility, from operating that establishment on a discriminatory basis. The district court dismissed the complaint on the ground that the Lake Nixon Club was not a “public accommodation” within the terms of the Act. The U.S. Circuit Court of Appeals for the Eighth Circuit affirmed the decision. The Supreme Court reversed.

According to the Court’s description, the Lake Nixon Club was “a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar.” Though the resort was located at a remote spot some 12 miles west of Little Rock and well away from any major interstate arteries of travel, Justice Brennan, speaking for the Court, nevertheless found the facility involved in interstate commerce. He noted first that a substantial portion of the food
served at the snack bar had come by way of interstate commerce and that three of the four items served at the snack bar (hot dogs and hamburgers on buns, soft drinks, and milk) had ingredients produced outside the state. Second, Brennan observed that “it would be unrealistic to assume that none of the 100,000 patrons actually served by the club each season was an interstate traveler.” In addition, Paul advertised the facility in newspapers and media in a manner reflecting an intent to appeal to interstate travelers. The Court also noted that the club leased some 15 paddleboats from an Oklahoma company and another boat was purchased from the same company. Finally, the Court found the club’s jukebox and the records played on it to be manufactured outside the state.

In the lone dissent, Justice Black objected to the extent to which the commerce power had been applied in this case. Said Justice Black:

Did Lake Nixon serve or offer to serve interstate travelers? There is not a word of evidence showing that such an interstate traveler was ever there or ever invited there or ever dreamed of going there. Nixon Lake can be reached only by country roads. The record fails to show whether these country roads are passable in all kinds of weather. They seem to be at least six to eight miles off the state or interstate roads over which interstate travelers are accustomed to travel. Petitioners did not offer evidence to show whether Lake Nixon is a natural lake, or whether it is simply a small body of water obtained by building a dam across a little creek in a narrow hollow between the hills. * * *

* * *

* * * If the facts here are to be left to such “iffy” conjectures, one familiar with country life and traveling would, it seems to me, far more likely conclude that travelers on interstate journeys would stick to their interstate highways, and not go miles off them by way of what, for all this record shows, may well be dusty, unpaved, “country” roads to go to a purely local swimming hole where the only food they could buy was hamburgers, hot dogs, milk, and soft drinks (but not beer). This is certainly not the pattern of interstate movements I would expect interstate travelers in search of tourist attractions to follow.

* * *

It seems clear to me that neither the paddle boats nor the locally leased juke box is sufficient to justify a holding that the operation of Lake Nixon affects interstate commerce within the meaning of the Act. While it is the duty of courts to enforce this important Act, we are not called on to hold nor should we hold subject to that Act this country people’s recreation center, lying in what may be, so far as we know, a little “sleepy hollow” between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me. I would affirm the judgments of the two courts below.

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**B. CONGRESS’S POWER TO REGULATE PRODUCTION UNDER THE COMMERCE CLAUSE**

**The Rise of Dual Federalism**

When Chief Justice Marshall elaborated on the definition of commerce in *Gibbons v. Ogden*, he did not indicate whether the production of goods as well as their distribution was within the constitutional bounds of federal regulation. In part, this is attributable to the fact that the question simply was not presented in *Gibbons*. Steamboats, after all, are means of transporting people and material, not an instrument for the production of goods. In light of Marshall’s expansive view of federal authority, however, it is difficult to believe that this alone would have stopped him, even if, legally speaking, such statements would have been nothing more than dicta. Perhaps nothing was said about the regulation of production
because it just did not occur to the Court. By 1824—the year Gibbons was decided—the Industrial Revolution had not advanced very far, but by century's end the effects of industrialism were very much apparent. Over the decades to come, the federal government—and a few enlightened states—responded by passing legislation to deal with the abuses that were a consequence of rapid industrialization: the exploitation of children, abysmal wages, long and exhausting hours of labor, and unsafe working conditions. Constitutionally speaking, however, jurisdiction over the regulation of production remained an open question until 1895. Unfortunately—from Marshall's perspective, at least—when the Court initially furnished an answer, it rejected such an extension of national power. The explanation lay in the fact that by then the Court had come to be dominated by Justices who inclined to dual federalism because it better comported with their vision of American society that included a markedly down-sized federal government.

The rise of dual federalism in the interpretation of the Commerce Clause began with a Supreme Court decision in 1895 that severely limited the application of the antitrust laws, and continuing on into the mid-1930s, a prevailing majority of the Justices adopted a profoundly dual federalist stance on the use of the commerce power for the national supervision of business. Relying on both a niggardly definition of commerce and a vigorous use of the Tenth Amendment, the Court consistently whacked away at national legislation aimed at economic reform. It frustrated the application of federal antitrust statutes, invalidated congressional child labor laws, and later killed off New Deal economic recovery measures.

United States v. E. C. Knight Co., 156 U.S. 1, 15 S.Ct. 249 (1895), involved the application of the Sherman Antitrust Act to head off the merger of five separate sugar refining firms into the American Sugar Refining Company, which would then control more than 98% of the country's sugar refining capacity. The Sherman Act, passed in 1890, made it illegal to monopolize, restrain, or attempt to monopolize or restrain interstate or foreign commerce by any contract, combination, or conspiracy. Under the statute, the federal government filed suit against the companies to prevent this monopolization of sugar manufacturing. The question presented by the case was not whether a monopoly would result but whether this was any of Congress's business. In an 8–1 decision, the Supreme Court held that the Sherman Act was not applicable to regulate manufacturing. Chief Justice Fuller spoke for the Court:

[T]he power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals * * * is a power originally and always belonging to the states, not surrendered by them to the general government, not directly restrained by the constitution of the United States, and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with * * *. On the other hand, the power of congress to regulate commerce amonng the several states is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free, except as congress might impose restraints. * * * That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. * * *

* * * Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * *

It is vital that the independence of the commercial power and of the police power * * * should always be recognized * * *[because it] is essential to the preservation of the autonomy of the states as required by our dual form of government * * *.

* * * The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. * * * The fact that an article is manufactured for export to another state
does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.

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If the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

What the [Sherman Act] struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true * * * that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or commerce with the several states and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. * * * There was nothing * * * to indicate any intention to put a restraint upon trade or commerce, and the fact * * * that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree. * * *

The lone dissenter was Justice Harlan who, conceding that the majority had not declared the Sherman Act itself unconstitutional, criticized the Court for pretty much “defeat[ing] the main object for which it was passed.” He rejected both the majority’s crabbed view of Congress’s power and its energized view of the Tenth Amendment—masked as strict construction—as flatly contradicting the principles declared by Chief Justice Marshall in Gibbons v. Ogden. Said Harlan:

[T]he citizens of the several states composing the Union are entitled of right to buy goods in the state where they are manufactured, or in any other state, without being confronted by an illegal combination whose business extends throughout the whole country, which, by the law everywhere, is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the states cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one state to another, may be reached by congress under its authority to regulate commerce among the states. The exercise of that authority so as to make trade among the states in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations is justified by an express grant of power to congress, and would redound to the welfare of the whole country. * * *

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[The majority’s] view of the scope of the [Sherman Act] leaves the public * * * entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one state to another state. * * * In my judgment, the general government is not placed by the constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one state only, but throughout the entire country, in the buying and selling of articles—especially the necessaries of life—that go into commerce among the states. The doctrine of the autonomy of the states cannot properly be invoked to justify a denial of power in the national government to meet such an emergency, involving, as it does, that freedom of commercial intercourse among the states which the constitution sought to attain.

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* * * The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which
concerns equally all the people of the Union, and which * * * cannot be adequately controlled by any one state. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the constitution, to accomplish. * * *

Thus the first line of attack on national legislation targeted to regulate production consisted of neatly distinguishing economic functions and then parceling them out to different levels of government. The Court came to distinguish manufacturing (in \textit{E. C. Knight} and in \textit{Hammer v. Dagenhart}, below), mining (in \textit{Carter v. Carter Coal Co.}, p. 303), and farming (in \textit{United States v. Butler}, p. 346) as elements of production that were subjects of state regulation though they were only in a limited sense local in scope. These varieties of production were analytically separated from means of distribution such as those considered in the preceding section of cases. Having segmented the economic process and assigned the two principal functions—production and distribution—to competing levels of government, that ended the matter. From then on, it simply became a matter of cataloging business activity in one or the other category and mechanically applying the constitutional rule appropriate to each category (see Exhibit 5.1).

The corollary of this tactic was, as we mentioned, a stultifying use of the Tenth Amendment. Spillover effects from national regulatory efforts would not be tolerated when they touched the protected haven of state powers. Thus, any vigorous use of the commerce power to regulate the distribution of goods that might directly affect or influence production was unconstitutional. This approach is illustrated well by Justice Day's opinion of the Court in \textit{Hammer v. Dagenhart}. But use of this strategy in striking down the federal Child Labor Act immediately raised problems of consistency with previous Court rulings, such as those in \textit{Champion v. Ames} and other decisions validating Congress’s exercise of the federal “police power.” As Justice Day strained to harmonize these decisions, Justice Holmes argued in dissent that the majority contrived a logically impossible distinction and, as a result, stood the law on its head.

\textbf{HAMMER V. DAGENHART}

\textbf{[THE CHILD LABOR CASE]}

Supreme Court of the United States, 1918
247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101

\textbf{BACKGROUND & FACTS} The Federal Child Labor Act of 1916 barred from shipment in interstate commerce products of factories that either employed children under the age of 14 or allowed children between the ages of 14 and 16 to work more than eight hours a day or more than six days a week or at night. Roland Dagenhart filed a
complaint in federal district court on behalf of himself and his two minor sons, employees in a cotton mill in North Carolina, against W. C. Hammer, a United States attorney, to enjoin the enforcement of the Act. The district court held the Act unconstitutional, and appeal was made to the Supreme Court.

Mr. Justice DAY delivered the opinion of the Court.

* * *

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the states.

* * *

[In previously decided cases in which the regulatory power of Congress was upheld,]3 the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce “consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.” The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. * * *

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. * * * If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. * * *

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in

3. In Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321 (1903), the Supreme Court upheld the power of Congress to outlaw the interstate transportation of lottery tickets; in Hipolite Egg Co. v. United States, 220 U.S. 45, 31 S.Ct. 364 (1911), it sustained the federal Pure Food and Drug Act, which prohibited the interstate distribution of impure foods and drugs; in Hoke v. United States, 227 U.S. 308, 33 S.Ct. 281 (1913), the Court upheld the constitutionality of the Mann Act (the so-called “White Slave Traffic” Act) that forbade the interstate transportation of women for immoral purposes (see also Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917)); and in Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311, 37 S.Ct. 180 (1917), it sustained Congress’s power over the transportation of intoxicating liquors.
those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

***

* * * The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *** The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

***

*** [T]he act *** not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

[I]f an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have ***.

[T]he statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. ***

*** I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

***

The Pure Food and Drug Act which was sustained in Hipolite Egg Co. v. United States, 220 U.S. 45, 57, 31 S.Ct. 364, 367 (1911), with the intimation that “no trade can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend,” applies not merely to articles that the changing opinions of the time condemn as intrinsically
harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. * * * It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. Hoke v. United States, 227 U.S. 308, 323, 33 S.Ct. 281 (1913); Caminetti v. United States, 242 U.S. 470, 492, 37 S.Ct. 192 (1917). * * * I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. * * * Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. * * *

Mr. Justice McKENNA, Mr. Justice BRANDEIS, and Mr. Justice CLARKE concur in this opinion.

The language by which the Court conducted this exercise in economic pigeonholing was the language of “direct” and “indirect” effects. A direct effect on interstate commerce was one that fell within Congress’s regulatory jurisdiction; an indirect effect on interstate commerce was one for the states to superintend. Relying in part on this lexicon, the Court, in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935), struck down the National Recovery Act (NRA) and the industrial codes of fair competition, which it spawned. Rebuffing one of the major legislative mechanisms by which Franklin Roosevelt’s administration sought to jump start the nation’s economy during the Depression, the Court faulted the NRA for its delegation of legislative power in the code-making process (see p. 130), and for a regulatory application that intruded into the domain of intrastate commerce. The operations of the Schechter brothers, who ran a Brooklyn business slaughtering and selling chickens, were not in “the stream of commerce,” but instead had only an indirect effect on commerce. The Court described the distinction between direct and indirect effects as “essential to the maintenance of our constitutional system” and declared, “The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.” That what the Court meant by “clear in principle” was a difference in kind between the two effects and not one in degree is clear from the Court’s opinion in Carter v. Carter Coal Co., declaring the Guffey Coal Act unconstitutional. In ringing terms, the Court proclaimed it was the kind of economic activity involved—in this case, mining—not the economic effect on interstate commerce that mattered. In sum,
direct effects on interstate commerce could only stem from economic functions associated with distribution—interstate carriers, navigation, and the interstate movement of goods and services—while indirect effects were always to be associated with some function of production and, therefore, necessarily lay beyond the regulatory reach of the federal government.

**Carter v. Carter Coal Co.**

Supreme Court of the United States, 1936

298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160

**BACKGROUND & FACTS** Congress passed the Bituminous Coal Conservation Act, more popularly known as the Guffey Act, in 1935 for the purpose of stabilizing the coal industry through regulations on prices, methods of competition, and labor relations. The Act established the National Bituminous Coal Commission, authorized to formulate a code within certain guidelines, and district boards with the authority to determine maximum and minimum prices on coal. Coal producers were subject to an excise tax of 15 percent on the sale price of coal at the mine, but were exempt from 90% of the tax if they accepted the Bituminous Coal Code. In addition, the Act contained labor provisions (which were not in effect as of the time of this case) relating to collective bargaining, hours, wages, and the creation of a labor board to adjudicate disputes. James Carter, a principal stockholder, brought suit against the Carter Coal Company to enjoin the company from complying with the code and paying the tax. A federal court in the District of Columbia held that, while the labor provisions were unconstitutional, the regulations on fair trade practices and the tax provisions were valid and dismissed Carter’s complaint. Carter and Guy Helvering, the Commissioner of Internal Revenue, cross-petitioned the Supreme Court for certiorari. Several other cases challenging the act were consolidated for hearing before the Court.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

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* *** Certain recitals contained in the act plainly suggest that its makers were of opinion that its constitutionality could be sustained under some general federal power, thought to exist, apart from the specific grants of the Constitution.

* *** The recitals to which we refer * *** are to the effect that the distribution of bituminous coal is of national interest, affecting the health and comfort of the people and the general welfare of the Nation; that this circumstance, together with the necessity of maintaining just and rational relations between the public, owners, producers, and employees, and the right of the public to constant and adequate supplies at reasonable prices, require regulation of the industry as the act provides. These affirmations—and the further ones that the production and distribution of such coal “directly affect interstate commerce,” because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will in the present act. Nevertheless, this preamble may not be disregarded. On the contrary it is important, because it makes clear, except for the pure assumption that the conditions described “directly” affect interstate commerce, that the powers which Congress undertook to exercise are not specific but of the most general character—namely, to protect the general public interest and the
health and comfort of the people, to conserve privately-owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nation-wide production and distribution of coal. These, it may be conceded, are objects of great worth; but are they ends, the attainment of which has been committed by the Constitution to the federal government? This is a vital question; for nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.

The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion.

The general rule with regard to the respective powers of the national and the state governments under the Constitution is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment.

The general purposes which the act recites, and which Congress undertook to achieve, are beyond the power of Congress except so far, and only so far, as they may be realized by an exercise of some specific power granted by the Constitution.

Since the validity of the act depends upon whether it is a regulation of interstate commerce, the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question in this branch of the case. In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation.

The word “commerce” is the equivalent of the phrase “intercourse for the purposes of trade.” Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor, and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject-matter of commerce into existence. Commerce disposses of it.

A consideration of the foregoing renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. Everything which moves in interstate commerce
has had a local origin. * * * [T]he local character of mining, of manufacturing, and of crop growing is a fact, and remains a fact, whatever may be done with the products.

* * *

But section 1 (the Preamble) of the act now under review declares that all production and distribution of bituminous coal “bear upon and directly affect its interstate commerce”; and that regulation thereof is imperative for the protection of such commerce. The contention of the government is that the labor provisions of the act may be sustained in that view.

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the “Preamble” recites, or indirect. * * *

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word “direct” implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not—What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but—What is the relation between the activity or condition and the effect?

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment, and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.

The government’s contentions in defense of the labor provisions are really disposed of adversely by our decision in the Schechter Case, supra. The only perceptible difference between that case and this is that in the Schechter Case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceases when interstate commercial
intercourse ends; and correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. ** * * A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended.

** * * *

[Reversed.]

** * * *

Mr. Justice CARDOZO, dissenting. ** * * *

** * * * I am satisfied that the act is within the power of the central government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected. Whether it is valid also in other provisions that have been considered and condemned in the opinion of the Court, I do not find it necessary to determine at this time. ** * * *

[The obvious and sufficient answer is, so far as the act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely “affect” it. ** * * * To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. ** * * * They must therefore be subject to the power of the Nation unless they are to be withdrawn altogether from governmental supervision. ** * * * If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. This does not mean, of course, that prices may be fixed for arbitrary reasons or in an arbitrary way. The commerce power of the Nation is subject to the requirement of due process like the police power of the states. ** * * * Heed must be given to similar considerations of social benefit or detriment in marking the division between reason and oppression. The evidence is overwhelming that Congress did not ignore those considerations in the adoption of this act. ** * * *

Regulation of prices being an exercise of the commerce power in respect of interstate transactions, the question remains whether it comes within that power as applied to intrastate sales where interstate prices are directly or intimately affected. Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. Sometimes it is said that the relation must be “direct” to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that “the law is not indifferent to considerations of degree.” Schechter Poultry Corporation v. United States, supra, concurring opinion, 295 U.S. at page 554, 55 S.Ct. 853 (1935). It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie. Perhaps, if one group of adjectives is to be chosen in preference to another, “intimate” and “remote” will be found to be
as good as any. At all events, “direct” and “indirect,” even if accepted as sufficient, must not be read too narrowly. * * * A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

One of the most common and typical instances of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors. In such circumstances Congress has the power to protect the business of its carriers against disintegrating encroachments. Houston, E. & W. T. R. Co. v. U.S. (Shreveport Case), 234 U.S. 342, 351, 352, 34 S.Ct. 833 (1914). * * * To be sure, the relation even then may be characterized as indirect if one is nice or over-literal in the choice of words. Strictly speaking, the intrastate rates have a primary effect upon the intrastate traffic and not upon any other, though the repercussions of the competitive system may lead to secondary consequences affecting interstate traffic also. * * * What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain. There is a like immediacy here. Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. * * *

***

I am authorized to state that Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.

The reason for the Court's newfound love affair with the dualist philosophy is not difficult to uncover. It stemmed less from an infatuation with any dogma of the federal relationship than from the utility such a legal ideology came to have in the late nineteenth and early twentieth centuries as it helped to actualize the economic philosophy of laissez-faire capitalism—that view that the economic life of a nation is best served by the noninterference of government with business, putting exclusive reliance on the operation of the free market. This self-serving outlook was not entirely foreign to the Court, since many of the Justices had prior experience as corporation lawyers. As you will see in Chapter 7, the Court's emasculation of the Commerce Clause—especially at a time when the rise of enormous business and financial conglomerates spanning many states made their description as "local" enterprises laughable—was coordinated with another constitutional doctrine, the "liberty of contract," to achieve the goal of no governmental regulation of business at all.

Discussions of the federal relationship do not take place in a vacuum. It is, therefore, important to understand the relationship between competing conceptions of federalism and the advancement of certain economic interests and political values at any given time. To the extent that liberal economic interests can be identified as favoring those in the society who have less income and property and conservative interests can be identified as favoring those who have more, it is clear that neither liberals nor conservatives have been consistent throughout American history in the view of federalism they have favored. Because liberal interests were well represented at the state level in the early days of this country, political leaders such as Jefferson and Andrew Jackson favored decentralization and were wary of attempts by the wealthier elements of society to use the powers of the national government to advance the interests of property holders. By the time we had reached the twentieth century, state governments often seemed to have been overtaken by conservative forces, which blocked needed measures to confront the effects of the Industrial Revolution.
Cooperative federalism thus became the theme of the domestic policies pursued by such Presidents as Franklin Roosevelt, Harry Truman, John F. Kennedy, and Lyndon Johnson. The propertied and business classes, however, were advantaged by Hamilton’s financial plan, by the policies pursued by the Federalists until they lost control of the national government in 1800, and by many of the rulings of the Marshall Court. State governments in those days were often in the hands of political forces sympathetic to the plight of debtor farmers. After the Civil War, conservatives increasingly found their interests better protected by state government—which in the American system is the level of government most involved in the regulation of private property—and they came to resist national efforts to address the economic consequences of the Industrial Revolution, economic interdependence, and urbanism.

It was the Court’s insensitivity to the deleterious effects of applying its dual federalist philosophy that led the Supreme Bench into supreme difficulty in the 1930s. The Great Depression brought home with cruel candor what the prevailing majority of Justices had chosen to ignore: that the days of agrarian supremacy and cottage industry—the stuff of which economic localism is made—had long since been replaced by an interdependent national economy, which could not tolerate the luxury of being left on automatic pilot. As the Court repeatedly sallied forth to hatchet New Deal legislation, such as the National Recovery Act and the Guffey Coal Act, designed to help the nation back on its feet, the gulf between legal image and economic reality grew. Tenacious adherence to an artificial view of the economy, fueled by a mechanical, unthinking application of legal concepts, ultimately set the Executive and the Court on a collision course.

The period of Republican dominance over the federal government that began with the election of Lincoln in 1860 ended with Franklin Roosevelt’s election in 1932. As Exhibit 5.2 below shows, the Great Depression was a time of radical and quick realignment in American politics when a new political coalition—the New Deal coalition—came to power and dominated American politics for the next three and a half decades. As with other realigning elections, like 1800 and 1860, the unelected, life-tenured federal judiciary was still in the hands of individuals highly sympathetic to the political interests that had just been turned out

<table>
<thead>
<tr>
<th>YEAR</th>
<th>POPULAR VOTE FOR PRESIDENT</th>
<th>HOUSE OF REPRESENTATIVES</th>
<th>SENATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1920</td>
<td>60.4% Harding (R)</td>
<td>132</td>
<td>300</td>
</tr>
<tr>
<td>1924</td>
<td>54.0% Coolidge (R)</td>
<td>183</td>
<td>247</td>
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<tr>
<td>1928</td>
<td>58.2% Hoover (R)</td>
<td>163</td>
<td>267</td>
</tr>
<tr>
<td>1930</td>
<td></td>
<td>216</td>
<td>218</td>
</tr>
<tr>
<td>1932</td>
<td>57.4% Roosevelt (D)</td>
<td>313</td>
<td>117</td>
</tr>
<tr>
<td>1934</td>
<td></td>
<td>322</td>
<td>103</td>
</tr>
<tr>
<td>1936</td>
<td>60.8% Roosevelt (D)</td>
<td>333</td>
<td>89</td>
</tr>
<tr>
<td>1938</td>
<td></td>
<td>262</td>
<td>169</td>
</tr>
<tr>
<td>1940</td>
<td>54.8% Roosevelt (D)</td>
<td>267</td>
<td>162</td>
</tr>
<tr>
<td>1944</td>
<td>53.5% Roosevelt (D)</td>
<td>243</td>
<td>190</td>
</tr>
</tbody>
</table>
of power. The political confrontation that resulted from this political changing of the guard was worse than most. Over the course of American history, presidents make an average of two appointments to the Supreme Court per four-year term. Some make more; some make less. President Warren Harding, a deeply conservative President by any measure you could use, made four appointments in his two and a half years in office; those appointees were as conservative as he was—an unremarkable observation, given that most Supreme Court appointees generally share the values of the administration appointing them. As luck would have it, however, Franklin Roosevelt turned out to be the first President in American history to serve a full term in office and not have even a single opportunity to make an appointment to the Court. Historical accident, therefore, combined with political ideology to make this confrontation more severe—an irony, given the fact that (as Exhibit 5.3 below shows) the

| EXHIBIT 5.3  VOTING BLOCS ON THE UNITED STATES SUPREME COURT |
|---------------|-----------------|---------------|
| **Left**—voting record favoring government over business in economic regulation cases and, since the 1920s, favoring the individual over government in civil liberties cases. | **Center** | **Right**—a voting record favoring business over government in economic regulation cases and, since the 1920s, favoring government over the individual in civil liberties cases. |
| **LEFT** | **CENTER** | **RIGHT** |
| The White Court in 1916 | McKenna (1898) | Day (1903) |
| | Holmes (1902) | White (1910) |
| | Brandeis (1916) | Van Devanter (1910) |
| | Clarke (1916) | Pitney (1912) |
| | | McReynolds (1914) |
| The Taft Court in 1923 | McKenna | Van Devanter |
| | Holmes | McReynolds |
| | Brandeis | Taft (1921) |
| | | Butler (1922) |
| | | Sutherland (1923) |
| | | Sanford (1923) |
| The Hughes Court in 1936 | Brandeis | Van Devanter |
| | Stone (1925) | McReynolds |
| | Cardozo (1932) | Butler |
| | | Sutherland |
| **LEFT** | **CENTER** | **RIGHT** |
| Black (1937) | Stone (1941)* | Roberts (1930) |
| Douglas (1939) | Frankfurter (1939) | The Stone Court in 1943 |
| Murphy (1940) | Jackson (1941) | Reed (1938) |
| Rutledge (1943) |

Dates in parentheses indicate year of appointment to the Court.

*Appointed Chief Justice by President Roosevelt

Note: Although the appearance of this chart may seem puzzling at first glance, the movement of the judicial voting blocs one position to the political left by 1943 reflects the result of the Constitutional Revolution that began in 1937: (1) the pivotal vote changes by Chief Justice Hughes and Justice Roberts, (2) the appearance of a completely new left position (the “preferred freedoms” approach), and (3) the retirement within the next three years of all of the Justices who heretofore had comprised the political right on the Court. With Justice McReynold’s exit from the Court in 1940, the old right-wing position disappeared entirely.
Court was much less solidly conservative (thanks to the three Hoover appointees in 1930 and 1932) than it had been only a short time before under Chief Justice Taft.

**The Decline of Dual Federalism**

Returned to office for a second term by the largest popular mandate in American history up to that time and with a Congress that showed Republican opposition reduced to a shadow of what it once had been, President Franklin Roosevelt launched a proposal to overhaul the Supreme Court. It provided a comfortable retirement for Justices leaving the Court and, more significantly, authorized the President to appoint one additional Justice for each sitting Justice on the Court who was 70 years of age or older. Though the formal debate was focused on whether an institution dominated by such elderly men (six were over 70) could effectively manage a burgeoning caseload, the real debate was political. Said Roosevelt, defending his plan in a “fireside chat” to the American public on March 9, 1937:

> We have * * * reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

> I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized. * * *

Franklin Roosevelt was unsuccessful in persuading Congress to adopt the proposal to “pack the Court.” Many Democratic legislators deserted him, sensing public outrage at any attack on the independence of so sacred an institution as the Supreme Court. The goal of attaining a more receptive judiciary was nonetheless realized when, in a marked shift from previous voting patterns, the Court’s moderate bloc, composed of Chief Justice Hughes and Justice Roberts—taking the hint—aligned with the Court’s three liberals, Justices Brandeis, Cardozo, and Stone, to create a majority sustaining the constitutionality of future New Deal legislation over the dissenting votes of the four hard-core conservatives, Justices Van Devanter, McReynolds, Butler, and Sutherland. Concluding that the cause was now lost, the conservatives one by one stepped down. By 1941, when McReynolds, the last of the four irreconcilables, retired, the Right position disappeared completely. The impact of President Roosevelt’s nine appointments, however, was historic not only in number (the only President to name more Justices to the Court was Washington with 10), but also in effect. Roosevelt’s nine appointments reconfigured voting alignments by shoving the Court one notch to the left: What was once the Center now became the political Right; what was once the Left now became the Center; and a new Left position—what we know as strict scrutiny or the preferred freedoms approach—emerged. Although Roosevelt had appointed his staunchest supporters in the Court-packing controversy—all vigorous critics of the old Court’s activism—a deep division among them would soon become apparent over whether a Court pledged to practice self-restraint in economic affairs was equally bound to judicial self-restraint when civil liberties were infringed.

To be sure, Congress’s unwillingness to acquiesce in Roosevelt’s Court-packing proposal spared the Court outright humiliation, but the ultimate decision to back down is in keeping with the overall pattern of other such confrontations. Under threats of impeachment and removal by a hostile Jeffersonian Congress, the Marshall Court chose
to bite its tongue and tone down some of its Federalist excesses rather than to battle it out. The same behavior is equally descriptive of a more dualist-oriented Court in the post–Civil War years, when a Radical Republican Congress began taking away seats on the Court and shaving down its appellate jurisdiction. These episodes underscore the combative weakness of the judicial institution as compared to the other two branches. Faced with the prospect of decisive open confrontation, the Court will—because it has to—tuck its tail. It is the style of abandonment and the ultimate wholehearted acceptance of the initially unacceptable cooperative federalist philosophy that tie together the remaining three cases in this section.

In its retreat from such a confrontation, the Court has three possibilities. It can ignore the irritating precedents that gave rise to the conflict. It can distinguish a case presently before it, thus pulling the teeth of the irritating precedents with a maximum of judicial grace and telegraphing to the antagonist that it has gotten the message and decided to retire from the battle. Finally, the Court can overrule itself, openly confessing it was wrong. This last option, however, is costly to the judicial image.

Forgetting irritating precedents was not possible in 1937. As we have seen, the Court affirmed the use of its dual federalist doctrines too often to make that strategy possible. So, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, the Court engaged in the second mode of retreat, elaborately explaining why what before might have seemed like “indirect effects” on national commerce suddenly were now somehow different. The interdependence among the sectors of the American economy, which the Depression had made so evident, paralleled the Court’s description of the integrated economic functions making up the giant Jones & Laughlin Steel Corporation. Miraculously, “direct” effects were now measured by their impact, not their source, and the constitutionality of the National Labor Relations Act was sustained. To the chagrin of the four conservatives, the majority here was engaged in the use of “word magic”—the abstract distinguishing of seemingly like cases to achieve significant political results.

**National Labor Relations Board v. Jones & Laughlin Steel Corp.**

Supreme Court of the United States, 1937

301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893

**BACKGROUND & FACTS** In 1935, Congress passed the National Labor Relations Act, commonly known as the Wagner Act, to replace the collective bargaining guarantee provision of the National Industrial Relations Act (NIRA), which had been declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935). The Wagner Act guaranteed the right of collective bargaining and authorized the National Labor Relations Board (NLRB) to prevent specified unfair labor practices that affected commerce. The rationale for the Act was, in part, that the unfair practices led to strikes and disputes, which, in turn, obstructed the free flow of commerce. An affiliate of the Amalgamated Association of Iron & Tin Workers of America initiated proceedings before the NLRB against the Jones & Laughlin Steel Corporation, the fourth largest steel producer in the country. The affiliate charged that the corporation was discouraging employees from joining the union and that it had, in fact, fired 10 men because of their union activities. After hearings, the board sustained the charge and, among other things, ordered the corporation to offer to reinstate the 10 men. The corporation refused to comply, maintaining that the Wagner Act regulated labor relations, not commerce, and was
consequently unconstitutional. The NLRB petitioned a U.S. circuit court to enforce the order, but that court denied the petition. The board appealed. On hearing by the Court, this case was consolidated with several others involving challenges to the Act.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board, and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pa. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore & Ohio Railroad systems. It owns the Aliquippa & Southern Railroad Company, which connects the Aliquippa works with the Pittsburgh & Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semifinished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases, and operates stores, warehouses, and yards for the distribution of equipment and supplies for drilling and operating oil and gas mills and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa “might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated.”

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

***

While respondent criticizes the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, *** the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose
The evidence supports the findings of the Board that respondent discharged these men “because of their union activity and for the purpose of discouraging membership in the union.”

First. The Scope of the Act.—The act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns.

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in section 10(a), 29 U.S.C.A. §160(a), which provides:

“Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158]) affecting commerce.”

The critical words of this provision, prescribing the limits of the Board’s authority in dealing with the labor practices, are “affecting commerce.” The act specifically defines the “commerce” to which it refers (section 2(6), 29 U.S.C.A. §152(6)):

“The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.”

There can be no question that the commerce thus contemplated by the act is interstate and foreign commerce in the constitutional sense. The act also defines the term “affecting commerce” section 2(7), 29 U.S.C.A. §152(7):

“The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”

The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes.

It is the effect upon commerce, not the source of the injury, which is the criterion.

Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The Unfair Labor Practices in Question.—

In its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the discharge of the employees are concerned.
of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209, 42 S.Ct. 72, 78 (1921). We reiterated these views when we had under consideration the Railway Labor Act of 1926 * * *.*

Third. The Application of the Act to Employees Engaged in Production.—The Principle Involved.—Respondent says that, whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent’s enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. * * * Schechter Corporation v. United States, 295 U.S. 495, at page 547, 55 S.Ct. 837, 850 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 304, 317, 327, 56 S.Ct. 855, 869, 875, 880 (1936).

The government distinguishes these cases. The various parts of respondent’s enterprise are described [by the government] as interdependent and as thus involving “a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business.” It is urged that these activities constitute a “stream” or “flow” of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397 (1922). * * *

* * * [But] congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a “flow” of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact “all appropriate legislation” for its “protection or advancement” * * * [and] to promote its growth and insure its safety.” * * * That power is plenary and may be exerted to protect interstate commerce “no matter what the source of the dangers which threaten it.” Second Employers’ Liability Cases, 223 U.S. 1, at page 51, 32 S.Ct. 169, 176. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. * * * Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace
effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. ** * * * 

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. The Shreveport Case (Houston, E. & W. T. R. Co. v. United States), 234 U.S. 342, 351, 34 S.Ct. 833 (1914). ** * * * 

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. ** * * * 

** * * * 

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the Schechter Case, supra, we found that the effect there was so remote as to be beyond the federal power. To find “immediacy or directness” there was to find it “almost everywhere,” a result inconsistent with the maintenance of our federal system. In the Carter Case, supra, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the Unfair Labor Practice in Respondent’s Enterprise.—Giving full weight to respondent’s contention with respect to a break in the complete continuity of the “stream of commerce” by reason of respondent’s manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent’s far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. ** * * *
The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

Our conclusion is that the order of the Board was within its competency and that the act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice McREYNOLDS delivered the following dissenting opinion.

Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, Mr. Justice BUTLER and I are unable to agree with the decisions just announced.

The Court as we think departs from well-established principles followed in Schechter Poultry Corporation v. United States, and Carter v. Carter Coal Co. * * *

By its terms the Labor Act extends to employers—large and small—unless excluded by definition, and declares that, if one of these interferes with, restrains, or coerces any employee regarding his labor affiliations, etc., this shall be regarded as unfair labor practice. And a "labor organization" means any organization of any kind or any agency or employee representation committee or plan which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

The three respondents happen to be manufacturing concerns—one large, two relatively small. The act is now applied to each upon grounds common to all. Obviously what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety of private enterprises—mercantile, manufacturing, publishing, stock-raising, mining, etc. It puts into the hands of a Board power of control over purely local industry beyond anything heretofore deemed permissible.

Any effect on interstate commerce by the discharge of employees shown here would be indirect and remote in the highest degree, as consideration of the facts will show. In [Jones & Laughlin] ten men out of ten thousand were discharged; in the other cases only a few. The immediate effect in the factory may be to create discontent among all those employed and a strike may follow, which, in turn, may result in reducing production, which ultimately may reduce the volume of goods moving in interstate commerce. By this chain of indirect and progressively remote events we finally reach the evil with which it is said the legislation under consideration undertakes to deal. A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine.

The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy.

We are told that Congress may protect the "stream of commerce" and that one who buys raw material without the state, manufactures it therein, and ships the output to another state is in that stream. Therefore it is said he may be prevented from doing anything which may interfere with its flow.

This, too, goes beyond the constitutional limitations heretofore enforced. If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch?
The products of a mine pass daily into interstate commerce; many things are brought to it from other states. Are the owners and the miners within the power of Congress in respect of the latter's tenure and discharge? May a mill owner be prohibited from closing his factory or discontinuing his business because so to do would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close the factory and thereby stop the flow of commerce? May arson of a factory be made a federal offense whenever this would interfere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction? If the ruling of the Court just announced is adhered to, these questions suggest some of the problems certain to arise.

And if this theory of a continuous “stream of commerce” as now defined is correct, will it become the duty of the federal government hereafter to suppress every strike which by possibility it may cause a blockade in that stream? ** Moreover, since Congress has intervened, are labor relations between most manufacturers and their employees removed from all control by the state? **

** There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from states other than that of his factory and whose products are regularly carried to other states, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce. In such business, there is not one but two distinct movements or streams in interstate transportation. The first brings in raw material and there ends. Then follows manufacture, a separate and local activity. Upon completion of this and not before, the second distinct movement or stream in interstate commerce begins and the products go to other states. Such is the common course for small as well as large industries. It is unreasonable and unprecedented to say the commerce clause confers upon Congress power to govern relations between employers and employees in these local activities. **

**

As the Court became fully transformed with the arrival of so many new Justices, the option of explicitly overruling the disagreeable precedents became feasible. Four years after the about-face in Jones & Laughlin, soon-to-be Chief Justice Harlan Stone overruled Hammer v. Dagenhart outright and sounded the death knell for Carter Coal in United States v. Darby, 312 U.S. 100, 61 S.Ct. 451 (1941). In Darby, the now–New Deal Court had little difficulty upholding the constitutionality of the Fair Labor Standards Act of 1938 (FLSA), which prohibited the shipment in interstate commerce of goods produced by employees who were paid less than a minimum wage (originally set at 25 cents an hour) or who had worked more than 44 hours a week without being paid overtime. The FLSA also required employers to keep records of workers’ wages and hours of employment. Darby, who owned a lumber business in Georgia, was indicted for violating these provisions of the law. After repeatedly quoting the principles declared in Gibbons v. Ogden, Justice Stone, on behalf of a unanimous Court, administered the coup de grâce:

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power “to prescribe the rule by which commerce is to be governed.” **

** The power of Congress over interstate commerce “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the Constitution.” ** That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. ** Congress, following its own conception of public policy
concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. * * *

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other constitutional provisions. * * *

The conclusion is inescapable that * * *

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. * * *

The means adopted by * * * [the provisions of the FLSA] for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce [are] so related to the commerce and so affect[ed] it as to be within the reach of the commerce power. * * *

So far as * * * [our recent] decisions under the Sherman Act and the National Labor Relations Act. * * *

The vitality of states’ rights as an independent bar to the exercise of the federal government’s enumerated powers vanished with a wave of the Court’s hand. The Tenth Amendment was reduced to stating a mere tautology:

Our conclusion is unaffected by the Tenth Amendment which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. * * *

The final step in harmonizing federal regulatory power over production with the longstanding precedents declaring its supremacy in regulating distribution was achieved a year later in * * *

The Agricultural Adjustment Act of 1938, as amended in 1941, directed the Secretary of Agriculture, Claude Wickard, to establish
within certain limits a national acreage allotment for wheat. This figure was subdivided several times into quotas for individual farmers. Penalties were fixed for farmers who exceeded their quota. Filburn owned a small farm in Ohio that was allotted 11.1 acres for the 1941 wheat crop. Instead, he grew 23 acres of wheat, intending to keep the excess crop for his own consumption. From this additional acreage Filburn harvested 239 bushels to which the government affixed a penalty of 49 cents each, for a total penalty of $117.11. Filburn refused to pay the penalty or to deliver the excess wheat to the Department of Agriculture. Instead, he filed a complaint in federal district court to have the enforcement of the penalty enjoined and for a declaratory judgment that the act as applied to him was unconstitutional under both the Commerce Clause and the Fifth Amendment. The district court granted the injunction, but on the basis of other issues surrounding the 1941 amendment, whereupon the government appealed.

Mr. Justice JACKSON delivered the opinion of the Court.

It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States v. Darby,* * * except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.* * * [The marketing quota for each farmer covered by the Act restricts him to harvesting a specific amount of wheat and penalizes excess production, whether the surplus is sold or whether it is consumed by the farmer.]

Appellee says that this * * * regulation of production and [home] consumption of wheat * * * are * * * beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most “indirect.” In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a “necessary and proper” implementation of the power of Congress over interstate commerce.

* * * We believe that a review of the course of decision[s] under the Commerce Clause * * * make[s] plain * * * that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as “production” and “indirect” and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

* * * In some cases sustaining the exercise of federal power over intrastate matters the term “direct” was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with “substantial” or “material”; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

* * * The Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause * * * has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be “production” nor can consideration of its economic effects be foreclosed by calling them “indirect.” * * *

Whether the subject of the regulation in question was “production,” “consumption,”
or “marketing” is, therefore, not material for purposes of deciding the question of federal power before us. ** If appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as “direct” or “indirect.”

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. **

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920s they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

**

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about $1.16 a bushel as compared with the world market price of 40 cents a bushel.

**

** Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding; and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. **

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

** The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. **

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the
regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

* * *

The statute is also challenged as a deprivation of property without due process of law contrary to the Fifth Amendment *** because of its regulatory effect on the appellee and because of its alleged retroactive effect. * * *

Appellee's claim that the Act works a deprivation of due process even apart from its allegedly retroactive effect is not persuasive. Control of total supply, upon which the whole statutory plan is based, depends upon control of individual supply. Appellee's claim is * * * that the Fifth Amendment requires that he be free from penalty for planting wheat and disposing of his crop as he sees fit.

We do not agree. In its effort to control total supply, the Government gave the farmer a choice which was, of course, designed to encourage cooperation and discourage non-cooperation. The farmer who planted within his allotment was in effect guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis. Exemption from the applicability of quotas was made in favor of small producers. The farmer who produced in excess of his quota might escape penalty by delivering his wheat to the Secretary or by storing it with the privilege of sale without penalty in a later year to fill out his quota, or irrespective of quotas if they are no longer in effect, and he could obtain a loan of 60 per cent of the rate for cooperators, or about 59 cents a bushel, on so much of his wheat as would be subject to penalty if marketed. Finally, he might make other disposition of his wheat, subject to the penalty. It is agreed that as the result of the wheat programs he is able to market his wheat at a price "far above any world price based on the natural reaction of supply and demand." We can hardly find a denial of due process in these circumstances ***. It is hardly lack of due process for the Government to regulate that which it subsidizes. * * *

Reversed.

C. REKINDLING DUAL FEDERALISM: THE REHNQUIST COURT

After three decades of the triumph of New Deal economics and with it New Deal federalism, the appointment of four Justices by President Nixon, ending in 1972, appeared to usher in a modest revival in the fortunes of the Tenth Amendment, which had been so cavalierly shrugged off in Darby. In Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017 (1968), the Supreme Court upheld Congress's extension of the provisions of the Fair Labor Standards Act to employees of state government. However, in National League of Cities v. Hodel, 426 U.S. 833, 96 S.Ct. 2465 (1976), eight years later, the Court overruled Wirtz and carved out for the states as states immunity from the reach of the very legislation it had sustained in Darby. Although avoiding the tax-raising impact of minimum wage and maximum hours legislation on the states, which was attractive to some, the notion that the states as states had functions that put them beyond the exercise of Article I powers by the federal government raised the question of just how far the parameters of sovereignty extended. Although National League of Cities was feared to be the entering edge of the wedge in a revival of dual federalism, this concern dissipated when the Court—sensing that drawing a boundary line separating state from national sovereignty was much more difficult
than it had first appeared—abandoned the effort and overruled National League of Cities within a decade in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005 (1985).

**The Rehnquist Court and the Commerce Clause**

Additional appointments to the Court rekindled the effort. During the period 1969–1993, 11 Justices were named to the Court—all by Republican presidents. Until 1993 and 1994 when President Clinton successfully nominated Justices Ginsburg and Breyer, no Democratic President had appointed a Justice since President Johnson named Justice Thurgood Marshall to the Court in 1967. In 1986, Chief Justice Burger retired and President Reagan elevated Justice William Rehnquist to the position. The effect of such a long stretch of appointments by Republican presidents who generally selected individuals to the political Right of the people they replaced, most notably when Justice Thomas was tapped to replace Justice Marshall in 1991, was that the Court became more and more conservative over the intervening decades so that, while the dual federalist flame may be said to have flickered in García (decided by a 5–4 vote), it never went out.

The political impact of the Reagan and Bush appointees was such that, by the mid-1990s, the Court’s conservatives were in a position to reignite dual federalism, and this is what they did in United States v. Lopez. As school violence mounted, Congress enacted the Gun-Free School Zones Act of 1990, the constitutionality of which was the issue in Lopez. The Court’s decision in that case was the first setback for Congress’s exercise of the “federal police power” since the Great Depression.

**UNITED STATES v. LOPEZ**

Supreme Court of the United States, 1995
514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626

**BACKGROUND & FACTS** By enacting the Gun-Free School Zones Act of 1990, 18 U.S.C.A. § 922(q), Congress made it a federal offense “for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone.” The statute defined a “school zone” as “in or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” Lopez, a senior at a San Antonio, Texas, high school was found by school officials to be carrying a .38 caliber handgun and five bullets at school. Lopez was arrested and charged under state law with possession of a firearm on school premises. The next day, the state charges were dismissed after federal agents charged the defendant with violating the Gun-Free School Zones Act. A federal grand jury later indicted Lopez with violating § 922(q), and he was subsequently convicted in a bench trial and sentenced to six months’ imprisonment and two years’ supervised release. On appeal, Lopez argued that § 922(q) exceeded Congress’s legislative power under the Commerce Clause. The federal appellate court agreed and reversed his conviction, whereupon the Supreme Court granted the federal government’s petition for certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

**W**e have identified three broad categories of activity that Congress may regulate under its commerce power. **F**irst, Congress may regulate the use of the channels of interstate commerce. **F**irst, Congress may regulate the use of the channels of interstate commerce. **S**econd, Congress is empowered to regulate and protect the instrumentalities of inter-
state commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. *** Finally, Congress’ commerce authority includes the power to regulate *** those activities that substantially affect interstate commerce.

***

The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, *** intrastate extortionate credit transactions, *** restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, *** and production and consumption of home-grown wheat, Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even Wickard, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. *** Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. ***

***

*** The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. *** Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. *** The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

*** The Government admits, under its “costs of crime” reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. *** Similarly, under the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on
federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school’s curriculum has a “significant” effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant “effect on classroom learning,” * * * and that, in turn, has a substantial effect on interstate commerce.

We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half-century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to “regulate Commerce . . . among the several States,” U.S. Const., Art. I, § 8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. * * *

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools). * * *

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words “rational basis” capture this leeway. * * *

Applying these principles to the case at hand, we must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. * * *

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, * * * that 12 percent of urban high school students have had guns
fired at them, * * * that 20 percent of those students have been threatened with guns, and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools * * *.

And, Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation’s classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation’s economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. * * *

As late as the 1920’s, many workers still received general education directly from their employers—from large corporations, such as General Electric, Ford, and Goodyear, which created schools within their firms to help both the worker and the firm. * * *

As public school enrollment grew in the early 20th century, * * * the need for industry to teach basic educational skills diminished. But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America’s economic growth in the early years of this century is traceable directly to increased schooling. * * *

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. * * *

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. * * * Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. * * * At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts. * * *

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. * * *

* * * In light of this increased importance of education to individual firms, it is no surprise that half of the Nation’s manufacturers have become involved with setting standards and shaping curricula for local schools, * * * that more than 20 States have recently passed educational reforms to attract new business, * * * and that business magazines have begun to rank cities according to the quality of their schools. * * *

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning also substantially threatens the commerce to which that teaching and learning is inextricably tied?

* * * At the very least, Congress could rationally have concluded that the links are “substantial.”

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, * * * and (2) to communities and businesses that might (in today’s “information society’’
otherwise gain, from a well-educated work force, an important commercial advantage of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the “funds” of “numerous localities,” and that unfair labor practices pose to instrumentalities of commerce. Congress has written that “the occurrence of violent crime in school zones” has brought about a “decline in the quality of education” that “has an adverse impact on interstate commerce and the foreign commerce of the United States.” The violence-related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

Five years later, on the eve of the 2000 presidential election, the five-Justice majority remained rock solid when the Court decided United States v. Morrison, which follows. At issue in Morrison was the constitutionality of the Violence Against Women Act, which Congress passed in 1994. As is clear from Justice Souter’s dissent, there was increasing polarization on the Court over the majority’s revival of dual federalism. No longer content simply to argue the specifics of the statute or the sufficiency of the legislative record Congress had assembled in passing it, the dissenters chided the majority for its failure to heed the lessons taught by the experience of the 1930s, and predicted that such efforts would only end in futility.

**United States v. Morrison**

Supreme Court of the United States, 2000

529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658

**BACKGROUND & FACTS** Christy Brzonkala, a freshman at Virginia Polytechnic Institute (VPI), alleged that she had been assaulted and raped by Antonio Morrison and two other students. In the months following the rape, Morrison loudly announced in a university dining hall that he liked to get women drunk and then in a series of debasing remarks said what he liked to do to them. The sexual attack resulted in serious depression and emotional disturbance and compelled Brzonkala to withdraw from the university. She filed a complaint against her attackers under VPI’s sexual assault policy. During the university’s hearing on the complaint, Morrison admitted having sexual relations with Brzonkala despite the fact that twice she had said “no.” Morrison was found guilty of sexual assault and given an immediate two-semester suspension. After Morrison threatened to sue alleging lack of adequate notice about the policy, the university conducted another hearing. VPI’s Judicial Committee came to the same conclusion and imposed the same sanction. Without explanation, the offense was later changed from “sexual assault” to “using abusive language,” and, following appeal through the university’s administrative system, the Provost set aside the punishment because it was out of line with previous cases. When Brzonkala learned that Morrison was back on campus, she sued her attackers under 42 U.S.C.A. § 13981, part of the Violence Against Women Act, which declares that “[a]ll persons within the United States shall have the right to be free from crimes of
violence motivated by gender” and affords an injured party the right to sue for compensatory and punitive damages and for injunctive relief. Brzonkala also sued VPI for its handling of her complaint as a violation of Title IX of the Education Amendments of 1972.

At trial in federal district court, Morrison moved to dismiss Brzonkala’s suit on grounds it failed to state a claim and that the civil remedy provided by § 13981 was unconstitutional. The United States then intervened to defend the constitutionality of the statute. The district court found she had stated a claim, but dismissed the suit because it held that neither the Commerce Clause nor § 5 of the Fourteenth Amendment provided a constitutional basis for the remedy. Ultimately, the case was heard by the U.S. Court of Appeals for the Fourth Circuit sitting en banc. Although that court agreed that Brzonkala had stated a claim of gender-motivated violence, a finding that was supported by Morrison’s crude and derogatory remarks, it affirmed the lower court’s ruling that the civil remedy provided by the statute was unconstitutional. The Supreme Court subsequently granted certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

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In contrast with the lack of congressional findings that we faced in Lopez, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. ***

*** Congress’ findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers. Congress found that gender-motivated violence affects interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.” Given these findings and petitioners’ arguments, the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded. ***

The reasoning that petitioners advance seeks to follow the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce. If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that
conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

Petitioner Brzonkala’s complaint alleges that she was the victim of a brutal assault. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is Affirmed.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 124–128, 63 S.Ct. 82 (1942). The fact of such a substantial effect is not an issue for the courts in the first instance but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours.

One obvious difference from United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce.

Based on the data Congress found that “crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.” Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges [Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348 (1964), and Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377 (1964)].

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In Wickard, we upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit. Violence against women may be found to affect interstate commerce and affect it substantially.

The Act would have passed muster at any time between Wickard in 1942 and Lopez in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, extended to all activity that, when aggregated, has a substantial effect on interstate commerce.

The fact that the Act does not pass muster before the Court today is proof that the Court’s adherence to
substantial effects test is merely ** nominal. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

[T]he elusive heart of the majority’s analysis ** is its statement that Congress’s findings of fact are “weakened” by the presence of a disfavored “method of reasoning.” ** This seems to suggest that the “substantial effects” analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases **.

***

Since adherence to ** formally contrived confines of [the] commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today’s decision can only be seen as a step toward recapturing the prior mistakes. ***

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting Wickard with one of the predecessor cases it superseded. It was obvious in Wickard that growing wheat for consumption right on the farm was not “commerce” in the common vocabulary, but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before Wickard, however, it had certainly been no less obvious that “mining” practices could substantially affect commerce, even though Carter Coal Co. had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the Carter Coal Court could not understand a causal connection that the Wickard Court could grasp; the difference, rather, turned on the fact that the Court in Carter Coal had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time Wickard was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. ** The Court in Carter Coal was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in Wickard knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall’s conception of the commerce power.

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[T]oday’s ebb of the commerce power *** will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes’s statement that “[t]he first call of a theory of law is that it should fit the facts.” O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory
of laissez-faire was able to govern the national economy 70 years ago.

Justice BREYER, with whom Justice STEVENS,* * * Justice SOUTER,* * * and Justice GINSBURG join,* * * dissenting.

The majority holds that the federal commerce power does not extend to such “noneconomic” activities as “noneconomic, violent criminal conduct” that significantly affects interstate commerce only if we “aggregate” the interstate “effect[s]” of individual instances.

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* * * The “economic/noneconomic” distinction is not easy to apply. Does the local street corner mugger engage in “economic” activity or “noneconomic” activity when he mugs for money? * * * Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute?

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More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress’ power to “regulate Commerce . . . among the several States,” and to make laws “necessary and proper” to implement that power. * * * The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

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*** We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. * * * And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause “aggregation” rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, * * * Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.

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During the 1980s and 1990s, Congress relied on the “federal police power,” as it had been interpreted in The Lottery Case and Brooks (see this Chapter, section A), when it passed such legislation as the Firearm Owner’s Protection Act of 1986, which prohibits the possession or transfer of semi-automatic assault weapons; the Child Support Recovery Act of 1992, which criminalizes the willful nonpayment of back child support for a child residing in another state; the Anti-Car Theft Act of 1992, which punishes carjacking; the Freedom of Access to Clinic Entrances Act of 1993, which punishes individuals whose threatening, obstructive, or destructive conduct is intended to interfere with persons seeking to obtain or provide contraceptive or abortion services; and the federal arson statute, 18 U.S.C.A. § 844(i), which criminalizes the attempted damage or destruction of a building or other property used in, or affecting, foreign or interstate commerce. It is worth noting that the laws just cited have consistently been upheld by federal appeals courts, and the Supreme Court has denied certiorari repeatedly. In Jones v. United States, 529 U.S. 848, 120 S.Ct. 1904 (2000), moreover, the Court unanimously concluded that the federal arson statute only applied to buildings sufficiently connected to interstate commercial activity and not to a building used solely as a private residence, although in another
instance it upheld a defendant’s conviction for setting fire to a hotel even though three-quarters of the guests did not come from outside the state.

It remains to be seen whether the rulings in *Lopez* and *Morrison* are a harbinger of a severely restricted “federal police power” or whether, like *National League of Cities*, they are a shot in the dark. *Gonzales v. Raich*, which follows, casts a shadow over them because it reasserts the expansive view of the commerce power embraced over 60 years before in *Wickard v. Filburn* (p. 318), the last note sounded in the Court’s historic retreat from its New Deal confrontation with President Franklin Roosevelt. The question of *Lopez* and *Morrison*’s vitality, moreover, is unlikely to be settled by President George W. Bush’s recent Court appointments of Chief Justice Roberts and Justice Alito. Even if these two Justices adopted the same *Lopez-Morrison* view of the Commerce Clause held by their predecessors (Rehnquist and O’Connor), the fact remains that there has been no change in the six-Justice majority that decided *Raich*. Barring any further changes in the Court’s membership, then, the matter is in the hands of Justices Scalia and Kennedy, whose alignment with the dissenters in *Lopez* and *Morrison* created the six-Justice majority in *Raich*.

**GONZALES v. RAICH**

Supreme Court of the United States, 2005
545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1

**BACKGROUND & FACTS** After California voters in 1996 approved an initiative legalizing the use of marijuana for medical purposes, the California legislature codified its provisions as the Compassionate Use Act. The law permitted medical patients to possess and use small amounts of marijuana on the recommendation of a certified physician to alleviate pain resulting from illness and the side-effects of medical treatment. Before the end of the next decade, 10 states authorized medical marijuana. Federal law, on the other hand, prohibits the possession and use of marijuana for any reason.

Angel Raich and Diane Monson, California residents who suffered from severe medical conditions, sought legal refuge under the state medical marijuana law for themselves and others similarly situated. Raich, for example, suffered from multiple illnesses, among them a form of wasting disease that caused excruciating pain. Use of marijuana alleviated the pain so that she could eat. Other patients used marijuana to relieve the nausea that accompanies chemotherapy. While Raich obtained the marijuana she used from two care-givers at no cost, Monson grew her own and ingested it by smoking and using a vaporizer. Monson’s home was raided by county and federal law enforcement officers who seized and destroyed her marijuana plants. Raich and Monson brought suit to enjoin the U.S. attorney general from enforcing the federal Controlled Substances Act. They argued that the federal law, as applied to users of medical marijuana, violated the Commerce Clause, denied due process under the Fifth Amendment by depriving them of medical treatment, and infringed the doctrine of medical necessity. Addressing only the Commerce Clause contention, a federal appeals court sustained the state law and invalidated the federal statute as applied. The attorney general then successfully petitioned for certiorari.

Justice STEVENS delivered the opinion of the Court.

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[The Controlled Substances Act of 1970 (CSA)] repealed most of the earlier antidrug laws in favor of a comprehensive regime to
combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.

Respondents in this case do not dispute that passage of the CSA was well within Congress’ commerce power. [They] argue [only] that the CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.

Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce. As we stated in Wickard [v. Filburn, 317 U.S. 111, 128–129, 63 S.Ct. 82 (1942)], “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”

* * *

* * * Like the farmer in Wickard, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. In Wickard, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

One concern prompting inclusion of wheat grown for home consumption in the [AAA] was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern here is the likelihood that the high demand in the interstate market will draw [home-grown] marijuana into that market. In both cases, the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

[Relying] heavily on * * * Lopez, 514 U.S. 549, 115 S.Ct. 1624 and Morrison, 529 U.S. 598, 120 S.Ct. 1740[,] respondents ask us to excise individual applications of a concededly valid statutory scheme.

Unlike those at issue in Lopez and Morrison, the activities regulated by the CSA are quintessentially economic. The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in Morrison casts no doubt on its constitutionality.

First, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply
with statutory and regulatory provisions mandating registration with the [Drug Enforcement Administration], compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements. * * * Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval. * * * [T]he mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

* * *

Second, limiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. * * * [T]he federal power over commerce is “superior to that of the States to provide for the welfare or necessities of their inhabitants,” however legitimate or dire those necessities may be. * * *

* * *

[That] the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana * * * is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor’s permission to recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with “any other illness for which marijuana provides relief” * * * is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. And * * * there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so. * * * The likelihood that * * * [marijuana cultivation] will promptly terminate when patients recover or will precisely match the patients’ medical needs during their convalescence seems remote * * *. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. * * *

Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

[For the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in Wickard v. Filburn and * * * later cases endorsing its reasoning foreclose that claim. * * *

[Vacated and remanded.]

Justice SCALIA, concurring in the judgment.

* * *

[M]arijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. * * * Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for “medical” marijuana and the more general marijuana market. * * * “To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the

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Justice O’CONNOR, with whom THE CHIEF JUSTICE [REHNQUIST] and Justice THOMAS join as to * * * [part], dissenting.

*** One of federalism’s chief virtues *** is that it promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. *** [The Court’s decision is] irreconcilable with our decisions in Lopez * * * and Morrison * * *.

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Today’s decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential * * * to the interstate regulatory scheme. Seizing upon our language in Lopez that the statute prohibiting gun possession in school zones was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,” * * * the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. *** If the Court is right, then Lopez stands for nothing more than a drafting guide: Congress should have described the relevant crime as “transfer or possession of a firearm anywhere in the nation”—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. ***

***

It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power. ***

In Lopez and Morrison, we suggested that economic activity usually relates directly to commercial activity. *** The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) Lopez makes clear that possession is not itself commercial activity. And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value. ***

The Court suggests that Wickard *** established federal regulatory power over any home consumption of a commodity for which a national market exists. *** [The Agricultural Adjustment Act of 1938 (AAA), challenged there, *** provided an exemption *** from production quotas and penalties] for small producers. When Filburn *** [harvested the wheat at issue in Wickard,] the statute exempted *** plantings less than six acres. [Filburn had
planted 23 acres. Wickard, then, did not extend Commerce Clause authority to something as modest as the home cook’s herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that Wickard did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress’ reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Nor has the Government shown that regulating such activity is necessary to an interstate regulatory scheme.

[S]omething more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Indeed, if it were enough in “substantial effects” cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in Lopez that guns in school zones are “never more than an instant from the interstate market” in guns already subject to extensive federal regulation, and thereby upheld the Gun-Free School Zones Act of 1990.

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.

[Bare declarations] amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence—descriptive, statistical, or otherwise.

Relying on Congress’ abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one’s own home for one’s own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. [W]hatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.

Justice THOMAS, dissenting.

[Because] respondents do not challenge the CSA on its face [but only] as applied to their conduct[,] [t]he question is whether the intrastate ban is “necessary and proper” as applied to medical marijuana users like respondents.

Congress’ goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress’ aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.

Congress is authorized to regulate “Commerce,” and respondents’ conduct does not qualify under any definition of that term. The majority’s opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from “commerce,” to “commercial” and “economic” activity, and finally to all “production, distribution, and consumption” of goods or services for which there is an “established . . . interstate market.” Federal power expands with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

One searches the Court’s opinion in vain for any hint of what aspect of American life
The decision in *Raich* did not declare the California statute unconstitutional, so it and the medical marijuana laws of 11 other states remain on the books. What it did was uphold federal authority to prosecute those who cultivate, possess, and use marijuana. But the week after Justice Stevens said in *Raich* that only Congress could make medical marijuana legal, the House voted not to. The vote was on an amendment that would have denied funding to the U.S. Justice Department to enforce the Controlled Substances Act in a manner that would interfere with medical marijuana in any of the states that voted to make it legal. The amendment was defeated in the House by a vote of 161–264. Congressional Quarterly Weekly Report, June 20, 2005, pp. 1649, 1664. The vote in favor of the bill was 13 more than proponents of medical marijuana had been able to muster in the attempt a year earlier.

On the heels of its decision in *Raich*, the Supreme Court granted cert., vacated judgment, and remanded for lower court reconsideration, decisions in two other cases: *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), in which defendant’s federal conviction for possession of a home-made machine gun had been overturned on grounds regulating mere possession did not have a commercial purpose and therefore did not fall within the reach of the Commerce Clause; and *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005), in which the appeals court reversed a federal criminal conviction for producing and possessing child pornography on grounds the defendant’s noncommercial and intrastate activities did not substantially affect interstate commerce (notwithstanding the fact that the film, photographic paper, and film processor had once moved in interstate commerce).  

### The Eleventh Amendment

The determination of the Rehnquist Court to restore dual federalism as the operative model of the federal relationship is also clearly evident in a string of decisions upholding the Eleventh Amendment’s guarantee of sovereign immunity (the doctrine that government cannot be sued without its consent). In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), the Court held that Congress could not use its Article I powers to permit a state to be sued in federal court for damages resulting from its violation of a federal statute. Three years later, in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240 (1999), the same five-Justice majority as in the *Lopez*, *Printz*, and *Morrison* cases slammed the *state* courthouse door to such suits as well. The plaintiffs in *Alden* sought damages against a state...
for its violation of the Fair Labor Standards Act (FLSA). The constitutionality of that statute had been upheld in the *Darby* case (p. 317) with respect to private employers and more recently had been determined to apply to employees of local and state governments in the *Garcia* case (p. 322). Alden and 64 other state employees sought to use Maine’s courts to recover overtime pay and damages. After the early Supreme Court had ruled in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), that a state could be sued by its citizens in federal court, Congress proposed and the states ratified the Eleventh Amendment that forbids suing one’s own state in *federal* court without its consent. In *Alden* the Court held that a state could not be sued in *its own* courts without its consent. Said Justice Kennedy, speaking for the majority:

* * * The concerns voiced at the ratifying conventions, the furor raised by *Chisholm*, and the speed and unanimity with which the Amendment was adopted, moreover, underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States. * * *

* * * Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. * * * The founding generation thought it “neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.” * * * The principle of sovereign immunity preserved by constitutional design “thus accords the States the respect owed them as members of the federation.” * * *

* * * Private suits against nonconsenting States, however, present “the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,” * * * regardless of the forum. Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public’s behalf.

[A] congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself. * * * A power to press a State’s own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. * * * Such * * * federal control of state governmental processes denigrates the separate sovereignty of the States.

It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.

* * * Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. * * * [U]limited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney’s fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. * * *

Speaking in behalf of what has become the customary foursome dissenting from the Court’s new dual federalism rulings, Justice Breyer in *Alden* responded:
[The flaw in the Court’s appeal to federalism lies in the fact that] the State of Maine is not sovereign with respect to the national objective of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005 (1985), and is not contested here.

Nor can it be argued that because the State of Maine creates its own court system, it has authority to decide what sorts of claims may be entertained there, and thus in effect to control the right of action in this case. Maine has created state courts of general jurisdiction; once it has done so, the Supremacy Clause of the Constitution, which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action. The Court’s insistence that the federal structure bars Congress from making States susceptible to suit in their own courts is, then, plain mistake.

It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American government’s immunity from private suit, it is not dignity.

It is equally puzzling to hear the Court say that “federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.” So long as the citizens’ will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State: the strain then is not only expected, but necessarily intended.

When Chief Justice Marshall asked about Marbury, “If he has a right, and that right has been violated, do the laws of his country afford him a remedy?,” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162, 2 L.Ed. 60 (1803), the question was rhetorical, and the answer clear.

In related decisions during its October 1998 Term, the same conception of the federal system and the same lineup of the Justices marked the Court’s disposition of a patent infringement suit and a trademark infringement suit brought against the state of Florida by a private company. In these cases, the Court denied Congress’s power to abrogate the state’s sovereign immunity under its authority to enforce provisions of the Fourteenth Amendment. See, respectively, Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 119 S.Ct. 2199 (1999); and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 119 S.Ct. 2219 (1999).

The ramifications of these rulings are potentially serious. Like a patent or a trademark, a copyright protects a form of intellectual property that Article I grants Congress the power to protect. What would prevent a state (or any of its employees authorized to do so) from duplicating and distributing any copyrighted material without the slightest fear of having to pay the copyright holder any royalties or any damages under federal copyright law? The vision of dual federalism embraced by the Court majority in these cases would thus appear to be on a collision course with the protection of traditional and intellectual property rights. This may seem odd in light of the fact that many—if not all—of those in the five-Justice majority in these cases are among the Court’s most enthusiastic defenders of property rights (see p. 453).

Although Congress may not restrict the states’ sovereign immunity by enacting legislation based on its Article I power over interstate commerce, it may do so if it relies on

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5. The Court so held in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996), by a bare majority but has since reaffirmed this holding several times.
its authority under § 5 of the Fourteenth Amendment. That Congress uses its amendment-enforcing power to make the states liable to suit without their consent, however, does not necessarily ensure the validity of the legislation. “Valid § 5 legislation must [also] exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” Nevada Department of Human Rights v. Hibbs, 538 U.S. 721, 728, 123 S.Ct. 1972, 1978 (2003), quoting City of Boerne v. Flores (p. 117). Legislation permitting individuals to sue the states for violations of the Age Discrimination in Employment Act failed this test. See Kimmel v. Florida Board of Regents, 528 U.S. 62, 120 S.Ct. 631 (2000). However, in Tennessee v. Lane, 541 U.S. 509, 124 S.Ct. 1978 (2004), the Court sustained the right of a disabled person to sue a state under the Americans With Disabilities Act (ADA) if the discrimination impaired the individual’s access to the judicial process (but not for state action in general that discriminated against the disabled, see University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001)). In Lane, the Court emphasized both the unique impact of the unequal treatment at issue and the limited nature of the state action Congress targeted: Discrimination against disabled persons hindering their access to judicial services had a long history and it persisted despite previous federal and state efforts to eradicate it. Impaired access often had the effect of excluding the disabled from participation in the judicial process and so implicated the Fourteenth Amendment’s guarantee of due process as well as that of equal protection. Congress was merely requiring the states to take “reasonable measures to remove architectural and other barriers to accessibility.” The law “require[d] only ‘reasonable modifications’ that would not fundamentally alter the nature of the services provided, and only when the [disabled] individual * * * [was] otherwise eligible for the service.” (Arguing that he had been denied access to the courts when he was cited for not appearing to answer a criminal traffic complaint, Lane had sued both state and county governments for damages under Title II of the ADA. The courthouse contained no elevator, and he refused to drag himself, or be carried, up two flights of stairs to the courtroom.)

In the Hibbs case cited above, the Court sustained a broader entitlement to equal treatment arising out a violation of the Family and Medical Leave Act of 1993 (FMLA). That law entitled employees of both private businesses and state and local agencies to 12 weeks of unpaid annual leave to deal with a “serious health condition” of a child, parent, or spouse and authorized a suit for money damages if this right was infringed by either a public or private employer. The Court cited the abundance of evidence supporting Congress’s findings that “[s]tate laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits” in employment and that “stereotype-based beliefs about the allocation of family duties remained firmly rooted” and “employers’ reliance on them in establishing discriminatory leave policies remained widespread.” While “the [s]tates’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits [was] weighty enough to justify the enactment of prophylactic § 5 legislation[,]” the case for the validity of the FMLA was compounded because gender-based discrimination was more disfavored, constitutionally speaking, and triggered a heightened level of scrutiny than did discrimination based on either age or disability.

Only states are protected by the Eleventh Amendment. Although counties and municipalities are creations of the state and owe their jurisdiction to the state, the Amendment does not protect them from suit in federal court, although administrative agencies of the states are protected. See Northern Insurance Company of New York v. Chatham County, Georgia, 547 U.S. 189, 126 S.Ct. 1689 (2006). For a discussion of the constitutionality of Congress’s use of the spending power to override the Eleventh Amendment by conditioning the receipt of federal money on a state’s waiver of sovereign immunity, see p. 360.
D. THE TAXING AND SPENDING POWER

Government that must subsist on voluntary contributions is, as we found during the days of the Confederation, weak and ineffective government. The inability of the central government in those days to legitimately compel the collection of revenue by which it could sustain its operations was the straw that broke the Confederation's back and triggered the call for a constitutional convention. As a consequence, the new Constitution sought to give the national government revenue-raising power free from the exercise of any discretion by the states.

The taxing power, the very first of the enumerated powers, carried one exception and two qualifications. As Article I, section 9 makes clear, the national government is forbidden to lay any tax on exports. The same section of the Constitution also qualifies the manner in which other taxes may be levied and distinguishes for this purpose between direct and indirect taxes. The former were to be apportioned among the states according to population for which purpose a census was to be taken; the latter were to be laid uniformly—geographically uniformly, that is—such that these taxes would be collected throughout the country on the same basis and at the same rate. The Constitution is vague as to exactly what are to be considered direct taxes other than to offer the clue that a head tax would certainly fall in that category. Very soon the Court was asked to determine into which category a federal carriage tax fell. In Hylton v. United States, 3 U.S. (3 Dall.) 171, 1 L.Ed. 556 (1796), the Court reasoned that only head and land taxes could be regarded as direct taxes; the carriage tax was an indirect tax. This was so because of the nature of the carriage tax and the impossibility of fairly apportioning it.

The view that the category of direct taxes was so limited remained the controlling constitutional rule until the Court's decision in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912 (1895), a century later. Dominated by Justices partial to the defense of private property, as we noted earlier, the Court struck down a federal income tax by a narrow 5–4 margin. In doing so, the majority reasoned that the category of direct taxes was not limited to the Hylton description, but also included taxes on the income derived from land and other property. Given the conclusion that an income tax was a direct tax and the unrealistic option of apportioning such a tax, Congress was denied this source of revenue until the Pollock decision was overturned in 1913 by the adoption of the Sixteenth Amendment. Passage of the Sixteenth Amendment and the fact that the personal income tax has become the largest single source of revenue for the national government combined to render largely academic further discussion of the federal taxing power in terms of direct and indirect taxes.

Prior to the twentieth century, consideration of the national taxing power focused principally on the means of raising revenue. Taxes, however, do not merely finance; they may also regulate. It is the use of the national taxing and spending power for the latter purpose that has sparked a controversy, and, as you might anticipate, how one resolved the dispute was largely contingent upon one's view of the federal relationship.

The Court's initial verdict on any examination of the revenue-raising as opposed to the regulatory use of the taxing power was announced in its decision in McCray v. United States, a case involving the constitutionality of what was clearly an inhibiting federal tax on the sale of oleomargarine colored to look like butter. Speaking for the Court, Justice White made it plain that the chronic examination of congressional motives, a prerequisite to establishing any conclusion that the margarine tax was passed for regulatory purposes, was

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6. A head tax (also known as a capitation tax) is a tax imposed on a designated class of persons, each of whom pays the same amount without regard for the amount of any property owned. In early American history, for example, it was common for a head tax to be imposed on all males over the age of 21.
an improper judicial activity, displaying a lack of due regard for the discretion of a coordinate branch of government. The Court in McCray also gave short shrift to the contention that a tax could be challenged on the grounds of its effect. Rejecting an invitation for judicial oversight on the theory that taxation resulting in the destruction of an industry amounted to a denial of due process, the Court made it clear that arguments about revenue-raising were properly left to the political process and, therefore, were to be directed to the legislative branch.

**McCray v. United States**

Supreme Court of the United States, 1904
195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78

**Background & Facts** Congress enacted legislation to tax oleomargarine that had been colored to look like butter at the rate of 10 cents a pound. Uncolored margarine, however, was taxed at only 1/4 cent per pound. McCray, a retail dealer in oleomargarine, had purchased a 50-pound package of the colored product for resale to which were affixed revenue stamps at the 1/4 cent per pound rate. When he refused to pay tax at the specified rate, the government sued to collect the $50 penalty for noncompliance prescribed by the statute. Among the defenses he offered, McCray asserted that the legislation was unconstitutional because (1) it was intended to and would effect the ruin of the oleomargarine industry to the advantage of the butter producers, and, thus, this scheme of taxation took property without due process of law; and (2) in regulating a product, it interfered with the police powers reserved to the states under the Tenth Amendment. The U.S. District Court held for the government, and McCray appealed.

Mr. Justice WHITE * * * delivered the opinion of the court:

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It is * * * argued * * * that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. ***

[Where] a lawful exercise of power by another department of the government *** [seeks to advance a wrong motive or purpose, the] remedy *** lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. ***

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. ***

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1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is
self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, * * * [since] enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, * * * the power to levy the tax * * * [is therefore negated]. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. * * *

* * *

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (Spencer v. Merchant [125 U.S. 345, 8 S.Ct. 921 (1888)]) that “The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.”

3. Whilst undoubtedly both the 5th and 10th Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject.

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine, and not upon natural butter artificially colored. * * *

* * * Conceding, merely for the sake of argument, that the due process clause of the 5th Amendment would [void] an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. * * * [T]he distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great, that it was held no violation of the due process clause of the 14th Amendment was occasioned by state legislation absolutely forbidding the manufacture, within the state, of oleomargarine artificially colored. As it has been thus decided that the distinction between the two products is so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient, under the extremest view, to justify a classification distinguishing between them.

4. Lastly we come to consider the argument that, even though as a general
rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit within the protection of the due process clause of the 5th Amendment.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, must be without influence upon the decision of this cause because the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

Affirmed.

The CHIEF JUSTICE [FULLER], Mr. Justice BROWN, and Mr. Justice PECKHAM dissent.

The Rise of Dual Federalism

The dualist zeal of the Court during the 1920s and 1930s dampened any long-term effect of the holding in McCray. McCray became a precedent to be distinguished, not one to be followed.

After experiencing ignominious defeat at the hands of the Court in *Hammer v. Dagenhart*, Congress turned to the taxing power to deal with the problem of child labor. The fruit of its efforts, the Child Labor Tax Act, reached the Court in 1922, four years after the ruling in *Hammer*. Speaking for the Court in *Bailey v. Drexel Furniture Co.*, which held the Act unconstitutional, Chief Justice Taft wasted no time asking the telltale question: Did the Child Labor Tax Act impose a tax or a penalty? How successful do you think he was in differentiating between the two? How well do these criteria operate to distinguish the “tax” in McCray from the “penalty” in Bailey? The very construction of such a distinction lays bare the precepts of dual federalism because a penalty is a form of regulation and Congress was precluded from regulating manufacturing because manufacturing was asserted to have only an indirect effect on interstate commerce. The Tenth Amendment cut off any intrusion by the national government into the cloisters of state power. Though reform elements in the Congress subsequently pushed for the adoption of a constitutional amendment to abolish child labor, the Court later overruled the decision in *Hammer* itself (see *United States v. Darby*, p. 317), sustaining the constitutionality of such legislation.

**BAILEY v. DREXEL FURNITURE CO.**

*[THE CHILD LABOR TAX CASE]*

Supreme Court of the United States, 1922

259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817

**BACKGROUND & FACTS** The year after the Supreme Court struck down the Federal Child Labor Act in *Hammer v. Dagenhart* (p. 299), Congress
enacted the Child Labor Tax Act. The Drexel Furniture Company was assessed $6,312.79 for violating the law, paid the tax under protest, and sued Bailey, the federal tax collector, to recover the money. The company argued that the so-called tax was simply a fine for violating federal child labor standards and was therefore just another unconstitutional attempt by Congress to regulate conditions in manufacturing, which lay beyond Congress’s power to regulate interstate commerce and intruded upon the powers reserved to the states under the Tenth Amendment.

Mr. Chief Justice TAFT delivered the opinion of the Court.

This case presents the question of the constitutional validity of the Child Labor Tax Law. * * *

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* * * Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. * * * But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer’s factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. * * *

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* * * Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word “tax” would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction * * * are important * * * [especially] when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as
such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us cannot be distinguished from that of Hammer v. Dagenhart, 247 U.S. 251, 38 S.Ct. 529 (1918). Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. * * *

In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.

* * *

For the reasons given, we must hold the Child Labor Tax Law invalid and the judgment of the District Court is Affirmed.

Mr. Justice CLARKE, dissents.

When the New Deal Congress passed the First Agricultural Adjustment Act (AAA) in 1933, it not only set the stage for another predictably hostile judicial response to use of the taxing and spending power for regulatory purposes, but also occasioned what is widely regarded as the classic dual federalist expression of its day. The First AAA was an early attempt by the Roosevelt administration to come to grips with the long-time depression in American agriculture. The low prices that farmers continued to receive for their crops were largely a result of overproduction. The AAA sought to raise the commodity prices by subsidizing the planting of reduced acreage. The money paid to the farmers to compensate them for planting less was to come from a tax imposed on those who processed the crops. The amount of subsidies and allotted acreage to be planted would fluctuate annually according to the state of the market. The Court’s opinion addressing the constitutionality of this legislation in United States v. Butler (p. 346), penned by Justice Roberts, is as important for its characterization of the judicial process as it is for its discussion of the taxing and spending power.

Although Justice Roberts rejected Madison’s interpretation of the taxing and spending power (that the national government was restricted to taxing and spending only to implement the other enumerated powers) and instead accepted Hamilton’s view (that the national government could tax and spend as long as it was for the general welfare and that it was not limited to merely financing its exercise of the other enumerated powers), the problem in the Butler case was whether the First AAA taxed and spent “for the general welfare.” Having adopted the larger view of the taxing and spending power, why then did the financing of agricultural subsidies under the AAA not constitute a legitimate exercise of Congress’s power to tax and spend for the general welfare? At least as controversial as the substance of his answer to this question was the manner in which Roberts declared the answer, for he presented the reasoning (critics said “camouflaged the reasoning”) by depicting the judicial process as a highly mechanical exercise in which logic and constitutional text were the only relevant variables. This description came to be ridiculed as the “yardstick theory” of the Constitution and constituted the last expression of constitutional absolutism or “mechanical jurisprudence” ever endorsed by a majority of the Court.
BACKGROUND & FACTS  In order to deal with the chronic overproduction of farm products and the consequent depression of farm income, Congress enacted the Agricultural Adjustment Act of 1933. Under terms of the Act, farmers were to receive payments from the government in return for agreeing to reduce crop production. Money for this subsidy was to come from a tax levied on the processor of the commodity. The tax was to be levied at a fluctuating annual rate equal to the difference between the current average farm price and the value of the commodity during the “fair exchange” base period 1909–1914. Butler, the receiver for Hoosac Mills, a processor of cotton, refused to pay the tax. The U.S. District Court found for the United States and ordered Butler to pay the tax. The U.S. Circuit Court of Appeals reversed, and the government appealed.

Mr. Justice ROBERTS delivered the opinion of the Court.

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The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers who will reduce their acreage for the accomplishment of the proposed end, and, meanwhile, to aid these farmers during the period required to bring the prices of their crops to the desired level.

The tax plays an indispensable part in the plan of regulation. As stated by the Agricultural Adjustment Administrator, it is “the heart of the law”; a means of “accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power.” A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop reduction and price raising. It is to equal the difference between the “current average farm price” and “fair exchange value.” It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. ** * * *

The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program embodied in title 1 of the act is to become inoperative when, in the judgment of the President, the national economic emergency ends; and as to any commodity he may terminate the provisions of the law, if he finds them no longer requisite to carrying out the declared policy with respect to such commodity. ** * * 

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production. ** * * *

It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term,
and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue, and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. Child Labor Tax Case, 259 U.S. 20, 37, 42 S.Ct. 449 (1922).

We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation; and that the respondents have standing to challenge the legality of the exaction.

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*** The government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute, their attack must fail because article 1, § 8 of the Constitution, authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the government.

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people’s representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The question is not what power the federal government ought to have, but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments; the state and the United States. Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article 1, § 8, of the Constitution, vests sundry powers in the Congress. * * *

[T]he government does not attempt to uphold the validity of the act on the basis of the commerce clause * * *

The clause thought to authorize the legislation * * confers upon the Congress power “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” * * The
government concedes that the phrase “to provide for the general welfare” qualifies the power “to lay and collect taxes.” The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. **The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation’s debts and making provision for the general welfare.**

Nevertheless, the government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the “general welfare”; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and, finally, that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. Article 1, § 9, cl. 7. They can never accomplish the objects for which they were collected, unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated “to provide for the general welfare of the United States.” **The conclusion must be that they were intended to limit and define the granted power to raise and to expend money.**

Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. **Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.**

**[We]** conclude that **[Hamilton’s]** reading is the correct one—that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. **But resort to the taxing power to effectuate an end which is not within the scope of the Constitution, is obviously inadmissible.**

**If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy.**

**But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best, it is a scheme for purchasing with**
federal funds submission to federal regulation of a subject reserved to the states.

***

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

***

The judgment is affirmed.

Mr. Justice STONE (dissenting).

***

[It is important to recognize] at the outset certain propositions which should have controlling influence in determining the validity of the act. They are:

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal not to the courts, but to the ballot and to the processes of democratic government.

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

3. As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to "provide for the *** general welfare." The opinion of the Court does not declare otherwise.

***

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

***

* * * The spending power of Congress is in addition to the legislative power and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted.
in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence, or flood, but may not impose conditions, health precautions, designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. * * *

Do all its activities collapse because, in order to effect the permissible purpose in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition.

* * *

The suggestion that [the taxing and spending power] must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. “The power to tax is the power to destroy,” but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states. * * * The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. * * *

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent—expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. * * * [T]he power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.

The Decline of Dual Federalism

The judicial fetish for distinguishing between taxes and penalties ended when the Constitutional Revolution of 1937 hit the taxing and spending power as well. Within a year and a half, the tenor of Justice Stone’s dissent in Butler became the dominant tone of the Court in Steward Machine Co. v. Davis. The financial aspects of the cooperative approach to the federal relationship are forcefully illustrated by the discussion in Justice Cardozo’s opinion of the Court. We noted earlier that the American system has had a long tradition of joint cooperation between the two levels of government—whether or not the Court has chosen at times to recognize it—in financing programs traditionally regarded as falling within the province of the states. The Social Security program, the constitutionality of which was at stake
in the Steward Machine Co. case, is a classic illustration of how these programs operate—the exchange of federal money, usually on a liberal matching basis, for the acceptance by the states of federally imposed guidelines. Note how this program follows the contours of the federal relationship even as Justice Cardozo acknowledged the national magnitude of the unemployment and welfare problems brought on by the Great Depression. Since the national government has no general power to legislate for the general welfare, its program, in accordance with the first provision of Article I, section 8, must be hitched to a taxing and spending scheme. Consider, too, the exchange between Justice Cardozo and the four dissenters as to the contention that states are coerced to participate in such a program. Have the states been raped, as conservative opponents of the program contend, or were they merely seduced?

STEWARD MACHINE CO. V. DAVIS
Supreme Court of the United States, 1937
301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279

BACKGROUND & FACTS The Social Security Act of 1935 required employers of eight or more workers to pay a federal excise tax on a certain percentage of their employees’ wages. The funds were not earmarked, but were collected as general revenue and deposited in the United States Treasury. In addition, the Act permitted employers who made contributions to a state unemployment fund to credit such payments against up to 90 percent of the federal tax. The state unemployment compensation program, however, had to be approved by the federal government as meeting certain minimum requirements to ensure that it was a program of substance before the credit would be allowed. Also, to guard against loss of the monies, the state had to deposit its unemployment fund in the U.S. Treasury.

Under the 1935 Act, the Steward Machine Company paid the federal government taxes of $46.14. The company then sued Harwell Davis, an Internal Revenue official, to recover payment, contending that the Social Security Act was unconstitutional. A federal district court dismissed the complaint, and its judgment was affirmed by a U.S. Circuit Court, whereupon the Steward Machine Company appealed to the Supreme Court.

Mr. Justice CARDOZO delivered the opinion of the Court.

* * *

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First: The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment.

We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. * * *

* * * We * * * [are also told] that employment for lawful gain is a “natural” or “inherent” or “inalienable” right, and not a
privilege” at all. But natural rights, so-called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. “Business is as legitimate an object of the taxing power as property.” * * * Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. * * * Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. * * *

The subject-matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises.” Article I, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. * * * Whether the tax is to be classified as an “excise” is in truth not of critical importance. If not that, it is an “impost.” * * * A capitation or other “direct” tax it certainly is not. “Although there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words ‘duties, impost, and excises,’ such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.” Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 557, 15 S.Ct. 673, 680 (1895). There is no departure from that thought in later cases, but rather a new emphasis of it. * * *

The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine, the uniformity exacted is geographical, not intrinsic. * * *

Second: The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply * * * to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. * * * But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. * * * They may tax some kinds of property at one rate, and others at another, and exempt others altogether. * * * They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. * * * If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. * * *

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. * * *

Third: The excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.
The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. * * * No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. * * * This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent. credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. Cincinnati Soap Co. v. United States [301 U.S. 308, 57 S.Ct. 764 (1937)]. There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement, there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. * * * During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the bread-winner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. * * *

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand, fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them are recognized hardships that government, state or national, may properly avoid. * * * If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the co-operating localities ought not in all fairness to pay a second time. Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. * * * For all that appears, she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled.
The difficulty with the petitioner’s contention is that it confuses motive with coercion. “Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” Sonzinsky v. United States, 300 U.S. 506, 57 S.Ct. 554 (1937). In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. * * * We think the choice must stand.

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject-matter to activities fairly within the scope of national policy and power. No such question is before us. * * *

The judgment is affirmed.

* * *

Separate opinion of Mr. Justice McREYNOLDS.

That portion of the Social Security legislation here under consideration, I think, exceeds the power granted to Congress. It unduly interferes with the orderly government of the state by her own people and otherwise offends the Federal Constitution. * * *

Ordinarily, I must think, a denial that the challenged action of Congress and what has been done under it amount to coercion and impair freedom of government by the people of the state would be regarded as contrary to practical experience. Unquestionably our federate plan of government confronts an enlarged peril.

Separate opinion of Mr. Justice SUTHERLAND.

* * *

[The administrative provisions of the act invade the governmental administrative powers of the several states reserved by the Tenth Amendment. A state may enter into contracts; but a state cannot, by contract or statute, surrender the execution, or a share in the execution, of any of its governmental powers either to a sister state or to the federal government, any more than the federal government can surrender the control of any of its governmental powers to a foreign nation. The power to tax is vital and fundamental, and, in the highest degree, governmental in character. Without it, the state could not exist. Fundamental also, and no less important, is the governmental power to expend the moneys realized from taxation, and exclusively to administer the laws in respect of the character of the tax and the methods of laying and collecting it and expending the proceeds.

The people of the United States, by their Constitution, have affirmed a division of...
internal governmental powers between the federal government and the governments of the several states—committing to the first its powers by express grant and necessary implication; to the latter, or to the people, by reservation, “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States.” The Constitution thus affirms the complete supremacy and independence of the state within the field of its powers. Carter v. Carter Coal Co., 298 U.S. 238, 295, 56 S.Ct. 855, 865 (1936). The federal government has no more authority to invade that field than the state has to invade the exclusive field of national governmental powers **. The necessity of preserving each from every form of illegitimate intrusion or interference on the part of the other is so imperative as to require this court, when its judicial power is properly invoked, to view with a careful and discriminating eye any legislation challenged as constituting such an intrusion or interference. **

The precise question, therefore, which we are required to answer by an application of these principles is whether the congressional act contemplates a surrender by the state to the federal government, in whole or in part, of any state governmental power to administer its own unemployment law or the state pay roll-tax funds which it has collected for the purposes of that law. An affirmative answer to this question, I think, must be made.

***

If we are to survive as the United States, the balance between the powers of the nation and those of the states must be maintained. There is grave danger in permitting it to dip in either direction, danger—if there were no other—in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment upon the administrative functions of the states is that greater encroachments, and encroachments upon other functions, will follow.

For the foregoing reasons, I think the judgment below should be reversed.

Mr. Justice VAN DEVANTER joins in this opinion.

[Justice BUTLER also dissented.]

Steward Machine was to the taxing and spending power what Jones & Laughlin was to the commerce power. It signaled the Court’s retreat; it did not overrule a precedent. Indeed, Butler is still technically the law. The Court’s opinion in Steward Machine revised only the Court’s understanding of “the general welfare” by acknowledging that interdependence that is the hallmark of a modern economy; it did not disown the prohibition on earmarking revenues that effected an “expropriation of money from one group to another.” In truth, however, earmarking revenues now has become commonplace, and the creation of numerous federal trust funds, maintained by taxes specifically levied for these purposes, has undeniably received the constitutional endorsement of the Court. Justice O’Connor’s opinion for the Court in New York v. United States (p. 373), appearing in the next chapter, forthrightly acknowledges it, whatever Butler’s technical status. At any rate, two years after its decision in Steward Machine, in Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648 (1939), the Court stamped its approval on the Second Agricultural Adjustment Act, which imposed marketing quotas on farmers and a penalty system for violations and thus rang in the modern era of a farm policy aimed at curbing the destructive economic tendency to overproduce. Straightforward acceptance of federal jurisdiction over agricultural production rendered obsolete any future discussion of the difference between a penalty and a tax.

The permanent change in the federal system wrought by decisions like Steward Machine is well illustrated by the Court’s more recent opinion in South Dakota v. Dole (p. 356). Regulating liquor sales within their borders was a power confirmed to the states by the Twenty-first Amendment. Yet modern grant-in-aid programs, which marry the superior revenue-raising capability of the federal government and the convenience of state
administration, give the national government enormous leverage over state policy by making an offer no intelligent state can refuse. The issue in *South Dakota v. Dole* is whether the federal government can lawfully induce some states to raise the minimum drinking age by threatening the loss of federal highway funds. In the face of a severe energy crisis and the same concern over reducing highway deaths, Congress enacted legislation in 1975 conditioning a state’s further receipt of federal highway funds on its reimposition of the 55-mile-per-hour speed limit. That statute, 23 U.S.C.A. § 154, was sustained without difficulty, and the question of its constitutionality never even reached the Court. See *State v. Dumler*, 221 Kan. 386, 559 P.2d 798 (1977); *People v. Austin*, 111 Ill.App.3d 213, 66 Ill. Dec. 1107 (1977). Moreover, the fact that federal funds were conditioned upon the adoption of a lower speed limit did not invalidate the state law. *State v. Padley*, 195 Neb. 358, 237 N.W.2d 883 (1976); *City of Princeton v. Francisco*, 454 F.Supp. 33 (S.D. Iowa 1978). In *South Dakota v. Dole*, the Court’s embrace of cooperative federalism would appear to be complete. However, the Court’s most vociferous contemporary champion of dual federalism, Justice O’Connor, joined by Justice Brennan—a most unlikely duo, to be sure—argued that it was still possible to draw a line that respects and guarantees the rightful jurisdiction of the states in such local matters.

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**South Dakota v. Dole**

Supreme Court of the United States, 1987

483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171

**BACKGROUND & FACTS**  Relying upon the spending power, Congress amended the Surface Transportation Assistance Act in 1984 to encourage states to raise their minimum drinking age to 21. The statutory provision, 23 U.S.C.A. § 158, directed the Secretary of Transportation to withhold part of a state’s federal highway funds for fiscal years 1987 and 1988 if, by October 1, 1986, the state had not adopted a minimum drinking age of 21. For the first fiscal year after the deadline, 5 percent of a state’s allocation was to be withheld, and this penalty was to double for the second fiscal year. The statute also provided that funds withheld could be reapportioned to a state if, “in any succeeding fiscal year,” it raised its minimum drinking age to 21.

South Dakota law permitted individuals 19 years of age or older to purchase beer containing 3.2% alcohol, and the state declined to raise the age limit. Consequently, the state was projected to lose $4 million in federal highway outlays for the 1987 fiscal year and double that amount the next fiscal year. The state brought suit against Secretary of Transportation Elizabeth Dole and challenged the law as a violation of its right to regulate the sale and consumption of alcoholic beverages within its territory under the Twenty-first Amendment and as a violation of the Tenth Amendment. A federal district court dismissed the complaint, and this judgment was affirmed by a federal appeals court.

Chief Justice REHNQUIST delivered the opinion of the Court.

**In this Court**, the parties direct most of their efforts to defining the proper scope of the Twenty-first Amendment. Relying on our statement in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 946 (1980), that 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,” South Dakota asserts that the setting of minimum drinking ages is clearly within the “core powers” reserved to the States under § 2 of the Amendment.***

*** Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States’ drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

The Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” Fullilove v. Klutznick, 448 U.S. 448, 474, 100 S.Ct. 2758, 2772 (1980) (Opinion of Burger, C. J.). See *** Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883 (1937). The breadth of this power was made clear in United States v. Butler, 297 U.S. 1, 66, 56 S.Ct. 312, 319 (1936), where the Court, resolving a long-standing debate over the scope of the Spending Clause, determined that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” Thus, objectives not thought to be within Article I’s “enumerated legislative fields,” *** may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, *** but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of “the general welfare.” See Helvering v. Davis, 301 U.S. 619, 640–641, 57 S.Ct. 904, 908 (1937); United States v. Butler, ***[297 U.S.,] at 65, 56 S.Ct., at 319. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *** Second, we have required that if Congress desires to condition the States’ receipt of federal funds, it “must do so unambiguously *** , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” Pennhurst State School v. Halderman, [451 U.S.,] at 17, 101 S.Ct., at 1540. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated “to the federal interest in particular national projects or programs.” Massachusetts v. United States, 435 U.S. 444, 461, 98 S.Ct. 1153, 1164 (1978) (plurality opinion). *** Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. ***

South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare ***. Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. *** And *** the condition imposed by Congress is directly related to one of the main purposes
for which highway funds are expended—
safe interstate travel. ** This goal of the
interstate highway system had been frus-
trated by varying drinking ages among the
States. A presidential commission ap-
pointed to study alcohol-related accidents
and fatalities on the Nation’s highways
concluded that the lack of uniformity in
the States’ drinking ages created “an incen-
tive to drink and drive” because “young
persons commut[e] to border States where
the drinking age is lower.” Presidential
Commission on Drunk Driving, Final Re-
port 11 (1983). By enacting § 158, Congress
conditioned the receipt of federal funds in a
way reasonably calculated to address this
particular impediment to a purpose for
which the funds are expended.

The remaining question about the valid-
ity of § 158—and the basic point of dis-
agreement between the parties—is whether
the Twenty-first Amendment constitutes an
“independent constitutional bar” to the
conditional grant of federal funds. ** Petitioner, relying on its view that the
Twenty-first Amendment prohibits direct
regulation of drinking ages by Congress,
asserts that “Congress may not use the
spending power to regulate that which it is
prohibited from regulating directly under
the Twenty-first Amendment.” ** But
our cases show that this “independent
constitutional bar” limitation on the spend-
ing power is not of the kind petitioner
suggests. United States v. Butler, 297 U.S.,
at 66, 56 S.Ct., at 319, for example,
established that the constitutional limita-
tions on Congress when exercising its
spending power are less exacting than those
on its authority to regulate directly.

These cases establish that the “independ-
ent constitutional bar” limitation on the
spending power is not, as petitioner suggests,
a prohibition on the indirect achievement
of objectives which Congress is not empow-
ered to achieve directly. Instead, we think
that the language in our earlier opinions
stands for the unexceptionable proposition
that the power may not be used to induce
the States to engage in activities that would
themselves be unconstitutional. Thus, for
example, a grant of federal funds condi-
tioned on invidiously discriminatory state
action or the infliction of cruel and unusual
punishment would be an illegitimate exer-
cise of the Congress’ broad spending power.
But no such claim can be or is made here.
Were South Dakota to succumb to the
blandishments offered by Congress and raise
its drinking age to 21, the State’s action in
so doing would not violate the constitu-
tional rights of anyone.

Our decisions have recognized that in some
circumstances the financial inducement of-
fered by Congress might be so coercive as to
pass the point at which “pressure turns into
compulsion.” Steward Machine Co. v. Davis,
*** [301 U.S.,] at 590, 57 S.Ct.,] at 892.
Here, however, Congress has directed only
that a State desiring to establish a minimum
drinking age lower than 21 lose a relatively
small percentage of certain federal highway
funds. **

When we consider, for a moment, that all
South Dakota would lose if she adheres to her
chosen course as to a suitable minimum
drinking age is 5% of the funds otherwise
obtainable under specified highway grant
programs, the argument as to coercion is
shown to be more rhetoric than fact. **

Here Congress has offered relatively mild
Encouragement to the States to enact higher
minimum drinking ages than they would
otherwise choose. But the enactment of
such laws remains the prerogative of the
States not merely in theory but in fact. Even
if Congress might lack the power to impose
a national minimum drinking age directly,
we conclude that encouragement to state
action found in § 158 is a valid use of the
spending power. Accordingly, the judgment
of the Court of Appeals is

Affirmed.

Justice BRENNAN, dissenting.

I agree with Justice O’CONNOR that
regulation of the minimum age of purchasers
of liquor falls squarely within the ambit of
those powers reserved to the States by the Twenty-first Amendment. * * * Since States possess this constitutional power, Congress can not condition a federal grant in a manner that abridges this right. * * *

Justice O’CONNOR, dissenting.

***

[Section] 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress’ power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment. * * *

***

[T]he Court’s application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended, is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the Spending Power only in ways reasonably related to the purpose of the federal program. * * * In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

***

[T]he Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure—“safe interstate travel”—and the drinking age condition. * * * The Court reasons that Congress wishes that the roads it builds may be used safely, that drunk drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of § 158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation. * * *

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158. * * *

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. as Amici Curiae:

“Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes * * *.

“The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference rests on whether the requirement specifies in some way how the money should be spent, so that Congress’ intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress’ delegated regulatory powers.” * * *
As discussed above, a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the Spending Power.

Of the other possible sources of congressional authority for regulating the sale of liquor only the Commerce Power comes to mind. But in my view, the regulation of the age of the purchasers of liquor, just as the regulation of the price at which liquor may be sold, falls squarely within the scope of those powers reserved to the States by the Twenty-first Amendment. * * *

Accordingly, Congress simply lacks power under the Commerce Clause to displace state regulation of this kind. * * *

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. * * * Because 23 U.S.C.A. § 158 cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. * * *

But can Congress constitutionally require that states waive their Eleventh Amendment immunity from being sued in federal court as a condition of receiving federal funds? The answer appears to be "yes." In Jim C. v. United States, 235 F.3d 1079 (8th Cir. en banc 2000), cert. denied, 533 U.S. 949, 121 S.Ct. 2591 (2001), a federal appeals court, by a 6–4 vote, upheld such a waiver requirement contained in the Rehabilitation Act of 1973, 29 U.S.C. § 794. Section 504 of that statute prohibits "any program or activity" receiving federal financial assistance from discriminating against a qualified individual because of his or her disability. The statute also requires states that accept federal funds to waive their Eleventh Amendment immunity against suits brought in federal courts for violating the prohibition. Said the appeals court, "Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly." In this case, parents of an autistic child sued the Arkansas Department of Education for discrimination on the basis of the child's disability. The state argued for dismissal of the complaint on grounds that the waiver requirement exceeded Congress's spending power by imposing overly broad and coercive conditions on the receipt of the federal money. The appeals court reasoned that the waiver requirement was comparable to the ordinary quid pro quo repeatedly approved in Supreme Court decisions. The state would not be required to forfeit all federal funds, but only those for the department implicated. While the sacrifice of all education funds by Arkansas, amounting to approximately $250 million or 12% of the state's education budget, might be "politically painful," the court could "not say that it compels Arkansas' choice." The court concluded that "the Spending Clause allows Congress to present States with this sort of choice." The four dissenting judges were of the view that "Eleventh Amendment immunity trumps any exercise of the powers of Congress enumerated in the original Constitution * * *. By resort to the spending power * * * Congress could achieve indirectly the same abrogation of Eleventh Amendment immunity it could not achieve directly by the simple expedient of coupling an abrogation provision with a provision conditioning the states' receipt of any or all federal funds upon the states' waiver of Eleventh Amendment immunity with respect to whatever sorts of claims Congress might specify. Given the financial and political reality within which state governments struggle to fund their operations adequately, most if not all of the states would yield. The same scenario could unfold with respect to other kinds of conditions on the states' receipt of federal funds, with Congress achieving through the spending power..."
ends it otherwise lacks the constitutional authority to pursue.”

In light of the Supreme Court’s decision in *Pennhurst State School and Hospital v. Halderman* (p. 116), it bears repeating that, while Congress has broad power to set the terms on which it disburses federal money, the conditions it attaches to the receipt of funds must be set out “unambiguously.” The states are bound only by conditions they accept “voluntarily and knowingly.” “[L]egislation enacted pursuant to the spending power is much in the nature of a contract,” and “[s]tates cannot knowingly accept conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’” *Arlington Central School District Board of Education v. Murphy*, 548 U.S. ——, ——, 126 S.Ct. 2455, 2459 (2006), quoting *Pennhurst*. 
CHAPTER 6

THE REGULATORY POWER
OF THE STATES IN THE
FEDERAL SYSTEM

When a state law conflicts with a law passed by Congress in an area of public policy where the national government has exercised its enumerated and implied powers, the Supremacy Clause commands that it is the state law that must give way. First enunciated by Chief Justice Marshall in McCulloch v. Maryland, this basic principle was reaffirmed in Gibbons v. Ogden, and much of the preceding chapter centered on the Supreme Court’s expanding definition of the term “interstate commerce” in what has surely become one of the most important and frequently used of the national government’s enumerated powers. The Court’s interpretation of the Commerce Clause pervades this chapter as well, but in some different contexts, conflict between the national and state governments is far from being either as frequent or as obvious as the cases in Chapter 5 may suggest. By contrast, there are many areas of public policy where the state governments and the national government act concurrently—where they both exercise power at the same time in the same policy areas. The national government and the states jointly legislate about elections, taxation, business regulation, crime, and a host of other subjects too numerous to mention. In many areas, both levels of government may legitimately occupy the field. In still other matters, states have legislated, but Congress has remained silent. In these situations, the constitutional boundaries marked by the Court’s decisions appear to be much less clear and seem to reflect judgments made on a case-by-case basis.

The Police Power

By virtue of the Tenth Amendment, the states possess general undefined legislative authority that Congress does not. Sometimes referred to as “reserved powers,” this residual legislative authority is also known in the aggregate as “the police power.” It encompasses broad authority to protect the public health, safety, welfare, and morals (although the last of these has been attacked as infringing a constitutional right of privacy, as is discussed in
Chapter 10). It is upon such general authority that the states repeatedly draw when they write and enforce criminal laws, charter corporations, regulate private property, provide for marriage and divorce, fund and operate institutions of public education, license doctors and nurses, enact antipollution laws, and do thousands of other things that touch our lives in countless ways every day. By contrast—as materials in the preceding chapter illustrated—the national government possesses no general authority to legislate just because it is in the public interest; laws passed by Congress must find their legal authorization in some Article I power.

The Supreme Court confronted an attack on the use of the police power to protect public health in *Jacobson v. Massachusetts*. Jacobson argued that compulsory vaccination violated his personal liberty protected by the Due Process Clause of the Fourteenth Amendment. Except where “fundamental” rights are affected, the burden of proof is on the attacking party to demonstrate that the statute is unconstitutional, and in order to prevail, that party must show that the law is unreasonable. The measure of whether an exercise of legislative power—at any level of government—has deprived someone of life, liberty, or property without due process of law is whether the policy enacted by the government is an arbitrary, capricious, or unreasonable response to the problem at hand. As the Court observed in *Jacobson*, democratically elected lawmakers enjoy wide latitude in their evaluation of the evidence and the arguments as to what appropriate public policy is because any other approach amounts to a form of minority rule. Accordingly, the requirement of due process is met when the policy a state selects bears a reasonable relationship to the problem it seeks to solve.

**JACOBSON V. MASSACHUSETTS**

Supreme Court of the United States, 1905
197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643

**BACKGROUND & FACTS** Pursuant to an act passed by the Massachusetts legislature, the city of Cambridge enacted a municipal ordinance requiring all the inhabitants of the city to be vaccinated against smallpox. The state law also contained a provision punishing violators by fining them five dollars. Jacobson, who offered to prove that vaccination was ineffective or dangerous, refused to comply with the ordinance, and he was tried and convicted. He asserted that the statute and the ordinance violated his rights under the Preamble and the Fourteenth Amendment of the Constitution. The state defended on the ground that such an act was a legitimate exercise of its police power. The Massachusetts Supreme Judicial Court sustained the legislation, and Jacobson appealed to the U.S. Supreme Court.

Mr. Justice HARLAN delivered the opinion of the court:

This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

* * *

The authority of the state to enact this statute is * * * what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution.

Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and “health laws of every description”; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative
enactment as will protect the public health and the public safety. ***

***

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every free man to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. ***

***

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. *** There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution,—to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. ***

***

[T]he defendant’s *** offers of proof *** in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had.
or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

In view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.

* * *

The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution. * * *

* * *

The judgment of the court below must be affirmed.

It is so ordered.

[Justice BREWER and Justice PECKHAM dissented.]

Reasonableness is a lenient standard of constitutionality, and very few laws will fail to receive a passing grade. But the state police power in this chapter is exercised in contexts where it may affect legitimate interests of the national government—such as ensuring the free flow of commerce among the states—and, thus, more than mere reasonableness will be required for a state law to pass constitutional muster.

Federal Preemption and Federal Dictation

In a speech he gave in 1913, Justice Holmes observed, “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.” Justice Holmes was keenly aware that the Court’s exercise of judicial review over state acts is an important counterweight to the threat of chaos that never disappears in a political system in which two (or more) levels of government simultaneously enact policies on many of the same subjects. Some institution—in our system, it is usually the Supreme Court—must act to settle disputes when conflicting policies are generated by different levels of government. The late Professor Paul Freund characterized the Court’s role in this respect as “the umpire of the federal system.” In instances such as McCulloch and Gibbons, which rules the umpire should apply seemed clear, or at least Chief Justice Marshall made it seem so.

When both Congress and the state legislatures have enacted laws in a particular field, it is not necessarily the case that state legislation is unconstitutional simply because the federal government has spoken. When we speak of a cooperative federal system, but one in which the national government is often considered to have the decisive word, we sometimes encounter the knotty problem of whether the federal government meant to entirely or only partially occupy a given policy field. We need to determine whether Congress has chosen to exercise exclusive or concurrent jurisdiction—whether to entirely occupy the field with a policy it has chosen or to exercise policymaking jointly with the states. When Congress has chosen to occupy the entire field, we say it has "preempted" state action. Since frequently Congress is less than clear about its intent or has deliberately left the matter unsettled, the Court—as "umpire of the federal system"—is left to make that determination, subject, of course, to any corrective legislation Congress may choose to pass after looking at the Court's conclusion.

Although determining whether a given policy field has been preempted by federal legislation necessarily means weighing specific competing national and state interests, the Court has identified three inquiries to guide its decision: (1) Is the scheme of federal regulation so pervasive as to make it a reasonable inference that Congress left no room for the states to supplement it? (2) Does the federal statute touch a field in which the federal interest is so dominant it must be assumed to preclude enforcement of state statutes on the same subject? (3) Could federal and state legislation coexist in the field without the prospect of serious conflict in the administration of the federal program? In Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477 (1956), the answers to these three questions led the Court to invalidate a state law punishing subversive activities on the ground that the federal government had preempted the field by passing the Smith Act. As a consequence, the states were barred from enacting laws that also made it a state crime to advocate or conspire to advocate the overthrow of the United States government by force and violence. Amid the anti-Communist hysteria of the 1950s, the Court's decision in the Nelson case showed what a risky business this process of trying to second-guess Congress can be. A significant number of congressmen and senators were so riled by what they saw as the Court's heavy-handed use of the preemption doctrine that proposals to overturn the ruling were only narrowly defeated.

In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission (below), the Court considered whether a California statute on the licensing of nuclear power plants to generate electricity was preempted by the federal Atomic Energy Act of 1954. Note that its analysis conforms to the pattern of inquiries just described; the lettered sections of the Court's opinion parallel the numbered questions above. The opinion takes particular care in describing the various regulatory concerns that accompany the domestic use of nuclear power, the evolution of the federal government's control over nuclear energy, and the role Congress has left for the states in a field now marked by cooperation.

**Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission**

Supreme Court of the United States, 1983
461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752

**BACKGROUND & FACTS** In 1976, the California legislature amended the state's Public Resources Code. Section 25524.1(b) of the amended Code specified that before construction of any more nuclear power plants would be authorized, the
State Energy Resources Conservation & Development Commission would have to determine on a case-by-case basis that the facility would have “adequate capacity” for storage of the plant’s spent fuel rods and that the plant would have continuous on-site full core reserve storage to permit storage of the entire reactor core in the event repairs had to be made to the reactor. Another addition to the Code, section 25524.2, addressed the long-term solution to nuclear waste by imposing a moratorium on the certification of any new nuclear power plants until the commission determined that the appropriate federal regulatory agency had approved a demonstrated technology for the disposal of high-level nuclear waste.

Pacific Gas & Electric Company and Southern California Edison Company, public utilities with a commercial interest in generating more electrical power through the construction of additional nuclear power plants, brought suit, arguing that Congress had already preempted this aspect of the nuclear power field by passing the Atomic Energy Act of 1954 and that these provisions of the state Code therefore violated the Supremacy Clause of the U.S. Constitution. A federal district court held that Congress had preempted the field and struck down the two provisions. A federal appellate court later concluded that the challenge to section 25524.1(b) was not ripe for adjudication because, due to the moratorium imposed, the commission had not yet found any plant’s storage capacity to be inadequate and might never do so. However, the appeals court did reverse the district court’s judgment as to section 25524.2, holding that it was not preempted by federal law. The U.S. Supreme Court subsequently agreed that the challenge to section 25524.1(b) was premature. The opinion that follows therefore only addresses whether section 25524.2 was preempted. It begins by providing some background on nuclear power technology and regulation.

Justice WHITE delivered the opinion of the Court.

* * * To facilitate * * * [the peaceful] development [of atomic energy] the Federal Government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the States would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

* * *

A nuclear reactor must be periodically refueled and the “spent fuel” removed. This spent fuel is intensely radioactive and must be carefully stored. The general practice is to store the fuel in a water-filled pool at the reactor site. For many years, it was assumed that this fuel would be reprocessed; accordingly, the storage pools were designed as short-term holding facilities with limited storage capacities. As expectations for reprocessing remained unfulfilled, the spent fuel accumulated in the storage pools, creating the risk that nuclear reactors would have to be shut down. This could occur if there were insufficient room in the pool to store spent fuel and also if there were not enough space to hold the entire fuel core when certain inspections or emergencies required unloading of the reactor. In recent years, the problem has taken on special urgency. * * * Government studies indicate that a number of reactors could be forced to shut down in the near future due to the inability to store spent fuel.

There is a second dimension to the problem. Even with water-pools adequate to store safely all the spent fuel produced during the working lifetime of the reactor,
permanent disposal is needed because the wastes will remain radioactive for thousands of years. A number of long-term nuclear waste management strategies have been extensively examined. These range from sinking the wastes in stable deep seabeds, to placing the wastes beneath ice sheets in Greenland and Antarctica, to ejecting the wastes into space by rocket. The greatest attention has been focused on disposing of the wastes in subsurface geologic repositories such as salt deposits. There are both safety and economic aspects to the nuclear waste issue: first, if not properly stored, nuclear wastes might leak and endanger both the environment and human health; second, the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor shutdowns, rendering nuclear energy an unpredictable and uneconomic adventure.

The California laws at issue here are responses to these concerns. * * *

Petitioners, the United States, and supporting amici, present three major lines of argument as to why §25524.2 is pre-empted. First, they submit that the statute—because it regulates construction of nuclear plants and because it is allegedly predicated on safety concerns—ignores the division between federal and state authority created by the Atomic Energy Act, and falls within the field that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States. * * * “So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Rice v. Santa Fe Elevator Corp., 331 U.S., at 230, 67 S.Ct., at 1152.

The Atomic Energy Act must be read, however, against another background. * * * Until 1954, * * * the use, control, and ownership of nuclear technology remained a federal monopoly. The Atomic Energy Act of 1954 * * * grew out of Congress’ determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. * * * The Act implemented this policy decision by providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors. * * * The [Atomic Energy Commission] AEC, however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. * * * Upon these subjects, no role was left for the States.

Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensive-
AEC's regulatory authority, does not purport to exercise its authority based on economic considerations. The NRC stated that utility financial qualifications are only of concern to the NRC if related to the public health and safety. It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments.

[Thus,] from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate-making, and the like.

[We emphasize that the statute § 25524.2] does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of nonsafety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation. Respondents broadly argue that although safety regulation of nuclear plants by States is forbidden, a State may completely prohibit new construction until its safety concerns are satisfied by the Federal Government. We reject this line of reasoning. State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." Rice v. Santa Fe Elevator Corp., 331 U.S., at 236, 67 S.Ct., at 1155. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal. A state prohibition on nuclear construction for safety reasons would be pre-empted.

That being the case, it is necessary to determine whether there is a nonsafety rationale for §25524.2. Petitioners maintain that § 25524.2 evinces no concern with the economics of nuclear power. This view of the statute is overly myopic. Once a technology is selected and demonstrated, the utilities and the California Public Utilities Commission would be able to estimate costs; such cost estimates cannot be made until the Federal Government has settled upon the method of long-term waste disposal. Moreover, once a satisfactory disposal technology is found and demonstrated, fears of having to close down operating reactors should largely evaporate.

Petitioners note that there already is a body, the California Public Utilities Commission, which is authorized to determine on economic grounds whether a nuclear powerplant should be constructed. While California is certainly free to make these decisions on a case-by-case basis, a State is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases. The economic uncertainties engendered by the nuclear waste disposal problems are not factors that vary from facility to facility; the issue readily lends itself to more generalized
decisionmaking and California cannot be faulted for pursuing that course.

Petitioners argue that § 25524.2 and companion provisions in California’s so-called nuclear laws, are more clearly written with safety purposes in mind.

There are two reasons why we should not become embroiled in attempting to ascertain California’s true motive. First, inquiry into legislative motive is often an unsatisfactory venture. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it. Second, it would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings. In these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands.

Therefore, we accept California’s avowed economic purpose as the rationale for enacting §25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation.

B

Petitioners’ second major argument concerns federal regulation aimed at the nuclear waste disposal problem itself. It is contended that §25524.2 conflicts with federal regulation of nuclear waste disposal, with the NRC’s decision that it is permissible to continue to license reactors, notwithstanding uncertainty surrounding the waste disposal problem, and with Congress’ recent passage of legislation directed at that problem.

In 1977, the NRC was asked by the Natural Resources Defense Council to halt reactor licensing until it had determined that there was a method of permanent disposal for high-level waste. The NRC concluded that, given the progress toward the development of disposal facilities and the availability of interim storage, it could continue to license new reactors. Natural Resources Defense Council, Inc. v. NRC, 582 F.2d 166, 168–169 (CA2 1978).

The NRC’s imprimatur, however, indicates only that it is safe to proceed with such plants, not that it is economically wise to do so. Because the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and §25524.2 is possible. Moreover, because the NRC’s regulations are aimed at insuring that plants are safe, not necessarily that they are economical, §25524.2 does not interfere with the objective of the federal regulation.

Nor has California sought through §25524.2 to impose its own standards on nuclear waste disposal. The statute accepts that it is the federal responsibility to develop and license such technology. As there is no attempt on California’s part to enter this field, one which is occupied by the Federal Government, we do not find §25524.2 preempted.

C

Finally, it is strongly contended that § 25524.2 frustrates the Atomic Energy Act’s purpose to develop the commercial use of nuclear power. It is well established that state law is pre-empted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 U.S., at 67, 61 S.Ct., at 404.

There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. It is true that Congress has sought to simultaneously promote the development of alternative energy sources, but Congress has [not] retreated from its oft-expressed commitment to further development of nuclear power for electricity generation.
Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-à-vis a fossil fuel plant should be built. The decision of California to exercise that authority does not constitute a basis for pre-emption. Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.

The judgment of the Court of Appeals is Affirmed.

Justice BLACKMUN, with whom Justice STEVENS joins, concurring in part and concurring in the judgment.

I join the Court’s opinion, except to the extent it suggests that a State may not prohibit the construction of nuclear power plants if the State is motivated by concerns about the safety of such plants. Since the Court finds that California was not so motivated, this suggestion is unnecessary to the Court’s holding. I cannot agree that a State’s nuclear moratorium, even if motivated by safety concerns, would be pre-empted.

* * * Congress has occupied not the broad field of “nuclear safety concerns,” but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards. * * *

* * *

[T]here is no federal policy preventing a State from choosing to rely on technologies it considers safer than nuclear power. * * *

* * *

* * * Congress has not required States to “go nuclear,” in whole or in part. I would conclude that the decision whether to build nuclear plants remains with the States. In my view, a ban on construction of nuclear powerplants would be valid even if its authors were motivated by fear of a core meltdown or other nuclear catastrophe.

The opinion in Pacific Gas & Electric emphasizes Congress’s sensitive appreciation for the role of state policymaking on the economic aspects of generating nuclear power. But when the states dragged their feet on the matter of disposing of low-level radioactive waste, Congress opted for sterner stuff. As you might expect, some states have very progressive records of tackling technological and social problems; others do not share that aggressive tradition of making public policy. One of the recurring complaints by those who are critical of an expanded role for the states in the federal system is that many states are simply unresponsive to problems. As the background to New York v. United States (p. 373) shows, the disposal of low-level radioactive waste was such a problem. In a federal system where many states often have to be prodded to act, there are many kinds of carrots and sticks available to the national government. In her opinion for the Court, Justice O’Connor takes inventory. Her discussion recalls several decisions from the preceding chapter—National League of Cities (p. 321), Garcia (p. 322), and South Dakota v. Dole (p. 356)—and places them in that context. Two of the “incentives” at issue in the federal statute pass muster because they were measures we understand are constitutional from the discussion in Chapter 5. The third element of the federal program—the “take title” provision—the Court found to be of a very different order. If Congress can do so much to influence how states exercise their police powers through preemption and financial incentives, what difference does it make if Congress has simply dictated that the states use their police powers in a particular way? As Justice O’Connor explains: When Congress preempts state action, it enacts the policy on its own authority and thus takes direct political responsibility for it; when Congress dictates how the states shall use their police power, the states are forced to take the political heat for a controversial policy engineered by someone else. The
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<th>Case</th>
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<td>Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 80 S.Ct. 813 (1960)</td>
<td>Detroit could legally enforce provisions of its smoke abatement code with respect to vessels moving in interstate commerce, notwithstanding the fact that the boilers and other equipment on those vessels had been inspected and licensed for interstate operation by the federal government pursuant to federal regulations.</td>
<td>7–2; Justices Frankfurter and Douglas dissented.</td>
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<td>City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S.Ct. 1854 (1973)</td>
<td>A city ordinance prohibiting jet aircraft from taking off between 11 p.m. and 7 a.m. was invalid because Congress had preempted state and local control over aircraft noise in the Federal Aviation Act of 1958 and the Noise Control Act of 1972.</td>
<td>5–4; Justices Stewart, White, Marshall, and Rehnquist dissented.</td>
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<td>Crosby v. National Foreign Trade Council, 530 U.S. 363, 122 S.Ct. 2288 (2000)</td>
<td>Massachusetts law prohibiting trade with Myanmar (Burma) was preempted by congressional legislation that imposed a qualified embargo on doing business with that nation and authorized the President to modify the boycott as incentive to achieve greater democracy and human rights there.</td>
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<td>Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S.Ct. 2404 (2001)</td>
<td>As with its partial occupation of the field in the regulation of nuclear power, Congress prohibited some, but not all, state and local regulation of tobacco advertising. The Federal Cigarette Labeling and Advertising Act precluded states and their political subdivisions from restricting cigarette advertising where such regulation was motivated by health concerns, but left open to them regulation of cigarette advertising where it had a zoning purpose—to ads on billboards, for example, where “[r]estrictions on the location and size of advertisements * * * apply to cigarettes on equal terms with other products.”</td>
<td>5–4; Justices Stevens, Souter, Ginsburg, and Breyer dissented.</td>
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<td>Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S.Ct. 2151 (2002)</td>
<td>State law requiring HMOs to provide a patient with a second medical opinion in disputes between a primary care physician and the HMO about patient’s treatment was not preempted by the federal Employee Retirement Income Security Act (ERISA).</td>
<td>5–4; Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissented.</td>
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<td>Kentucky Association of Health Care Plans, Inc. v. Miller, 538 U.S. 329, 123 S.Ct. 1471 (2003)</td>
<td>If state law requires it, HMOs must open their networks to any doctor who agrees to their conditions and rates. State “any willing provider” laws are not preempted by ERISA. If a doctor is willing to function under its conditions and rates, an HMO cannot bar a patient from the doctor of his choice.</td>
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<td>Aetna Health, Inc. v. Davila, 542 U.S. 200, 124 S.Ct. 2488 (2004)</td>
<td>Patients bringing legal action because their HMOs would not pay for necessary medical services cannot sue for damages in state court under state law because ERISA completely preempts the field. ERISA requires that such malpractice suits be brought only in federal court.</td>
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evidence of congressional responsibility is clear in preemption, but when Congress dictates the exercise of state policy that direct evidence is missing. In other words, federal dictation wipes the controversial policy free of congressional fingerprints, so the real culprit cannot easily be identified.

NEW YORK v. UNITED STATES
Supreme Court of the United States, 1992
505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120

BACKGROUND & FACTS
Between 1962 and 1971, six sites in various areas of the country opened as depositories for low-level radioactive waste. A combination of events—filling to capacity, water management problems, and temporary shutdown—left only one site open by 1979. Congress, alarmed at the prospect that soon no disposal sites would be left, passed legislation holding each state responsible for the radioactive waste generated within its borders and authorized the creation of regional compacts by states that, once ratified by Congress, could restrict use of disposal facilities to waste coming from within member states. Because three-fifths of the states failed to act, Congress in 1985 legislated several “incentives” to “encourage” those that remained unresponsive. The legislation reflected a compromise between the three states that still operated nuclear waste disposal sites and the unsited states. The sited states agreed to accept low-level waste from the remainder of the country for seven more years; the rest of the states agreed to end their reliance on those three facilities in 1992. States were again encouraged to form interstate compacts to deal with the problem, and the three sited states were permitted to impose escalating surcharges on the waste they received. The 1985 legislation contained three kinds of incentives to get the unresponsive states to act: (1) monetary incentives—states that made progress toward long-term solution of the problem and met deadlines would receive payments from the Secretary of Energy out of an account created from the surcharges; (2) access incentives—states that failed to meet deadlines faced double, triple, and quadruple surcharges and finally were to be denied all access; and (3) a “take title” provision—any state that failed to provide for disposal of its own radioactive waste by 1996 was ordered to assume title to (possession of) the waste and was liable for all direct and indirect damages arising from failure to dispose of it.

New York, a state that generates a large share of the nation’s low-level radioactive waste, did not join a regional compact, but instead targeted two locations within the state as depository sites, something that was not particularly appreciated by the two counties affected. The state and the two counties then sued the federal government, arguing that the 1985 legislation was outside Congress’s enumerated powers and violated the Tenth Amendment. A federal district court dismissed the complaint, and a federal appeals court affirmed. The Supreme Court then granted the plaintiffs’ petition for certiorari.

Justice O’CONNOR delivered the opinion of the Court.

* * *

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress’ authority under the Commerce Clause. * * * Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it
wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

***

The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions. *** In Chief Justice Chase’s much-quoted words, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” Texas v. White, 74 U.S. (7 Wall.) 700, 725, 19 L.Ed. 227 (1869). ***

***

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. *** We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *** The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State’s policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

First, under Congress’ spending power, “Congress may attach conditions on the receipt of federal funds.” South Dakota v. Dole, 483 U.S., at 206, 107 S.Ct., at 2795. Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending ***. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State’s legislative choices. ***

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *** This arrangement, which has been termed “a program of cooperative federalism,” *** is replicated in numerous federal statutory schemes. These include the Clean Water Act, 86 Stat. 816, as amended ***.

By either of these two methods, *** the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of
New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

With these principles in mind, we turn to the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.

**A**

The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

The first of these steps is an unexceptionable exercise of Congress’ power to authorize the States to burden interstate commerce. While the Commerce Clause has long been understood to limit the States’ ability to discriminate against interstate commerce, that limit may be lifted, as it has been here, by an expression of the “unambiguous intent” of Congress. Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress’ approval, the States can clearly do so with Congress’ approval, which is what the Act gives them.

The second step, the Secretary’s collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress’ commerce or taxing power. Steward Machine Co. v. Davis, 301 U.S. 548, 581–583, 57 S.Ct. 883, 888–889 (1937).

The third step is a conditional exercise of Congress’ authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority in any of the four respects our cases have identified. See generally South Dakota v. Dole, 483 U.S., at 207–208, 107 S.Ct., at 2796. The expenditure is for the general welfare; the States are required to use the money they receive for the purpose of assuring the safe disposal of radioactive waste. The conditions imposed are unambiguous; the Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related to the purpose of the expenditure; both the conditions and the payments embody Congress’ efforts to address the pressing problem of radioactive waste disposal. Finally, petitioners do not claim that the conditions imposed by the Act violate any independent constitutional prohibition.

* * * Petitioners argue that because the money collected and redisbursed to the States is kept in an account separate from the general treasury, because the Secretary holds the funds only as a trustee, and because the States themselves are largely able to control whether they will pay into the escrow account or receive a share, the Act “in no manner calls for the spending of federal funds.”

The Constitution’s grant to Congress of the authority to “pay the Debts and provide
for the general Welfare has never, however, been thought to mandate a particular form of accounting. A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose. See, e.g., 23 U.S.C. §118 (Highway Trust Fund); 42 U.S.C. §401(a) (Federal Old-Age and Survivors Insurance Trust Fund); 42 U.S.C. §401(b) (Federal Disability Insurance Trust Fund); 42 U.S.C. §1395t (Federal Supplementary Medical Insurance Trust Fund). The Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner. * * *

The Act’s first set of incentives, in which Congress has conditioned grants to the States upon the States’ attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

B

In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. * * *

This is the choice presented to nonsited States by the Act’s second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State’s refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act’s milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. * * * Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act’s second set of incentives thus represents a conditional exercise of Congress’ commerce power, along the lines of those we have held to be within Congress’ authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

C

The take title provision is of a different character. This third so-called “incentive” offers States, as an alternative to regulating pursuant to Congress’ direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States’ failure to do so promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

* * *

The take title provision offers state governments a “choice” of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different
than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators’ damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would “commandeer” state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress’ direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Whether one views the take title provision as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

State officials [also] cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. * * *

* * * While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them. The judgment of the Court of Appeals is accordingly affirmed in part and reversed in part. Justice WHITE, with whom Justice BLACKMUN and Justice STEVENS join, concurring in part and dissenting in part.

* * *

[After] undertaking initial steps to honor the interstate compromise embodied in the 1985 Act, New York continued to take full advantage of the import concession made by the sited States, by exporting its low-level radioactive waste for the full 7-year extension period provided in the 1985 Act. By gaining these benefits and complying with certain of the 1985 Act's deadlines, therefore, New York fairly evidenced its acceptance of the federal-state arrangement—including the take title provision.

* * *

The State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act. * * *

The practical effect on New York’s position is that because it is unwilling to...
honor its obligations to provide in-state storage facilities for its low-level radioactive waste, other States with such plants must accept New York’s waste, whether they wish to or not. Otherwise, the many economically and socially-beneficial producers of such waste in the State would have to cease their operations. The Court’s refusal to force New York to accept responsibility for its own problem inevitably means that some other State’s sovereignty will be impinged by it being forced, for public health reasons, to accept New York’s low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.

***

The ultimate irony of the decision today is that in its formalistically rigid obeisance to “federalism,” the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems. *** By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective. ***

Justice STEVENS, concurring in part and dissenting in part.

***

Three years later, the Court struck down the interim background check requirement of the Brady Act in Printz v. United States. Although the provision invalidated was a stop-gap, the perceived constitutional defects of which could be corrected in any of several ways, as Justice O’Connor’s concurring opinion pointed out, the impact of the political values embraced by the majority in New York was evident.

PRINTZ v. UNITED STATES
Supreme Court of the United States, 1997
521 U.S. 98, 117 S.Ct. 2365, 138 L.Ed.2d 914

BACKGROUND & FACTS The Brady Act, passed by Congress in 1993 to amend the Gun Control Act of 1968, imposed a waiting period of up to five days in the purchase of a handgun for the purpose of checking the purchaser’s background.
Although the Brady Law anticipated that, within five years of its enactment, future background checks would be performed instantaneously at the time of purchase through a computerized national criminal check system maintained by the Department of Justice, the Act meantime required that the check be performed by the chief law enforcement officer (CLEO) of the prospective purchaser’s place of residence. The check was to be performed on the basis of the prospective buyer’s sworn statement forwarded to the law enforcement officer by a federally licensed gun dealer. If the law enforcement officer approved the purchase under federal law, the buyer’s statement was to be destroyed. If the law enforcement officer disapproved the purchase on the basis of federal law, he had to give reasons. Jay Printz, Sheriff of Ravalli County, Montana, and Richard Mack, Sheriff of Graham County, Arizona, brought suit to enjoin the background check requirements imposed on them by the Brady Act as a violation of the Tenth Amendment. The district courts hearing their respective suits found the federal requirement unconstitutional. The appeals were consolidated for argument and decision before a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, which reversed the judgments of the district courts, and the Supreme Court granted certiorari.

Justice SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, * * * 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

* * *

The petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs’ challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. * * *

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that “the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws.” * * *

* * *

Not only do the enactments of the early Congresses * * * contain no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On * * * the day before its proposal of the Bill of Rights * * * the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government’s laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States’ executive, but a recommendation to their legislatures. * * * Moreover, when Georgia refused to comply with the request, * * * Congress’s only reaction was a law authorizing the marshal in any State that failed to comply with the [r]ecommendation * * * to rent a temporary jail until provision for a permanent one could be made * * *

* * *

*** [T]here is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. ***

* * *
It is incontestible that the Constitution established a system of “dual sovereignty.”

The Framers’ experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people. The great innovation of this design was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other” — “a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838, 115 S.Ct. 1842, 1872 (1995) (KENNEDY, J., concurring). The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, “shall take Care that the Laws be faithfully executed,” personally and through officers whom he appoints. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

Opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.

It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be “dragooned” into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of New York because it does not diminish the accountability of state or federal officials. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

We held in New York [v. United States, 505 U.S. 144, 112 S.Ct. 2408 (1992)] that Congress cannot compel the States to enact

CHAPTER 6 THE REGULATORY POWER OF THE STATES IN THE FEDERAL SYSTEM
or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. * * * [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice O’CONNOR, concurring.

* * * The Brady Act violates the Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers. * * * Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program. Moreover, the directives to the States are merely interim provisions scheduled to terminate November 30, 1998. * * * Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs. * * *

* * *

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

* * * The question [presented in this case] is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the Framers of the Constitution, whether the Congress could require state agents to collect federal taxes. Or the question whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

[In times of national emergency[, m]atters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment * * * that forbids the enlistment of state officers to make that response effective? * * *

* * *

The Brady Act was passed in response to what Congress described as an “epidemic of gun violence.” * * * The Act’s legislative history notes that 15,377 Americans were murdered with firearms in 1992, and that 12,489 of these deaths were caused by handguns. * * * Congress expressed special concern that “[t]he level of firearm violence in this country is, by far, the highest among developed nations.” * * * The partial solution contained in the Brady Act, a mandatory background check before a handgun may be purchased, has met with remarkable success. Between 1994 and 1996, approximately 6,600 firearm sales each month to potentially dangerous persons were prevented by Brady Act checks; over 70% of the rejected purchasers were convicted or indicted felons. * * *

* * *

Article I, §8, grants the Congress the power to regulate commerce among the
It can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers” is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. * * *

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress. * * * Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens. Indeed, it would be more reasonable to infer that federal law may impose greater duties on state officials than on private citizens because another provision of the Constitution requires that “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.” U.S. Const., Art. VI, cl. 3.

* * *

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.

Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign states, but it had no authority to govern individuals directly. * * * That method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient. * * *

The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers. * * *

The Founders intended to enhance the capacity of the federal government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials. Hamilton made clear that the new Constitution, “by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws.” The Federalist No. 27, at 180. Hamilton’s meaning was unambiguous; the federal government was to have the power to demand that local officials implement national policy programs. * * *

* * * The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as registering young adults for the draft, * * * creating state emergency response commissions designed to manage the release of hazardous substances, * * * collecting and reporting data on underground storage tanks that may pose an environmental hazard, * * * and reporting traffic fatalities * * * and missing children * * * to a federal agency.

* * *

Recent developments demonstrate that the political safeguards protecting Our Federalism are effective. The majority expresses special concern that were its rule
not adopted the Federal Government would be able to avail itself of the services of state government officials “at no cost to itself.” * * * But this specific problem of federal actions that have the effect of imposing so-called “unfunded mandates” on the States has been identified and meaningfully addressed by Congress in recent legislation. See Unfunded Mandates Reform Act of 1995, * * * 109 Stat. 48.

The statute was designed “to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State . . . governments without adequate Federal funding, in a manner that may displace other essential State . . . governmental priorities.” 2 U.S.C.A. §1501(2) (Supp. 1997). * * * Whatever the ultimate impact of the new legislation, its passage demonstrates that unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances.

* * * By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State’s rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government’s ability to rely on the magistracy of the states. * * *

[New York v. United States] squarely approved of cooperative federalism programs, designed at the national level but implemented principally by state governments. New York disapproved of a particular method of putting such programs into place, not the existence of federal programs implemented locally. * * * Indeed, nothing in the majority’s holding calls into question the three mechanisms for constructing such programs that New York expressly approved. Congress may require the States to implement its programs as a condition of federal spending, in order to avoid the threat of unilateral federal action in the area, or as a part of a program that affects States and private parties alike. * * *

* * *

The provision of the Brady Act that crosses the Court’s newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign state. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

* * *

The fault identified by the Court in Printz and in New York v. United States is essentially what we have come to call “an unfunded federal mandate.” By this we mean that Congress orders the states to do something within their jurisdiction but doesn’t provide the money. Instead of conditioning action upon the receipt of federal funds, policy is simply imposed. As we saw in Chapter 5, section D, Congress may attach strings to its exercise of the taxing and spending power, but simply telling the states what to do in areas of their rightful jurisdiction is unconstitutional.

What if the states agree to the conditions established by Congress, Congress gives them money, but the federal funds appropriated are woefully insufficient to accomplish the specified goals so that the states are locked in to spending substantially more than was anticipated at the beginning? In other words, is an under-funded federal mandate an unfunded mandate?
In his Printz dissent, Justice Stevens suggested that Congress put the whole issue to rest in 1995 when it passed the Unfunded Federal Mandates Act, 109 Stat. 48. Not so. Congress’s self-imposed ban on unfunded public mandates was riddled with exceptions. Excluded is any legislative provision that enforces the constitutional rights of individuals, prohibits discrimination, provides for emergency assistance, is necessary for national security, or relates to Social Security’s old-age, survivors, and disability programs. Moreover, the unfunded mandates law also does not apply to any duty imposed on states or localities as “a condition *** arising from participation in a voluntary federal program.”

Front and center in the most recent controversy is the chorus of dissatisfaction from states arising from implementation of the No Child Left Behind (NCLB) Act, 115 Stat. 1425, portrayed on its passage in January 2002 as one of the crown jewels of President George W. Bush’s domestic policy agenda. The NCLB law mandated that any state accepting federal money pursuant to it must: revise the state’s curriculum standards in core areas; develop standardized tests to measure students’ success in meeting those standards; administer such tests to all but a very small number of its students; require schools and school districts to determine whether students are making adequate yearly progress; take certain specified actions against those schools and school districts not making timely progress; and ensure that teachers and others are meeting prescribed qualifications. The statute also provided that “Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.”

However, the cost of complying with these federal mandates far exceeded the limited increase in federal funding that followed enactment of the NCLB Act. Consequently, the country’s largest teachers’ union and eight school districts in Michigan, Texas, and Vermont sued the U.S. Department of Education to relieve state governments who signed on to the NCLB of any obligations to meet the Act’s requirements in the absence of adequate federal funding. Plaintiffs argued, for example, that Illinois received $13 million annually to develop and administer tests but this level of funding created a $2.4 million shortfall. They argued that many districts spent more money on just collecting, analyzing, and reporting the required data than they received in total NCLB funds. They alleged that “technical assistance” under the statute was so woefully underfunded that Connecticut, for instance, received $218,000 in 2005 to provide assistance to 93 schools, but the actual cost of the mandate was $18 million.

In School District of City of Pontiac v. Spellings, 2005 WL 3149545 (E.D.Mich. 2005), a federal district court held that “[i]f Congress had meant that federal funding would pay for 100% of all NCLB requirements, then *** it would have said so clearly and unambiguously.” The court continued, “By including the words ‘an officer or employee of,’ Congress meant only ‘to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute.’” The Secretary of Education or any of her subordinates could not impose additional requirements but, said the court, that did not mean “Congress could not do so, which it obviously has done by passing the NCLB Act.” And, the court concluded, the “plaintiffs have pointed to no other statutory provision *** to support their argument that Congress intended for these requirements to be paid for solely by the federal appropriation.” The district court did not reach any constitutional issues, but for discussion of them, see Ronald D. Wenkart, “Unfunded Federal Mandates: The No Child Left Behind Act and the Individuals with Disabilities Education Act,” 202 Education Law Reports 461 (2005). A second suit, filed by the Attorney General of Connecticut, also attacking NCLB’s underfunding, is pending.
A similar legal challenge is brewing against the REAL ID Act, 119 Stat. 311, enacted by Congress in 2005 as Title II of an $82 billion emergency spending bill. It enlists state departments of motor vehicles in the crackdown on illegal aliens and would-be terrorists. Section 202 of the law: (1) standardizes the information required to obtain a driver’s license; (2) mandates that state motor vehicle departments verify the applicant is an American citizen or legal resident by inspecting photo identification, a Social Security card, and address of current residence; (3) compels verification of the information with other governmental agencies; (4) stipulates the entry of this information into a national database; and (5) requires certain physical security features to prevent duplicating, counterfeiting, and tampering with licenses. In effect, the law charges the states with the task of creating a national identification card system. State governors argue that this would turn DMV offices into local arms of the FBI and the Immigration & Naturalization Service, add appreciably to the cost of running DMVs, and increase the expense of a driver’s license. The law originally gave states until 2008 to comply, but there has been pressure to extend the deadline. While some states already meet the standards, Congress did provide some funding in §204 to enable the remaining states to upgrade. Although Congress has authorized $40 million in assistance, the estimated total tab could be as much as $11 billion over five years. The incentive for states to comply is not limited to the loss of whatever federal funding is made available; uncooperative states could find that their citizens will not be able to clear airport security because they lack the required identification. See Peter Harkness, “Real ID Reality Check,” Congressional Quarterly Weekly Report, Oct. 2, 2006, p. 2612.

The National Voter Registration Act of 1993, 107 Stat. 77, aimed at increasing voter participation, found much easier sledding than the Brady Act challenged in Printz. Dubbed the “Motor Voter Act” because it requires states to provide for voter registration at such places as it receives applications for driver’s licenses and provides public assistance or services to the disabled, the law was challenged as a violation of the Tenth Amendment. Although federal courts upholding the statute made it clear that motor-voter registration applies only to elections of federal office holders and states can insist on separate voter registration for state elections at places of their own choosing, they concluded it was a valid exercise of congressional power under Article I, section 4, clause 1, which provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations * * *.” Moreover, the federal courts have also held that the states have to bear the cost of complying with the law, even if it is substantial. See Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093, 116 S.Ct. 815 (1996).

The Supreme Court also upheld the Drivers’ Privacy Protection Act (DPPA), 108 Stat. 2099, passed by Congress in 1994 to prevent direct marketers and criminals from obtaining personal information contained in state driver’s license records. The law bars state motor vehicle departments from knowingly disclosing information such as names, addresses, telephone numbers, photographs, Social Security numbers, and medical and disability data, except for expressly permitted purposes. In Reno v. Condon, 528 U.S. 141, 120 S.Ct. 666 (2000), the Court unanimously accepted the federal government’s argument that the statute was distinguishable from the ill-fated laws struck down in New York and Printz. The connection between the statute and Congress’s legislative power was firmly established by the fact that “the motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers and others engaged in interstate commerce to contact drivers with customized solicitations.” Beyond question, then, “drivers’ information is * * * an article of commerce []” But this finding did not conclusively settle the matter because South Carolina didn’t argue that “Congress lacked
authority over the subject matter” but “that the DPPA violates the Tenth Amendment because it ‘thrusts upon the States all of the day-to-day responsibility for administering its complex provisions’ and thereby makes ‘state officials the unwilling implementors of federal policy.’” As to this contention, the Court held: “[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.” Nor did the DPPA regulate the states as states because “[t]he DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.”

The Interstate Movement of Persons

As we noted earlier, even Chief Justice Marshall acknowledged the possibility several years after the decision in Gibbons v. Ogden that, absent congressional action, state legislation regulating business that happened to touch interstate commerce was not necessarily unconstitutional. It remained, however, for the Court under the influence of Marshall’s successor, Roger Taney, fully to develop the possibility. In Mayor of City of New York v. Miln, 36 U.S. (11 Pet.) 102, 9 L.Ed. 648 (1837), the Court upheld a state statute designed to control the size of the welfare rolls by discouraging the immigration of indigents through the port of New York. Among other things, the act required the master of a ship entering the port from any state or foreign country to submit a report containing specified information about the passengers on board and, upon demand of the mayor, to pay bonds for the support of foreign passengers who later became public charges. Speaking for the Court, Justice Barbour found the act was “not a regulation of commerce, but of police,” likening it to an “inspection law.” Said the Court, “We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease.” In dissent, Justice Story characterized the law as an unconstitutional restraint on interstate and foreign commerce and allowed as how, from a personal conversation with John Marshall, New York’s barrier to discourage the arrival of welfare recipients “fell directly within the principles established in the case of Gibbons v. Ogden” and went further than anything the late Chief Justice would have sanctioned. The position the Taney Court took in Miln is also further than any the Court would be willing to take today.

In Edwards v. California (p. 387), the Court took aim at an “anti-Okie” law of the 1930s enacted by California, whose modest Depression-era public welfare system was strained still further by the additional demand placed on it by the arrival of thousands of poor people fleeing the Oklahoma dust bowl. The statute made it a misdemeanor to bring “into the state any indigent person who is not a resident of the state, knowing him to be an indigent person.” Five Justices agreed the law was clearly “an unconstitutional barrier to interstate commerce”; the remaining four were of the view that the right to travel was “an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.”
EDWARDS V. CALIFORNIA
Supreme Court of the United States, 1941
314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119

BACKGROUND & FACTS
Edwards, a citizen of the United States and a resident of California, was convicted in a California court of violating a state statute that made it a misdemeanor to bring "into the state any indigent person who is not a resident of the state, knowing him to be an indigent person." He had transported his wife's brother, Frank Duncan, also a U.S. citizen but a resident of Texas, to Marysville, California, in his automobile, knowing Duncan to have no means of support or savings. Duncan, in fact, spent the last of his money en route to Marysville with the defendant, Edwards. He subsequently lived with the defendant unemployed for about a week and a half before receiving aid from the Farm Security Administration. Edwards's conviction was affirmed by a state superior court, which recognized that the issue raised in these proceedings made this a "close" constitutional case. Edwards, however, was precluded from further appeal within the California system. He appealed to the U.S. Supreme Court, which granted certiorari to examine his constitutional challenge.

Mr. Justice BYRNES delivered the opinion of the Court.

***

* * * The issue presented in this case * * * is whether the prohibition embodied in Section 2615 against the "bringing" or transportation of indigent persons into California is within the police power of that State. We think that it is not, and hold that it is an unconstitutional barrier to interstate commerce.

The grave and perplexing social and economic dislocation which this statute reflects is a matter of common knowledge and concern. * * * We appreciate that the spectacle of large segments of our population constantly on the move has given rise to urgent demands upon the ingenuity of government. * * * The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. * * * [W]e do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties. * * *

But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. Seelig, 294 U.S. 511, 523, 55 S.Ct. 497, 500 (1935).

It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute. Moreover, the indigent non-residents who are the real victims of the
statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy. * * * We think this statute must fail under any known test of the validity of State interference with interstate commerce.

It is urged, however, that the concept which underlies Section 2615 enjoys a firm basis in English and American history. This is the notion that each community should care for its own indigent, that relief is solely the responsibility of local government. * * * Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged, the blind and dependent children. * * * It is reflected in the works programs under which work is furnished the unemployed, with the States supplying approximately 25% and the Federal government approximately 75% of the cost. * * * It is further reflected in the Farm Security laws, under which the entire cost of the relief provisions is borne by the Federal government. * * *

[In] not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation.

What has been said with respect to financing relief is not without its bearing upon the regulation of the transportation of indigent persons. For the social phenomenon of large-scale interstate migration is as certainly a matter of national concern as the provision of assistance to those who have found a permanent or temporary abode. Moreover, and unlike the relief problem, this phenomenon does not admit of diverse treatment by the several States. The prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative. Moreover, it would be a virtual impossibility for migrants and those who transport them to acquaint themselves with the peculiar rules of admission of many states. * * *

[It is argued] that the limitation upon State power to interfere with the interstate transportation of persons is subject to an exception in the case of “paupers”. It is true that support for this contention may be found in early decisions of this Court. In City of New York v. Miln, 36 U.S. (11 Pet.) 102, 143, 9 L.Ed. 648, 664 (1837), it was said that it is “as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported * * *. This language has been casually repeated in numerous later cases up to the turn of the century. * * * In none of these cases, however, was the power of a State to exclude “paupers” actually involved.

Whether an able-bodied but unemployed person like Duncan is a “pauper” within the historical meaning of the term is open to considerable doubt. * * * But assuming that the term is applicable to him and to persons similarly situated, we do not consider ourselves bound by the language referred to. City of New York v. Miln was decided in 1836. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a “moral pestilence”. Poverty and immorality are not synonymous.

We are of the opinion that Section 2615 is not a valid exercise of the police power of California, that it imposes an unconstitutional burden upon interstate commerce, and that the conviction under it cannot be sustained. In the view we have taken it is unnecessary to decide whether the Section is repugnant to other provisions of the Constitution.

Reversed.

Mr. Justice DOUGLAS, concurring.
I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines. While the opinion of the Court expresses no view on that issue, the right involved is so fundamental that I deem it appropriate to indicate the reach of the constitutional question which is present.

The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference. * * *

Mr. Justice BLACK and Mr. Justice MURPHY join in this opinion.

Mr. Justice JACKSON, concurring.

I concur in the result reached by the Court, and I agree that the grounds of its decision are permissible ones under applicable authorities. But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights. I turn, therefore, away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any state to abridge his privileges or immunities as such. * * *

Why we should hesitate to hold that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens passes my understanding. The world is even more upside down than I had supposed it to be, if California must accept aliens in deference to their federal privileges but is free to turn back citizens of the United States unless we treat them as subjects of commerce.

Does “indigence” as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man’s mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. “Indigence” in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color. I agree with what I understand to be the holding of the Court that cases which may indicate the contrary are overruled.

Today, when the number of homeless among us has risen dramatically, the decision in Edwards is suffused with a new relevance. The Court subsequently reaffirmed its repudiation of the outlook in Milh by holding, in Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969), that a state may not even impose a one-year residency requirement as a prerequisite to eligibility for public assistance. Nor may a state limit the maximum amount of welfare benefits that could be received by new arrivals during their first year of residency to the amount that would have been paid to them in the state where they had previously lived. Nor may Congress authorize the states to adopt such a policy, because it would violate the Privileges and Immunities Clause of the Fourteenth Amendment and that clause “is a limitation on the powers of the National Government as well as the States.” As Justice Stevens, speaking for the Court in Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1518 (1999), explained, the “right to travel,” now “firmly embedded in our jurisprudence,” has three different components: “It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien.
when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”

The Negative or Dormant Commerce Clause

The Commerce Clause is an affirmative grant of legislative power to Congress. Some members of the Court, such as Justice Scalia, have argued that it was not meant to be anything more than that. It is a grant of power to Congress, not the Court. In *Gibbons v. Ogden*, on the other hand, Justice Johnson (p. 278) expressed the view that state regulation of interstate steamboat traffic would have been unconstitutional even if Congress had not passed federal licensing legislation. In his view, the states had no regulatory authority over foreign and interstate commerce; whether Congress acted made no difference at all. In *Edwards*, the Court held the “anti-Okie” law unconstitutional, even though Congress had not prohibited the states from passing such a statute. The reason is found in what has come to be called the Negative or Dormant Commerce Clause. Beginning in the Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 21 L.Ed. 146 (1873), but implicit in dicta appearing in earlier opinions—for example in *Cooley v. Board of Wardens*—the Court declared that sometimes an exercise of the police power can run afoul of the Commerce Clause because it obstructs commerce among the states, even though Congress has made no such determination. This concept—that states may not use the police power to unduly burden the flow of interstate commerce—is known as the Negative Commerce Clause or the Dormant Commerce Clause. It is a judicially created concept, and that is why strict constructionists—like Justice Scalia—oppose it in principle; but, as a practical matter, even Justice Scalia has become reconciled to it because it is so entrenched in precedent (see *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810 (1987) (opinion concurring and dissenting); and *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205 (1994) (opinion concurring in the judgment)). Because the states have legislated on many issues while Congress has remained silent, there is now considerable Court-made law applying the Dormant Commerce Clause.

The Taney Court’s best-remembered and most influential effort at coming to grips with the clash of national and state interests in the regulation of commerce appeared in *Cooley v. Board of Wardens of the Port of Philadelphia* below. Writing some 15 years after *Miln*, Justice Curtis sustained the constitutionality of a Pennsylvania law requiring every ship under penalty of a fee to employ a local pilot when entering or leaving the port of Philadelphia. What is significant in the opinion is not only the Court’s acceptance of the proposition that under some conditions the regulation of commerce can be a concurrent power of the national and the state governments, but also the beginning of the search for a standard that would separate commerce constitutionally susceptible to state regulation from that within the exclusive purview of Congress, even though Congress may not have already occupied the field. In the words of the opinion, the national government exercises exclusive power only over “subjects of this power [that] are in their nature national, or admit only of one uniform system, or plan of regulation * * *.” This notion, entitling the states to limited concurrent authority over interstate commerce in the absence of congressional action, is known as the doctrine of selective exclusiveness.

**Cooley v. The Board of Wardens of the Port of Philadelphia**

Supreme Court of the United States, 1852
53 U.S. (12 How.) 299, 13 L.Ed. 996

**BACKGROUND & FACTS** A Pennsylvania law passed in 1803 required ships entering or leaving Philadelphia to employ a pilot from the city for navigation
purposes. It further stated that vessels failing to conform to this requirement would have to pay one-half of the pilotage fees into a fund for retired pilots and their dependents. Exceptions were made for ships of less than 75 tons, ships sailing to or from a port on the Delaware River, and ships engaged in the Pennsylvania coal trade. The Board of Wardens brought action against Aaron Cooley to recover fees due when two of his ships did not use pilots. The Pennsylvania Supreme Court affirmed a judgment in favor of the board by a court of common pleas, and the case was then brought to the United States Supreme Court. Although Congress had passed an act in 1789 that permitted states to regulate pilots, Cooley argued that the Pennsylvania law was an unconstitutional tax on commerce, not a pilot regulation.

Mr. Justice CURTIS delivered the opinion of the court:

* * *

That the power to regulate commerce includes the regulation of navigation, we consider settled. * * *

* * *

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The Act of Congress of the 7th of August, 1789, sec. 4, is as follows:

“That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.”

* * *

* * * [W]e are brought directly * * * to the consideration of the question, whether the grant of the commercial power to Congress, did per se deprive the States of all power to regulate pilots. * * * The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject * * *. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then * * * the States may legislate in the absence of congressional regulations. * * *

[T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

* * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem
applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated “by such laws as the States may respectively hereafter enact for that purpose,” * * * manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. * * *

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. * * *

This opinion * * * does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject. * * *

We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

* * * Justices McLEAN and WAYNE dissented. Mr. Justice DANIEL, although he concurred in the judgment of the court, yet dissented from its reasoning.

The thrust of the Negative Commerce Clause is the prevention of economic Balkanization, the sort of commercial anarchy that made life under the Articles of Confederation so intolerable and directly led to the calling of what became the Constitutional Convention. For this reason, the Court has applied a virtually absolute rule against legislation designed to secure for any state a competitive advantage over the other states. On the other hand, the Court has tried to be sympathetic to state legislation reflecting a real and substantial interest in protecting the health and safety of its citizens, even though this may affect interstate commerce. In these circumstances, as the Court explained in Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736 (1979), it has sought to inquire “(1) whether the challenged statute regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.” These three inquiries require the Court to engage in interest balancing potentially more rigorous than that applied in other areas of constitutional law outside of civil liberties.

First, the Court must consider whether the regulatory policy at issue is consistent with the principle of free trade that animates the Commerce Clause. A state may not regulate interstate business in a discriminatory fashion, that is with the purpose or effect of placing itself in economic isolation or securing some sort of competitive advantage. State regulatory policy with protectionism as its hallmark is prohibited as a matter of principle. As the Court has often noted, the Framers adopted the Commerce Clause precisely to avoid the economic chaos that resulted when the stages regulated commercial intercourse under the Articles of Confederation. The difficulty, however, lies in determining whether the state’s policy is discriminatory. Not infrequently, this has led to a controversial examination of the purpose behind the policy, with an attendant inquiry into legislative motive. Although the
Court time and again has disclaimed engaging in mindreading exercises of this sort. Justices Brennan and Marshall appeared to do just that in Kassel v. Consolidated Freightways (p. 394). Their concurring opinion drew fire from Justice Rehnquist for exactly this reason.

Second, the Court must be satisfied that the policy serves a legitimate local interest, such as protecting public health and safety. A measure ostensibly enacted to address risks to health or safety may mask protectionism. This prong of the test entails an examination of whether and how the means chosen by the state advance a legitimate interest. It requires that the state demonstrate at least a minimal fit between the means it has chosen and the ends being served.

Finally, assuming the regulatory policy is not protectionist and is a means that advances a legitimate local purpose, the Court must decide whether the burden imposed on interstate commerce is proportionate to the state interest being served. Regulation of any sort will, to some extent, burden interstate business. The Dormant or Negative Commerce Clause does not prohibit all burdens. The states may justifiably protect local health and safety interests, and interstate commerce may legitimately be expected to bear its fair share of the burden. However, the burden must be proportionate to the state interest being advanced.

These three inquiries, of course, involve matters of judgment. When is state regulation legitimate and not simply protectionism dressed up as a health or safety measure? What level of proof is required to show that the means chosen by the state sufficiently advance a legitimate public interest? How does one measure the burden imposed on interstate businesses to know whether the burden is proportionate to a legitimate regulatory interest? How much of a burden is too much of a burden? These are not easy questions to answer, and the difficulty is compounded by the institutional limitations of courts as evaluators of empirical evidence. In furnishing answers, states frequently rely upon medical evidence or engineering studies. How are courts to appraise this evidence? The adversary process, after all, is designed through the presentation and cross-examination of testimonial evidence to answer questions of personal blameworthiness not to expose and test the methodology, validity, and findings of scientific and technological studies. Of course, expert witnesses may be called to testify, but they usually are called to buttress the case for one side or the other and their role as neutral, scientific analysts is clouded at best. These concerns pose real problems for courts: Should judges rigorously parse such studies and demand that the states rely on only the “best evidence,” whatever that may mean? If so, doesn’t that transfer to judges the policy choices that ought to be made by democratically elected legislators? Or should judges simply defer to choices made by the legislators (who are often heavily influenced by interest group lobbyists)? And if judges are simply to rubber-stamp legislative choices, doesn’t that risk a return to the sort of economic Balkanization that made life under the Articles of Confederation so intolerable?

The following passage from Justice Stone’s opinion for the Court in South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177, 58 S.Ct. 510 (1938), is frequently cited as correctly describing the approach judges should take in evaluating the constitutionality of state regulatory policies under the Dormant or Negative Commerce Clause. In that case the Court sustained a state law that imposed width and length limitations on trucks using the state’s highways. As Justice Stone saw it:

[C]ourts do not sit as Legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce. And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. * * * When the action of a Legislature is
within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. ** This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. **

Since the adoption of one weight or width regulation, rather than another, is a legislative, not a judicial, choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. ** Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination, we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. **

In Kassel v. Consolidated Freightways, which follows, the Court faced a rerun of the Barnwell Brothers case in many respects. Of the three opinions penned in the case, Justice Rehnquist’s dissent comes closest to the approach sketched by Justice Stone. Some observers, on the other hand, have objected that Stone’s general treatment of the judge’s role ducks the difficult problems of judgment. Taken together, the trilogy of opinions in Consolidated Freightways illustrates very well the many problems that confront the Court in Dormant Commerce Clause cases.

**Kassel v. Consolidated Freightways Corp.**

Supreme Court of the United States, 1981

450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580

**BACKGROUND & FACTS** Consolidated Freightways, one of the nation's largest common carriers, operates under a certificate from the Interstate Commerce Commission and provides service in all but two states. It principally carries commodities through Iowa on two interstate highways. Consolidated relies chiefly on two kinds of trucks: a single or "semi" and a double or twin. A single, whose total length is 55 feet, consists of a three-axle tractor pulling a 40-foot two-axle trailer. A double, whose overall length is 65 feet, uses a two-axle tractor pulling a single-axle trailer that, in turn, hauls a single-axle dolly and a second single-axle trailer. Because doubles can carry more and because they have trailers that can be detached and routed separately, many trucking companies such as Consolidated prefer to transport some commodities in them rather than singles. Iowa law, however, generally bars 65-foot doubles on roads within the state. Most trucks are limited to a maximum length of 55 feet, although the statute allows a 60-foot maximum for doubles (not commonly used anywhere but in Iowa), mobile homes, trucks carrying farm vehicles and equipment, and singles transporting livestock. Iowa law also permits cities abutting the state line to adopt the truck-length limitations of the neighboring state and enables truck manufacturers in the state and Iowa mobile home owners to obtain permits for trucks 70 feet in length.

Iowa’s truck-length law forced Consolidated to choose from among four options: use 55-foot singles, use 60-foot doubles, detach the trailers of 65-foot doubles at the state line and move them through the state separately, or divert its 65-foot doubles...
around Iowa. Because of the expense associated with each of these options, Consolidated brought suit, attacking Iowa’s law as an unconstitutional burden on interstate commerce. The state defended its prohibition of 65-foot doubles on safety grounds. A federal district court found that 65-foot doubles were just as safe as 55-foot singles and struck down the state law. This judgment was affirmed on appeal.

Justice POWELL announced the judgment of the Court and delivered an opinion, in which Justice WHITE, Justice BLACKMUN, and Justice STEVENS joined.

The question is whether an Iowa statute that prohibits the use of certain large trucks within the State unconstitutionally burdens interstate commerce.

The Commerce Clause does not, of course, invalidate all state restrictions on commerce. It has long been recognized that, “in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.” Southern Pacific Co. v. Arizona, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519 (1945). The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State’s power to regulate commerce is never greater than in matters traditionally of local concern.

For example, regulations that touch upon safety—especially highway safety—are those that “the Court has been most reluctant to invalidate.” Raymond [Motor Transportation Inc. v. Rice], 434 U.S., at 443, 98 S.Ct., at 795.

But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.

[Weighing the asserted safety purpose against the degree of interference with interstate commerce] requires—and indeed the constitutionality of the state regulation depends on—“a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.”

Applying these general principles, we conclude that the Iowa truck-length limitations unconstitutionally burden interstate commerce.

[Although] Iowa made a * * * serious effort to support the safety rationale of its law [* * * the District Court found that the “evidence clearly establishes that the twin is as safe as the semi.” The record supports this finding.]

The trial focused on a comparison of the performance of the two kinds of trucks in various safety categories. The evidence showed, and the District Court found, that the 65-foot double was at least the equal of the 55-foot single in the ability to brake, turn, and maneuver. The double, because of its axle placement, produces less splash and spray in wet weather. And, because of its articulation in the middle, the double is less susceptible to dangerous “off-tracking,” and to wind.

None of these findings is seriously disputed by Iowa. Indeed, the State points to only three ways in which the 55-foot single is even arguably superior: singles take less time to be passed and to clear intersections; they may back up for longer distances; and they are somewhat less likely to jackknife.

The first two of these characteristics are of limited relevance on modern interstate

2. “Off-tracking” refers to the extent to which the rear wheels of a truck deviate from the path of the front wheels while turning. [Footnote by Justice Powell.]
highways. As the District Court found, the negligible difference in the time required to pass, and to cross intersections, is insignificant on 4-lane divided highways because passing does not require crossing into oncoming traffic lanes, and interstates have few, if any, intersections. The concern over backing capability also is insignificant because it seldom is necessary to back up on an interstate.

Statistical studies supported the view that 65-foot doubles are at least as safe overall as 55-foot singles and 60-foot doubles. Numerous insurance company executives, and transportation officials from the Federal Government and various States, testified that 65-foot doubles were at least as safe as 55-foot singles. Iowa concedes that it can produce no study that establishes a statistically significant difference in safety between the 65-foot double and the kinds of vehicles the State permits. Nor, as the District Court noted, did Iowa present a single witness who testified that 65-foot doubles were more dangerous overall than the vehicles permitted under Iowa law.

Consolidated, meanwhile, demonstrated that Iowa's law substantially burdens interstate commerce. Trucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them through separately. Alternatively, trucking companies must use the smaller 55-foot singles or 60-foot doubles permitted under Iowa law. Each of these options engenders inefficiency and added expense. The record shows that Iowa's law added about $12.6 million each year to the costs of trucking companies. Consolidated alone incurred about $2 million per year in increased costs.

In addition to increasing the costs of the trucking companies (and, indirectly, of the service to consumers), Iowa's law may aggravate, rather than ameliorate, the problem of highway accidents. Fifty-five foot singles carry less freight than 65-foot doubles. Either more small trucks must be used to carry the same quantity of goods through Iowa, or the same number of larger trucks must drive longer distances to bypass Iowa. In either case, as the District Court noted, the restriction requires more highway miles to be driven to transport the same quantity of goods. Other things being equal, accidents are proportional to distance traveled. Thus, if 65-foot doubles are as safe as 55-foot singles, Iowa's law tends to increase the number of accidents, and to shift the incidence of them from Iowa to other States.

Iowa urges the Court simply to "defer" to the safety judgment of the State. It argues that the length of trucks is generally, although perhaps imprecisely, related to safety. The task of drawing a line is one that Iowa contends should be left to its legislature.

The Court normally does accord "special deference" to state highway safety regulations. Raymond, 434 U.S., at 444, n. 18, 98 S.Ct., at 795, n. 18. This traditional deference "derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses. Such a disproportionate burden is apparent here. Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use.

At the time of trial there were two particularly significant exemptions. First, singles hauling livestock or farm vehicles were permitted to be as long as 60 feet. As the Court of Appeals noted, this provision undoubtedly was helpful to local interests. Second, cities abutting other
States were permitted to enact local ordinances adopting the larger length limitation of the neighboring State. * * * This exemption offered the benefits of longer trucks to individuals and businesses in important border cities without burdening Iowa’s highways with interstate through traffic. * * *

* * * The Court of Appeals correctly concluded that a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it. * * * Because Iowa has imposed this burden without any significant countervailing safety interest, its statute violates the Commerce Clause. The judgment of the Court of Appeals is affirmed. * * *

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in the judgment.

* * *

In considering a Commerce Clause challenge to a state regulation, the judicial task is to balance the burden imposed on commerce against the local benefits sought to be achieved by the State’s lawmakers. * * * In determining those benefits, a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment. * * * Since the court must confine its analysis to the purposes the lawmakers had for maintaining the regulation, the only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes. * * * It is not the function of the court to decide whether in fact the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes. * * *

My Brothers POWELL and REHNQUIST make the mistake of disregarding the intention of Iowa’s lawmakers and assuming that resolution of the case must hinge upon the argument offered by Iowa’s attorneys: that 65-foot doubles are more dangerous than shorter trucks. They then canvass the factual record and findings of the courts below and reach opposite conclusions as to whether the evidence adequately supports that empirical judgment. * * * [M]y Brothers POWELL and REHNQUIST have asked and answered the wrong question. For although Iowa’s lawyers in this litigation have defended the truck-length regulation on the basis of the safety advantages of 55-foot singles and 60-foot doubles over 65-foot doubles, Iowa’s actual rationale for maintaining the regulation had nothing to do with these purported differences. Rather, Iowa sought to discourage interstate truck traffic on Iowa’s highways. Thus, the safety advantages and disadvantages of the types and lengths of trucks involved in this case are irrelevant to the decision.

* * * The Iowa Legislature has consistently taken the position that size, weight, and speed restrictions on interstate traffic should be set in accordance with uniform national standards. The stated purpose was not to further safety but to achieve uniformity with other States. The Act setting the limitations challenged in this case, passed in 1947 and periodically amended since then, is entitled “An Act to promote uniformity with other states in the matter of limitations on the size, weight and speed of motor vehicles. * * *” 1947 Iowa Acts, ch. 177 (emphasis added). Following the proposals of the American Association of State Highway and Transportation Officials, the State has gradually increased the permissible length of trucks from 45 feet in 1947 to the present limit of 60 feet.

In 1974, the Iowa Legislature again voted to increase the permissible length of trucks to conform to uniform standards then in effect in most other States. This legislation, Bill 671, would have increased the maximum length of twin trailer trucks operable in Iowa from 60 to 65 feet. But Governor
Ray broke from prior state policy, and vetoed the legislation. The legislature did not override the veto, and the present regulation was thus maintained. In his veto, Governor Ray did not rest his decision on the conclusion that 55-foot singles and 60-foot doubles are any safer than 65-foot doubles, or on any other safety consideration inherent in the type or size of the trucks. Rather, his principal concern was that to allow 65-foot doubles would “basically open our state to literally thousands and thousands more trucks per year.”

This increase in interstate truck traffic would, in the Governor’s estimation, greatly increase highway maintenance costs, which are borne by the citizens of the State, and increase the number of accidents and fatalities within the State. The legislative response was not to override the veto, but to accede to the Governor’s action, and in accord with his basic premise, to enact a “border cities exemption.” This permitted cities within border areas to allow 65-foot doubles while otherwise maintaining the 60-foot limit throughout the State to discourage interstate truck traffic.

Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways. Such an attempt has all the hallmarks of the “simple protectionism” this Court has condemned in the economic area. Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535 (1978). Just as a State’s attempt to avoid interstate competition in economic goods may damage the prosperity of the Nation as a whole, so Iowa’s attempt to deflect interstate truck traffic has been found to make the Nation’s highways as a whole more hazardous. That attempt should therefore be subject to “a virtually per se rule of invalidity.”

The decision of Iowa’s lawmakers to promote Iowa’s safety and other interests at the direct expense of the safety and other interests of neighboring States merits no such deference. No special judicial acuity is demanded to perceive that this sort of parochial legislation violates the Commerce Clause.

I therefore concur in the judgment.

Justice REHNQUIST, with whom THE CHIEF JUSTICE [BURGER] and Justice STEWART join, dissenting.

The Commerce Clause is, after all, a grant of authority to Congress, not to the courts. Although the Court when it interprets the “dormant” aspect of the Commerce Clause will invalidate unwarranted state intrusion, such action is a far cry from simply undertaking to regulate when Congress has not because we believe such regulation would facilitate interstate commerce.

The Court very recently reaffirmed the longstanding view that “[i]n no field has deference to state regulation been greater than that of highway safety.” Raymond, supra, at 443, 98 S.Ct., at 794.

A determination that a state law is a rational safety measure does not end the Commerce Clause inquiry. A “sensitive consideration” of the safety purpose in relation to the burden on commerce is required. When engaging in such a consideration the Court does not directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to “outweigh” the former. Such an approach would make an empty gesture of the strong presumption of validity accorded state safety measures, particularly those governing highways. It would also arrogate to this Court functions of forming public policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures.

Admonitions [of judicial self-restraint] are peculiarly apt when, as here, the question involves the difficult comparison of financial losses and “the loss of lives and limbs of workers and people using the highways.”
Locomotive Firemen [v. Chicago R.I. & P.R. Co.], 393 U.S., at 140, 89 S.Ct., at 328.

The purpose of the “sensitive consideration” referred to above is rather to determine if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce. We will conclude that it is if the safety benefits from the regulation are demonstrably trivial while the burden on commerce is great.***

*** There can be no doubt that the challenged statute is a valid highway safety regulation and thus entitled to the strongest presumption of validity against Commerce Clause challenges. *** All 50 States regulate the length of trucks which may use their highways. *** There can also be no question that the particular limit chosen by Iowa—60 feet—is rationally related to Iowa’s safety objective. Most truck limits are between 55 and 65 feet, *** and Iowa’s choice is thus well within the widely accepted range.

Iowa adduced evidence supporting the relation between vehicle length and highway safety. The evidence indicated that longer vehicles take greater time to be passed, thereby increasing the risks of accidents, particularly during the inclement weather not uncommon in Iowa. *** The 65-foot vehicle exposes a passing driver to visibility-impairing splash and spray during bad weather for a longer period than do the shorter trucks permitted in Iowa. Longer trucks are more likely to clog intersections, *** and although there are no intersections on the Interstate Highways, the order below went beyond the highways themselves and the concerns about greater length at intersections would arise “[a]t every trip origin, every trip destination, every intermediate stop for picking up trailers, reconfiguring loads, change of drivers, eating, refueling—every intermediate stop would generate this type of situation.” ***

In rebuttal of Consolidated’s evidence on the relative safety of 65-foot doubles to trucks permitted on Iowa’s highways, Iowa introduced evidence that doubles are more likely than singles to jackknife or upset ***

The District Court concluded that this was so and that singles are more stable than doubles. *** Iowa also introduced evidence from Consolidated’s own records showing that Consolidated’s overall accident rate for doubles exceeded that of semis for three of the last four years.***

*** In sum, there was sufficient evidence presented at trial to support the legislative determination that length is related to safety, and nothing in Consolidated’s evidence undermines this conclusion.

*** The question *** is whether the Iowa Legislature has acted rationally in regulating vehicle lengths and whether the safety benefits from this regulation are more than slight or problematical. *** “Since the adoption of one weight or width regulation, rather than another, is a legislative and not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard.” Barnwell Brothers, 303 U.S., at 191, 58 S.Ct., at 517.

The answering of the relevant question is not appreciably advanced by comparing trucks slightly over the length limit with those at the length limit. It is emphatically not our task to balance any incremental safety benefits from prohibiting 65-foot doubles as opposed to 60-foot doubles against the burden on interstate commerce. Lines drawn for safety purposes will rarely pass muster if the question is whether a slight increment can be permitted without sacrificing safety. ***

***

*** Under our constitutional scheme *** there is only one legislative body which can pre-empt the rational policy determination of the Iowa Legislature and that is Congress. Forcing Iowa to yield to the policy choices of neighboring States perverts the primary purpose of the Commerce Clause, that of vesting power to
My Brother BRENAN argues that the Court should consider only the purpose the Iowa legislators actually sought to achieve by the length limit, and not the purposes advanced by Iowa's lawyers in defense of the statute. ** The argument has been consistently rejected by the Court in other contexts **. It assumes that individual legislators are motivated by one discernible "actual" purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons. ** How, for example, would a court adhering to the views expressed in the opinion concurring in the judgment approach a statute, the legislative history of which indicated that 10 votes were based on safety considerations, 10 votes were based on protectionism, and the statute passed by a vote of 40–20? What would the actual purpose of the legislature have been in that case? This Court has wisely "never insisted that a legislative body articulate its reasons for enacting a statute." [United States Railroad Retirement Board v. Fritz, 449 U.S.] at 179, 101 S.Ct. at 461.

Furthermore, the effort in both the plurality and the concurrence to portray the legislation involved here as protectionist is in error. Whenever a State enacts more stringent safety measures than its neighbors, in an area which affects commerce, the safety law will have the incidental effect of deflecting interstate commerce to the neighboring States. Indeed, the safety and protectionist motives cannot be separated: The whole purpose of safety regulation of vehicles is to protect the State from unsafe vehicles. If a neighboring State chooses not to protect its citizens from the danger discerned by the enacting State, that is its business, but the enacting State should not be penalized when the vehicles it considers unsafe travel through the neighboring State.

The other States with truck-length limits that exclude Consolidated's 65-foot doubles would not at all be paranoid in assuming that they might be next on Consolidated's "hit list." The true problem with today's decision is that it gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them. **

As reflected in many of the cases in the preceding chapter, 60 to 100 years ago the regulation of industrial production captured the Court's attention as the premier issue of government regulation. Today, the course of the Industrial Revolution has put the disposal of waste on the cutting edge of constitutional interpretation with respect to the state police power. As the Court's decision in City of Philadelphia v. State of New Jersey tells us, waste products are clearly within the meaning of "commerce," and their disposal poses difficult problems for both the quality of life in the states and the principle of free trade implicit in the federal Union. Propositions such as "No state may set itself in economic isolation" and "A state may not force those outside the state to bear the cost of its regulatory policy" seem clear enough in the abstract, but Philadelphia v. New Jersey and other recent cases (p. 405) disclose their complexity in practical application.

** CITY OF PHILADELPHIA v. STATE OF NEW JERSEY **

Supreme Court of the United States, 1978
437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475

BACKGROUND & FACTS Chapter 363 of the 1973 New Jersey Laws prohibits the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State." The legislature prefaced its
enactment with findings “that * * * the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.” Operators of private New Jersey landfills and several cities in other states with whom these collectors had contracts for waste disposal brought suit, attacking the law as an unconstitutional burden on interstate commerce.

Mr. Justice STEWART delivered the opinion of the Court.

***

Before it addressed the merits of the appellants’ claim, the New Jersey Supreme Court questioned whether the interstate movement of those wastes banned by ch. 363 is “commerce” at all within the meaning of the Commerce Clause. * * *

*** All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. * * *

[We] reject the state court's suggestion that the banning of “valueless” out-of-state wastes by ch. 363 implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement. * * *

Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention “because of their local character and their number and diversity.” South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185, 58 S.Ct. 510, 513 (1938). In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. * * * The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose. That broad purpose as well expressed by Mr. Justice Jackson in his opinion for the Court in H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537–538, 69 S.Ct. 657, 665 (1949):

“This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. Seelig, 294 U.S. 511, 527, 55 S.Ct. 497 [(1935)], ‘what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.’ ”

The opinions of the Court through the years have reflected an alertness to the evils of “economic isolation” and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. * * * The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State’s borders. * * * But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in Pike v.
Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970):

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. * * * If a legitimate local purpose is found then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities." * * *

The crucial inquiry, therefore, must be directed to determining whether ch. 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

* * *

The New Jersey Supreme Court accepted * * * [the] statement of the state legislature's purpose. The state court additionally found that New Jersey's existing landfill sites will be exhausted within a few years; that to go on using these sites or to develop new ones will take a heavy environmental toll, both from pollution and from loss of scarce open lands; that new techniques to divert waste from landfills to other methods of disposal and resource recovery processes are under development, but that these changes will require time; and finally, that "the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes." * * * Based on these findings, the court concluded that ch. 363 was designed to protect not the State's economy, but its environment, and that its substantial benefits outweigh its "slight" burden on interstate commerce. * * *

The appellants strenuously contend that ch. 363, "while outwardly cloaked 'in the currently fashionable garb of environmental protection,' * * * is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents." * * * They cite passages of legislative history suggesting that the problem addressed by ch. 363 is primarily financial: Stemming the flow of out-of-state waste into certain landfill sites will extend their lives, thus delaying the day when New Jersey cities must transport their waste to more distant and expensive sites.

The appellees, on the other hand, deny that ch. 363 was motivated by financial concerns or economic protectionism. In the words of their brief, "No New Jersey commercial interests stand to gain advantage over competitors from outside the state as a result of the ban on dumping out-of-state waste." Noting that New Jersey landfill operators are among the plaintiffs, the appellees argue that "[t]he complaint is not that New Jersey has forged an economic preference for its own commercial interests, but rather that it has denied a small group of its entrepreneurs an economic opportunity to traffic in waste in order to protect the health, safety and welfare of the citizenry at large."

This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by
discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.

* * * On its face, it imposes on out-of-state commercial interests the full burden of conserving the State’s remaining landfill space. * * *

The appellees argue that not all laws which facially discriminate against out-of-state commerce are forbidden protectionist regulations. In particular, they point to quarantine laws, which this Court has repeatedly upheld even though they appear to single out interstate commerce for special treatment. * * * In the appellees’ view, ch. 363 is analogous to such health-protective measures, since it reduces the exposure of New Jersey residents to the allegedly harmful effects of landfill sites.

It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. * * * But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.

The New Jersey statute is not such a quarantine law. There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter. The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey’s remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.

Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

The judgment is reversed.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE [BURGER] joins, dissenting.

* * *

The question presented in this case is whether New Jersey must also continue to receive and dispose of solid waste from neighboring States, even though these will inexorably increase the health problems discussed above. The Court answers this question in the affirmative. New Jersey must either prohibit all landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the State. * * *

The Commerce Clause does not present appellees with such a Hobson's choice. * * *

* * *

[T]he Commerce Clause does not present appellees with such a Hobson's choice. * * *

* * *

[The Court’s previous] cases are dispositive of the present one. Under them, New Jersey may require germ-infected rags or diseased meat to be disposed of as best as possible within the State, but at the same
time prohibit the importation of such items for disposal at the facilities that are set up within New Jersey for disposal of such material generated within the State. Similarly, New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens. The fact that New Jersey continues to, and indeed must continue to, dispose of its own solid waste does not mean that New Jersey may not prohibit the importation of even more solid waste into the State. I simply see no way to distinguish solid waste, on the record of this case, from germ-infected rags, diseased meat, and other noxious items.

The Court’s effort to distinguish these prior cases is unconvincing. It first asserts that the quarantine laws which have previously been upheld “ban the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils.” According to the Court, the New Jersey law is distinguishable from these other laws, and invalid, because the concern of New Jersey is not with the movement of solid waste but of the present inability to safely dispose of it once it reaches its destination. But I think it far from clear that the State’s law has as limited a focus as the Court imputes to it: Solid waste which is a health hazard when it reaches its destination may in all likelihood be an equally great health hazard in transit.

Even if the Court is correct in its characterization of New Jersey’s concerns, I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public’s health and safety.

* * * New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion, just as it must treat New Jersey cattle suffering from hoof-and-mouth disease. It does not follow that New Jersey must, under the Commerce Clause, accept solid waste or diseased cattle from outside its borders and thereby exacerbate its problems. * * *

Even more problematic—and unfortunately beyond the focus taken in this chapter—is the constitutionality of state regulatory legislation aimed at stabilizing local produce markets. Just as the Great Depression taught the Nation much about the perils of leaving the national economy unregulated and, therefore, subject to recurrent booms and busts, so it taught much the same lesson about economic health to the states. As federal legislation since the New Deal has sought to keep the national economy on an even keel, so New York, for example, acted to protect the milk industry in that state from the ravages of destructive competition; California acted to maintain the stability of its raisin industry; and so on and so forth. Yet such regulatory actions, even from the best of motives, create a good deal of tension for the Commerce Clause. As Justice Jackson put it, speaking for the Court in one New York milk regulation case, H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 665 (1949):

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. If the command of the Commerce Clause, then, is seen as “free trade,” but the states have enacted regulatory legislation to maintain the economic health of their local markets
### Other Cases on State Regulation

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<td>Great Atlantic &amp; Pacific Tea Co. v. Cottrell, 424 U.S. 366, 96 S.Ct. 923 (1976)</td>
<td>A state regulation that permitted milk from another state to be sold in Mississippi only if the other state allowed Mississippi to sell its milk there failed to serve a legitimate public health interest. Such a regulation would permit another state to sell its milk in Mississippi even if it did not meet Mississippi's health standards, but only because Mississippi's milk could be sold in the other state. Mississippi could insist that milk sold in Mississippi meet its health standards and could condition access to its market on meeting that requirement, but Mississippi could not threaten economic isolation as a weapon to force other states into reciprocity agreements.</td>
<td>8–0. Justice Stevens did not participate.</td>
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<td>Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981)</td>
<td>Minnesota's ban on the retail sale of milk in plastic nonreturnable, nonrefillable containers while permitting milk to be sold in disposable paperboard milk cartons was a constitutional use of the police power to promote conservation of resources, ease solid waste disposal problems, and save energy. It had only an incidental burden on interstate commerce and regulated all milk retailers alike.</td>
<td>6–2; Justices Powell and Stevens dissented. Justice Rehnquist did not participate.</td>
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<td>New England Power Co. v. New Hampshire, 455 U.S. 331, 102 S.Ct. 1096 (1982)</td>
<td>A New Hampshire law prohibiting an electric utility from transmitting electric power outside the state without the prior approval of the state's public utilities commission and allowing the commission to withhold such approval if it determined that such electric power was needed for use within the state was precisely the sort of economic protectionism that violated the Commerce Clause.</td>
<td>9–0</td>
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<td>Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982)</td>
<td>Ground water is an article of commerce, and conservation of it in dry western states, where irrigated farms depend on it, has an interstate dimension. Nebraska could rightly take conservation concerns into account in limiting the withdrawal of ground water from wells in the state, but Nebraska could not limit access to states that have reciprocal ground water access agreements with it.</td>
<td>7–2; Justices Rehnquist and O'Connor dissented.</td>
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<td>Wyoming v. Oklahoma, 502 U.S. 437, 112 S.Ct. 789 (1992)</td>
<td>An Oklahoma law that required coal-fired electric utilities in the state to burn at least 10 percent Oklahoma-mined coal discriminated on its face against interstate commerce because it excluded coal mined in Wyoming and elsewhere based solely on its origin outside the state. Nor was this restriction justified by any other substantial interest that could not be advanced by less discriminatory means.</td>
<td>7–2; Justices Scalia and Thomas dissented.</td>
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precisely because unrestrained competition has such periodically devastating consequences, the Court faces a genuine dilemma as it threads its way through state economic regulation cases, trying to determine when economic regulation has gone so far that it amounts to the sort of "protectionist" legislation our constitutional system cannot tolerate. In such cases, the methodology of interest balancing will be even more essential as the Court tries to harmonize not only competing federal and state interests, but rival economic theories of laissez faire and economic regulation as well.

The exercise of the police power is not, however, the only means by which states can run afoul of the Commerce Clause. Although limitations of space prohibit extensive discussion of the matter here, it is important to note that the states' taxing powers can violate the Constitution by unduly burdening interstate commerce. In assessing the constitutionality of state legislation levying a tax on interstate businesses, the Court again has relied on an interest-balancing approach that weighs the burden imposed on interstate commerce.

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<td>Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 114 S.Ct. 1345 (1994)</td>
<td>Oregon's imposition of a $2.50-per-ton surcharge on the disposal of solid waste generated in other states, but only an $.85 fee per ton on solid waste generated within the state, amounted to protectionism because interstate commerce was being made to pay more than its fair share of the cost.</td>
<td>7–2; Chief Justice Rehnquist and Justice Blackmun dissented.</td>
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<td>Granholm v. Heald, 544 U.S. 460, 125 S.Ct. 1885 (2005)</td>
<td>Michigan law prohibiting out-of-state wineries from directly shipping to Michigan customers but allowing in-state wineries to do so violated the Commerce Clause. “States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.” The state presented no persuasive evidence to show that (1) it kept alcohol out of the hands of children, or (2) it facilitated state tax collection. There was little basis to suggest minors made credit card purchases of wine from out-of-state vendors, and tax collection objectives could be met by electronic monitoring that did not discriminate against interstate commerce. The Twenty-first Amendment does not exempt the states from limitations imposed by the Negative Commerce Clause.</td>
<td>5–4; Chief Justice Rehnquist and Justices Stevens, O'Connor, and Thomas dissented.</td>
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<td>United Haulers Association v. Oneida-Herkimer Solid Waste Disposal Authority, 550 U.S. —, 127 S.Ct. 1786 (2007)</td>
<td>Local government can constitutionally compel the disposal of all solid waste produced within its borders in a government-run landfill. A law that imposes exactly the same requirement on all private businesses hauling trash, whether in-state or out-of-state, does not discriminate against interstate commerce. Although the fees imposed at the public landfill substantially exceeded those charged on the open market, court-enforced deregulation of trash disposal would lead to unprecedented and unbounded interference with the democratically-exercised police power of state and local government.</td>
<td>6–3; Justices Stevens, Kennedy, and Alito dissented.</td>
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against the justification proffered by the state. The Court has long recognized that interstate business can and should be made to pay its fair share for benefits furnished by the states. In such state taxation cases, the Court has focused on such issues as whether the conduct of business by a given interstate company has some nexus to the state interest; in other words, whether the business in fact receives at least some minimal benefit for which the state can expect to be compensated. The Court has also been sensitive to burdens that can fall on interstate corporations from simultaneous taxation by several jurisdictions, resulting in burdensome multiple taxation of the same income. Concisely summing up the relevant factors in a recent opinion of the Court, Justice Brennan wrote, “When a state tax is challenged as violative of the dormant interstate Commerce Clause, we have asked four questions: is the tax applied to an activity with a substantial nexus with the taxing State; is the tax fairly apportioned; does the tax discriminate against interstate commerce; is the tax fairly related to the services provided by the State.” Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 8, 106 S.Ct. 2369, 2373 (1986). As a result, the Court has had to look at the practical effects of different kinds of state taxes imposed simultaneously on business corporations doing business across several state boundaries.

Judicial Federalism

The issues in state regulation that have been discussed thus far arose through policy making by the legislative and executive branches of state government. However, since the early 1970s, when the U.S. Supreme Court began to seriously retract the protection of individual rights as a matter of federal constitutional law, there has been expansive development of policy making with respect to personal liberties by state supreme courts. The protection of civil liberties as a matter of state law is by no means a new development. Indeed, as Chapter 8, section A, makes clear, before the adoption of the Fourteenth Amendment and the process by which the Supreme Court later gradually incorporated fundamental rights contained in the Bill of Rights, making them applicable against state as well as federal infringement, state constitutions were virtually the only source of protection against human rights abuses by state governments. Once a fundamental right, such as freedom of speech, has been made applicable against state action, the Supremacy Clause obligates the states to afford their residents the same protection as the amendment guarantees against infringement by the national government. States may therefore not give their residents fewer civil liberties than they are guaranteed as a matter of federal constitutional law. But a state supreme court may read provisions of its state’s constitution so as to give residents of that state more rights. As long as such an expansive reading of a state constitutional provision does not thereby deny federal constitutional rights to other state residents, the ruling constitutes an independent state ground and the decision may not be overturned by the U.S. Supreme Court. This concept is often referred to as “judicial federalism.” Because examples of this in constitutional law principally abound in civil liberties, the concept is much more evident in the material presented in Chapters 8 through 14. The following examples, drawn from different areas, illustrate the concept of judicial federalism.

From 1968 to 1976, the U.S. Supreme Court recognized a First Amendment right of private individuals to picket on private property, such as shopping centers, as long as they abided by reasonable time, place, and manner regulations posted by the owners. Although the Court had narrowed the latitude of this right over the years, it reconsidered its previous decisions and overturned them, declaring in Hudgens v. National Labor Relations Board, 424 U.S. 507, 96 S.Ct. 1029 (1976), that there was no First Amendment right of free speech on private property. In Robins v. PruneYard Shopping Center, 23 Cal.3d 899, 153
Cal.Rptr. 854, 592 P.2d 341 (1979), the California Supreme Court upheld a protester's right to collect signatures on a political petition even though he was doing it in a privately owned shopping mall. The California court, conceding that there was no longer a First Amendment right to do so, based its decision on a provision of the state constitution guaranteeing freedom of speech to the state's citizens. In PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980), the Supreme Court let the ruling stand. The only basis upon which a ruling such as this could be overturned by the U.S. Supreme Court is if the shopping center owners could successfully argue that their federal constitutional rights were somehow infringed by the state supreme court's ruling. The U.S. Supreme Court rejected contentions that the state court ruling infringed the owners' Fifth and First Amendment rights for the following reasons, respectively: The California Supreme Court's ruling did not "take" the shopping center property (and therefore require just compensation) because of the minimal nature of the physical intrusion and the fact that the owners, after all, had invited the public in. Nor did the state ruling force the property owners to endorse the protester's views or even pressure them to take a position, because the owners could simply post signs dissociating themselves from any statements made by protesters (much as a radio or TV station does when it airs the views of commentators or those making editorial replies).

Another example of judicial federalism is apparent in the different approaches the Supreme Court and some state supreme courts have taken on the scope of immunity required when government compels a witness to give testimony that would disclose his involvement in criminal activity. The Fifth Amendment is no defense when someone has been compelled to testify, provided the scope of immunity from prosecution is broad enough to displace the criminal jeopardy. As noted when we considered the power of legislative bodies to investigate (see p. 159), the critical question is how much immunity is required? Immunity only against the use of his statement as direct evidence against him in a criminal prosecution (use immunity)? Immunity also against the admission of an evidence against him at trial that was obtained by leads from the statements he made (derivative use immunity)? Immunity from all prosecution related to any crime identified in his statements (transactional immunity)? In Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972), the U.S. Supreme Court decided that the Fifth Amendment required only the granting of use and derivative use immunity. In other words, it adopted the view that use plus derivative use immunity together put the witness in no worse position than he would be in if no immunity were granted. This, the Court held, was all the Fifth Amendment required. In State v. Soriano, 68 Or.App. 642, 684 P.2d 1220 (1984), the Oregon Court of Appeals held, as a matter of state constitutional law, that only transactional immunity would suffice in the state. Its decision was affirmed by the Oregon Supreme Court, 298 Or. 392, 693 P.2d 26 (1984). Five other state supreme courts have adopted this position as the authoritative interpretation of their own state's constitution; seven state supreme courts have rejected it.

A final illustration may be drawn from the dispute over the funding of public schools. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct 1278 (1973), the Supreme Court held that there was no violation of the Fourteenth Amendment simply because Texas chose to finance its public elementary and secondary schools largely through the local property tax. Because the school districts varied greatly in the value of their taxable property, and therefore differed significantly in the amount of revenue that could be raised (even if the tax rates in poorer districts were as high as state law permitted), parents of children residing in the poorer school districts argued that the state's failure to alter its school-aid formula to provide sufficient additional money amounted to a violation of the Equal Protection Clause. In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), the
New Jersey Supreme Court held such inequality to be unlawful and required that the state provide compensatory subsidies to offset the inequity among the districts.\(^3\) Seventeen other state supreme courts have followed suit, although the independent state grounds they cited have varied. For a more extensive discussion, see Chapter 14, section E.\(^4\)

These are all examples of judicial federalism and they serve to underscore the point that state power need not be thought of as limited to regulation of the public health, safety, and welfare as embodied in statutes passed by the legislature and signed by the governor. It also includes decisions by state courts. For more examples of judicial federalism cited in this book, see the entry “judicial federalism” in the Index. For additional discussion of judicial federalism, see the references cited in footnote 24 on p. 839, and see G. Alan Tarr and Mary Cornelia Porter, State Supreme Courts in State and Nation (1988), chap. 1.

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3. In fact, New Jersey’s was not the first state supreme court to strike down this sort of wealth-based discrimination in the funding of public education. The California Supreme Court reached that conclusion two years earlier in Serrano v. Priest, 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971), but had rested its decision on the Fourteenth Amendment. Since that interpretation was rejected by the U.S. Supreme Court in Rodriguez, the California court on remand substituted its interpretation of the state constitution as the basis for its decision to replace the grounds it had initially relied upon. Serrano v. Priest, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976).

4. Also covered in the same section of this book are recent decisions by some state supreme courts upholding the extension of rights possessed by heterosexual married couples to gay couples as a matter of state constitutional law; this is not precisely an illustration of judicial federalism as the term is used here because there has been no comparable U.S. Supreme Court decision from which the state supreme court rulings could be said to diverge.
CHAPTER 7

PROPERTY RIGHTS AND ECONOMIC LIBERTIES

In the view of Madison and other Framers, one of the principal reasons for the creation of the social compact that gave rise to civil society was the protection of what are called “vested rights.” In the aggregate, this concept refers to a bundle of claims that can be subsumed under the general right to own and acquire private property and that, in turn, rests upon a fundamental moral assumption that a person should be able to reap and profit from the fruits of his or her labor. To many of the political thinkers responsible for the Constitution, this concept of the primacy of property rights not only antedated government, but also constituted a significant, authoritative principle, which circumscribed the regulatory power of government. As such, the doctrine of vested rights not only precluded infringements on the present accumulation of capital, such as the expropriation of land or other tangible property without just compensation, but also extended to damaging interference with future property interests, such as obligations embodied in contractual arrangements. In sum, the document that created government was thought necessarily to include guarantees that property holders would be secure in their possessions and contractual assets.

Arrayed against these private considerations are important public interests embodied in the states’ inherent power to legislate for the public health, safety, and welfare. The problem of arriving at a balance between the doctrine of vested rights and that of the states’ police power is intensified when the form of government is a democracy. What a popularly elected legislative majority sees as the legitimate regulation of private property interests in the broader view of the welfare of all citizens, property holders may well see as an effort by the people to “soak the rich.” This tension puts the judiciary in the difficult position of assessing constitutionally whether the exercise of the police power in a given instance is related to legitimate regulatory interests or whether the state has crossed the line and taken property for which just compensation must be paid. Such a question about the difference between the “regulation” and the “taking” of property is no dry, academic matter; it can cut deeply with severe financial consequences. The conflict between the competing public and private interests becomes all the more acute as a nation develops an industrialized,
integrated, interdependent economy. The luxury of leaving private economic arrangements alone becomes increasingly less tolerable, since the vast power accumulated and exercised by private property holders has such a significant effect on the welfare of all.

A. THE CONTRACT CLAUSE AND THE STATE POLICE POWER

Despite the Framers’ substantial concern over the prospect of attacks on the institutions of private property by radical state legislatures, the original Constitution contained only two provisions, aside from the prohibition on bills of attainder, that might be read as protective of vested rights. Both of these constitute prohibitions on certain exercises of state power and appear together in the context of general limitations placed on the states in Article I, section 10. The relevant passage reads as follows: “No State shall * * * pass any * * * ex post facto Law, or Law impairing the Obligation of Contracts * * *.”

The provision precluding states from the passage of ex post facto laws, however, received a very narrow interpretation from the Supreme Court in 1798 when, in Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648, it was held to bar only retroactive penal legislation (i.e., legislation affecting an individual either by making something a crime after the act was committed or by increasing the penalty for an existing offense after commission of the crime) and not retroactive state enactments that affect property interests or contractual obligations. The net effect, of course, was to leave the Contract Clause as the only barrier to state legislative intrusion on vested rights. It subsequently fell to the Marshall Court to take up the cudgels by putting some meaning into the Contract Clause.

The articulation of constitutional doctrines hospitable to commercial development and advantageous to the propertied classes did not come hard to the Marshall Court, for the Chief Justice saw the nation’s future as inseparably linked to the fortunes of industry and commerce. Strong and effective national government of the kind typified by the decisions in McCulloch and Gibbons was essential to providing the economic stability in which business enterprise could flourish, but it was not sufficient. A climate of economic stability and investment security was equally dependent on the inviolability of contractual agreements.

The contribution of the Marshall Court in fostering business enterprise through generous interpretation of the Contract Clause manifested itself in two ways. One of these was the vigor with which it resisted state encroachment on presently existing creditor-debtor relations. In Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 4 L.Ed. 529 (1819), the Court, speaking through Marshall, invalidated New York’s newly enacted bankruptcy law, which operated to relieve debtors of preexisting financial obligations and contained dictum suggesting that the state law was also invalid as applied to contracts executed after it had been enacted. Eight years later, in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 6 L.Ed. 606 (1827), the Court—over Marshall’s dissent—held that a state bankruptcy law did not impair the obligation of contract when it applied to future contracts. Marshall took the position that the only obligations of a contract were those agreed to by the parties signing the agreement. The majority in Ogden v. Saunders held that the obligations binding the contracting parties not only were those they explicitly agreed to, but also included provisions of the state bankruptcy law that were in effect when the contract was made and that permitted the debtor to be released from his obligation if the provisions of the state law were satisfied.

The second dimension to the Marshall Court’s reading of the Contract Clause lay in the expanded scope of the term “contract.” Promissory notes executed between two individuals, like those abrogated by the legislation at issue in Sturges, were a widely
recognized form of contract, but what about the status of other arrangements, say those made in the name of the state? The answer to that question was furnished in two decisions that substantially expanded the constitutional definition of contract and, therefore, the effect of the Contract Clause. In Fletcher v. Peck, which follows, Chief Justice Marshall, speaking for the Court, held that a public grant qualified as a contractual obligation and could not be abrogated without fair compensation even if the legislature that struck the land deal did so under corrupt influence. The State of Georgia no more than a common debtor would be free to wriggle out of a bad bargain. Nine years later in Dartmouth College v. Woodward (p. 414), Marshall, again speaking for the Court, held that corporate charters were also contracts protected against impairment. The doctrine of vested rights was now firmly cemented in place, for the decision in Dartmouth College meant that the charters of all profit-making corporations as well were inviolable. With these decisions, the effect of the Contract Clause in protecting vested rights reached its apex.

**FLETCHER V. PECK**
Supreme Court of the United States, 1810
10 U.S. (6 Cranch) 87, 3 L.Ed. 162

**BACKGROUND & FACTS** Fletcher brought suit against John Peck for breach of covenant on land that Peck sold to him in 1803. The property was originally part of a larger purchase from the State of Georgia by four land companies after they had bribed several members of the state legislature in 1795 to support the passage of an act authorizing the sale. The next year the legislature declared the act of 1795 and all the rights or claims derived from it to be null and void. Peck obtained possession of the land in 1800. In his deed, which he signed over to Fletcher three years later, Peck stated that all of the past sale transactions involving the land had been lawful. Fletcher contended that the original sale of land by the legislature was void and, therefore, Peck was guilty of breach of covenant, since the property was not legally his to sell. The circuit court rendered a judgment for Peck, and the case came before the U.S. Supreme Court on a writ of error.

MARSHALL, Chief Justice, delivered the opinion of the court as follows:

***

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

***

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, *** [then the legislature would be able at will to] devest any other individual of his lands ***.
Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. * * *

[But when] a law is in its nature a contract, when absolute rights have vested under that contract; a repeal of the law cannot devest those rights * * *

* * * The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

* * *

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained[,] * * * by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

* * *
BACKGROUND & FACTS  In 1769, Dartmouth College received from the British Crown a corporate charter that authorized a 12-member board of trustees to govern the college and to appoint their own successors. The charter, however, was amended in 1816 by the New Hampshire legislature when it passed several acts increasing the number of trustees to 21 and creating a board of overseers with the power to review important decisions of the trustees. In addition, the state governor was empowered to appoint the nine new trustees and to fill positions on the board of overseers. The effect of these acts was to take power from the incumbent trustees of the college. They responded by refusing to recognize the legislation as binding upon them and by bringing action against William Woodward, the secretary and treasurer of the college, to recover corporate property that was temporarily entrusted to him by one of the 1816 acts. The trial court's special verdict left unresolved the issue as to whether or not the three acts violated the United States Constitution. A state superior court upheld the legislation, whereupon the incumbent trustees brought the case to the U.S. Supreme Court.

The opinion of the court was delivered by MARSHALL, Chief Justice:

* * *

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are:

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. * * *

[It appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.]

* * * The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. * * * The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain,
and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

** Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not, indeed, to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants *** are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected, by the corporation. ***

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also ***.

It is *** possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced[,] *** [or] in the mind of the convention when the article was framed, nor of the American people when it was adopted. *** [But if so, there must be something] absurd, or mischievous, or repugnant to the general spirit of the *** [Constitution] to justify *** [it.]

On what safe and intelligible ground can this exception stand. There is no exception in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. *** Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. ***

The opinion of the court *** is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. ***

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New
Hampshire to which the special verdict refers.

* * * The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should * * * retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is re-organized; and re-organized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This * * * is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

* * *

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State Court must therefore be reversed.

[Justices WASHINGTON and STORY delivered separate opinions concurring in the decision of the Court. Justice DUVALL dissented.]

By contrast with the decisions in Fletcher and Dartmouth College, the Court under Marshall’s successor, Roger Taney, exhibited much less attachment to the belief that the Constitution required the subordination of the state regulatory power to the interests of business enterprise. In our earlier consideration of federalism, we noted that the Taney Court allowed the states much greater latitude in exercising their police powers (see pp. 386, 390–392). That change in emphasis is also reflected in the Taney Court’s principal Contract Clause decision, Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837). In that case, the Massachusetts legislature passed an act in 1785 incorporating the Charles River Bridge Company and authorizing it to build a bridge over the Charles River and to collect tolls for its use. The company’s charter contained certain requirements pertaining to the construction and maintenance of the bridge and obligated the company to pay Harvard University £200 a year as compensation in lieu of its right to operate a ferry, which Massachusetts had granted the college in 1650. The company fulfilled these requirements and in 1792 the state extended the Charles River Bridge Company’s charter for another 70 years. However, in 1828 the legislature incorporated the Warren Bridge Company and authorized it to build another bridge located within 275 yards of the Charles River Bridge. The Charles River Bridge Company sued to enjoin construction of the rival bridge. By the time this case reached the Supreme Court, the operators of the Warren Bridge, under terms of their 1828 charter, had surrendered their bridge to the state for free public access after being reimbursed for the expenses of constructing and operating the bridge. The Charles River Bridge Company argued that the state abridged the implied exclusiveness of its right to operate a bridge over the river and thereby impaired the obligation of contract contained in the 1792 statute. Its franchise was exclusive, the plaintiff bridge company argued, because Harvard University was granted its ferry monopoly in perpetuity and the state transferred this exclusive right to the Charles Bridge Company.

Speaking for the Court, Chief Justice Taney rejected this doctrine of implied exclusiveness. He reasoned that none of the prerogatives stated in its charter had been
denied to the Charles Bridge Company; it could still operate its bridge and collect tolls. That people would no longer want to pay tolls when they could cross the river for free by using another bridge not 300 yards away was something else. It asked for the guarantee of a right that the words of the charter did not grant. Such a right of exclusiveness—of freedom from competition—could only be obtained by implication, and state regulatory power could not be limited in this way. Rights given by state charter were only such as could be directly inferred from the document’s words. Were it otherwise, benefits from all sorts of technological improvements in transportation and other scientific and engineering developments would be denied to the public. Justice Story (and two other Justices) dissented. He found support for the plaintiffs’ position in the protection of property rights at common law, the Court’s previous decisions in Fletcher and Dartmouth College, and the history of large expenditures and great risk by the Charles River Bridge Company investors. Set against the backdrop of anti-monopoly attitudes that characterized the Jacksonian era, it might accurately be said that the Charles River Bridge decision did not so much diminish the Marshall Court precedents as it simply refused to expand them.

The decline of rigid constitutional adherence to the vested rights position became increasingly apparent the more the Marshall Court faded into history. By the end of the nineteenth century, the exigencies of economic and social development had substantially eroded the Court’s enthusiasm for using the Contract Clause as a vehicle with which to restrain state regulatory power. In Stone v. Mississippi, 101 U.S. (11 Otto) 814, 25 L.Ed. 1079 (1880), for example, the Court held that nothing in the Contract Clause could prevent a state that initially had chartered a company to operate a lottery from later changing its mind and using its police power to make gambling a crime. By the time we had reached the twentieth century, as the Depression-era decision in Home Building & Loan Association v. Blaisdell below shows, considerations of the public interest operated as implicit conditions in any contract and needed only to be activated by state use of the police power. Thus, the Court saw the moratorium legislation in Blaisdell not as an infringement of contractual obligations, but as a needed postponement of them, well justified by the economic emergency’s dire consequences for everyone.

**Home Building & Loan Association v. Blaisdell**

*The Minnesota Moratorium Case*

Supreme Court of the United States, 1934

290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413

**Background & Facts** Reacting to widespread unemployment and economic dislocation rampant in the midst of the Depression, the Minnesota legislature in 1933 passed the Minnesota Moratorium Law. The purpose of the Law was to prevent widespread foreclosures on mortgages of homeowners and farmers by postponing their payments until they had a chance to get back on their feet. Part One, section four of the Law authorized state courts to extend the period of redemption from foreclosure sales for such additional time. John Blaisdell and his wife, owners of a lot that was mortgaged to the Home Building & Loan Association, applied to the District Court of Hennepin County for an extension of time so that they could retain ownership of their home. The district court, however, granted a motion by the creditor association to dismiss the Blaisdells’ petition. The Minnesota Supreme Court reversed. A subsequent decision of the trial court to extend the period
of redemption was sustained by the state supreme court, and the Home Building & Loan Association appealed. Throughout these proceedings, the association as creditor contended that the statute violated both the state and the federal constitutions by abridging a contract and taking property without due process of law.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

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In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power * * *

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." Wilson v. New, 243 U.S. 332, 348, 37 S.Ct. 298, 302 (1917). The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a state to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts." But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause.* * *

[T]he reasons which led to the adoption of that clause, and of the other prohibitions of section 10 of article 1, are not left in doubt[ ]* * * The widespread distress following the revolutionary period and the plight of debtors had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. * * * It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of "private faith." The occasion and general purpose of the contract clause are summed up in the terse statement of Chief Justice Marshall in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354, 355, 6 L.Ed. 606 (1827): "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home
to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government."

***

The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States, in relation to the operation of contracts, to protect the vital interests of the community? * * *

***

Whatever doubt there may have been that the *** [police] power of the state *** may be exercised *** in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. * * *

In these cases of leases, it will be observed that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession. * * * It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. * * *

[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

***

Applying the criteria established by our decisions, we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. * * * The finding of the Legislature and state court has support in the facts of which we take judicial notice. * * * [T]hat there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said, * * * the economic emergency which threatened "the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.

2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular
individuals but for the protection of a basic interest of society.

3. * * * [T]he relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the act was obviously to give a reasonable opportunity for the authorized application to the court. [T]he integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. * * * The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief. * * *

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. * * * [T]he operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

* * *

The judgment of the Supreme Court of Minnesota is affirmed.

Mr. Justice SUTHERLAND, dissenting.

* * *

A provision of the Constitution * * * does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum [against an unwilling party] by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it * * * means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. * * *

* * *

It is quite true that an emergency may supply the occasion for the exercise of power * * *. [But] the question is not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty is that the contract impairment clause forbids state
action under any circumstances, if it have
the effect of impairing the obligation of
contracts. That clause restricts every state
power in the particular specified, no matter
what may be the occasion. It does not
contemplate that an emergency shall furnish
an occasion for softening the restriction or
making it any the less a restriction upon
state action in that contingency than it is
under strictly normal conditions.

The Minnesota statute either impairs the
obligation of contracts or it does not. * * *

Whether the legislation under review is
wise or unwise is a matter with which we
have nothing to do. Whether it is likely to
work well or work ill presents a question
entirely irrelevant to the issue. The only
legitimate inquiry we can make is whether it
is constitutional. If it is not, its virtues, if it
have any, cannot save it; if it is, its faults
cannot be invoked to accomplish its
destruction. If the provisions of the Consti-
tution be not upheld when they pinch as
well as when they comfort, they may as well
be abandoned. Being unable to reach any
other conclusion than that the Minnesota
statute infringes the constitutional restric-
tion under review, I have no choice but to
say so.

I am authorized to say that Mr. Justice
VAN DEVANTER, Mr. Justice McREYNOLDS and Mr. Justice BUTLER concur
in this opinion.

What Blaisdell had shown to be true in foul times, subsequent Court decisions showed to
be equally true of fair times. In City of El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577
(1965), for example, the Supreme Court effectively overruled Fletcher by adopting the
position that a bad bargain made by the state was itself contrary to the public interest and
legitimately could be undone by exercising the police power. Simmons involved the cheap
sale of public land in Texas originally for the purposes of encouraging settlement of the state
and raising revenue to support the public school system. Beginning in 1876, state law
provided that the land could be purchased with a down payment of one-fortieth of the price
and payment of interest annually at 3%. The law also stipulated that if the purchaser missed
an interest payment, the land was forfeited to the state, but the buyer retained the right to
reinstate his claim at any time if he paid the interest owed before someone else purchased it.
Simmons, a Kentucky resident, purchased land that had been forfeited and in turn forfeited
the land to the state for nonpayment of interest. Five years and two days later, he applied to
have his claim reinstated and offered to pay up. His application was denied, however,
because meanwhile in 1941 the state had amended its land law to impose a five-year
deadline on the reinstatement of claims following nonpayment of interest. Having missed
the deadline by two days, Simmons could not have his claim reinstated and he sued,
arguing that the amendment to the land law impaired the contractual obligations assumed
by the state when he purchased the land. What led the state to modify its land law was not
much of a mystery: The buyers were mainly land speculators and by the 1940s oil had been
discovered. In this context, the terms of the 1876 land law now operated to cheat the state.
Finding support in the Blaisdell decision, the Court by an 8–1 margin upheld the
amendment to the state land law, finding that, on balance, the state's interests "in restor[ing]
confidence in the stability and integrity of land titles and * * * protect[ing] and adminis-
ter[ing] its property in a businesslike manner" outweighed a "modification of a contractual
promise." Said the Court, "The five-year limitation allows defaulting purchasers with a bona
fide interest in their lands a reasonable time to reinstate. It does not and need not allow
defaulting purchasers with a speculative interest in the discovery of minerals to remain in
endless default while retaining a cloud on title." Citing Fletcher v. Peck as controlling
precedent, Justice Black, the lone dissenter, objected that the Court had "balanc[ed] away
the plain guarantee” of the Contract Clause. In a parting shot, he added, “I most certainly cannot agree that constitutional law is simply a matter of what the Justices of this Court decide is not harmful for the country, and therefore is ‘reasonable.’”

Justice Black condemned rulings like that in Simmons, which he upbraided for upholding “the fluctuating policy of the legislature, so long as the legislature acts in accordance with the fluctuating policy of this Court.” Just as the approach taken by the Court in Blaisdell and Simmons represented distinctly New Deal attitudes toward economic regulation, so the shoe was somewhat on the other foot by the early 1970s. Following the Nixon and Ford appointments of the early 1970s, the Supreme Court began to show greater regard for property rights. And, while the legacy of Blaisdell and Simmons was certainly in no danger of being emasculated, the Burger Court made it clear that there were limits on the regulatory power of the States when it came to contractual obligations.

In Simmons, the Court emphasized that there had been “no substantial impairment of the value of the obligation” (emphasis supplied). However, as the Burger Court saw them, the facts were very different two decades later in United States Trust Company v. State of New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977). That case was set in an America locked in the grips of an energy crisis where gasoline was both in short supply and expensive. An interstate compact between New York and New Jersey, executed in 1962, limited the ability of the Port Authority to subsidize mass transit from revenues pledged to secure bonds the Authority had floated (and which were to be retired mainly from tolls and fees paid by motor vehicle operators). In the wake of the national energy crisis a decade later, the New York and New Jersey legislatures, acting concurrently, retroactively repealed the 1962 covenant to provide greater revenue for mass transit. Mass transit has usually been a big money-loser, whereas toll roads, bridges, and tunnels have been money-makers because Americans prefer the independence of driving. To the extent, then, that Port Authority revenues were used to provide greater subsidy for mass transit, it would pose added risk to those who held the Authority’s bonds. The United States Trust Company, a trustee and bondholder of the Port Authority, brought suit attacking the 1974 repealer as a violation of the Contract Clause. New Jersey defended the repealer as a legitimate exercise of its police power designed to deal with the energy crisis by making greater resources available for public transportation so that there would be less reliance on the use of private automobiles. Speaking for the six-Justice majority, Justice Blackmun agreed that the repealer amounted to a substantial (and unnecessary) impairment of the contractual obligation:

First, it cannot be said that total repeal of the covenant was essential; a less drastic modification would have permitted the contemplated plan without entirely removing the covenant’s limitations on the use of Port Authority revenues and reserves to subsidize commuter railroads. Second, without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. Appellees contend, however, that choosing among these alternatives is a matter for legislative discretion. But a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well. * * *

But, notwithstanding an occasional flicker of life like the United States Trust Co. decision, for all practical purposes the Contract Clause ceased to be the principal constitutional

1. For a discussion of decisions in several fields of constitutional law in which the early Burger Court exhibited a renewed interest in defending property rights, see William J. Van Alstyne, “The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties,” 43 Law & Contemporary Problems 66 (1980).
battleground on which the opposing forces of economic rights and government regulation would fight it out. The scene of the action moved elsewhere.

B. THE LIFE AND DEATH OF “LIBERTY OF CONTRACT”

The Contract Clause faded principally, however, because it possessed limited utility in protecting property and business interests, particularly given the growing scope and volume of social legislation that began to appear in the late nineteenth and early twentieth centuries. In the face of state efforts to regulate rates and business practices, to enable the formation of labor unions, to outlaw child labor, and to set limits as to minimum wages and maximum hours for one’s job, defenders of existing economic institutions and privileges turned from the body of the Constitution itself to take refuge in the amendments, notably the Fourteenth. Their chief success in that regard lay in enlarging the concept of due process from that of a constitutional standard assuring procedural regularity and fairness in government’s treatment of the individual to that of a constitutional standard capable of limiting the content of governmental policy, especially when it was aimed at economic regulation.

The Fourteenth Amendment commands, “[N]or shall any State deprive any person of life, liberty or property, without due process of law * * *.” As traditionally conceived, the concept of due process does not prevent government from taking away any of these things, but only guarantees that the deprivation will occur by means that are regularly, not arbitrarily, applied; in other words, it ensures only that government will act fairly. This orthodox conception of due process has been redundantly called “procedural due process” and focuses on the reasonableness with which government has acted. Advocates of greater economic freedom, however, were dissatisfied with the minimal level of protection afforded by procedural due process, turned their attention to the word “liberty” in the Due Process Clause, and gave it a specific meaning. From 1895 until 1937, a majority of Justices defined it to mean “liberty of contract.” By giving particular substance to that word—a concept contradictorily known as “substantive due process”—advocates of greater economic freedom sought to keep government from enacting policies that regulated the economy.

Social Darwinism

Every legal doctrine has a purpose, and the Justices’ purpose in creating the “liberty of contract” doctrine was to advance a particular conception of American society known as Social Darwinism.2 Popularized by writers such as Herbert Spencer and William Graham Sumner, the theory of Social Darwinism was to better the human race through unrestricted competition. The notion was essentially an amalgam of ideas borrowed from other disciplines and imported into sociology. From biology, Darwin’s idea of natural selection contributed the notion that in the evolution of species the stronger beings survive and the weaker beings perish, so that the species acquires traits that permit it to survive and thrive. To this was added the central tenet of economics espoused by Thomas Malthus—and for which economics came to be known as “the dismal science”—that the human species was destined for a worsening struggle, since the resources necessary to sustain it would increase arithmetically while the population would grow geometrically. Malthusian economics thus contributed this imperative: There would never be enough resources to go around;

2. For a comprehensive presentation, discussion, and criticism of this vision of society, see Richard Hofstadter, Social Darwinism in American Thought (1955).
competition was inevitable and likely to grow more severe. Finally, the Protestant Ethic identified the human traits that were thought desirable and essential to survival. Sobriety, hard work, thrift, and diligence were values both good in themselves and conducive to success in the social struggle. The visible sign of success and moral worth was wealth. Those who were morally and socially “fit” lived well and prospered; those who were lazy, stupid, inefficient, or immoral were left by the wayside. Through this process, society and the beings in it would evolve to a higher form. As Exhibit 7.1 shows, this vision of society was implemented by certain political and legal doctrines.

In this vision of society, the role of government was to be severely restricted. The thrust of government intervention in the economy in the wake of the Industrial Revolution was to better people’s lives by doing for them what they could not do for themselves. This impulse to better the human condition contradicted the notion of a struggle because when government intervened in the economy, it usually did so on the side of those who were not wealthy—and thus, in the eyes of Social Darwinists, not worthy. Government intervention in the economy prevented the full effect of the struggle or, worse yet, perpetuated the existence of the weak, the

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Which, after 1936, were overturned or severely modified by:
lazy, the stupid, and the immoral by taking resources from the wealthy and redistributing them to those who should be allowed to perish. What was needed was for government to keep its hands off the economic system. This concept of a hands-off policy toward business and the economy generally is known as laissez faire capitalism. It is the posture we usually refer to as negative government—that government is best which governs least. In the Social Darwinist vision of the United States, the functions of government were to maintain order so that the struggle could go on and to protect the hard-won property of the wealthy from being pillaged by the undeserving poor.

These political doctrines were translated by a majority of the Justices into doctrines of constitutional law, an act of inventiveness that did not come hard to them, since many had been railroad and corporation lawyers before coming to the Court.\(^3\) That the interpretation of several constitutional provisions during the late nineteenth and early twentieth centuries was predicated on what many of the Justices thought was the good and proper separation of the state from the economic order is borne out not simply by the development of substantive due process, but also by how this doctrine fit into the context of applying other constitutional provisions. We saw how the doctrine of dual federalism was applied by the Supreme Court in commerce and taxing and spending cases in Chapter 5 to invalidate regulatory legislation enacted by the Congress. When such legislation was invalidated on the national level as infringing the exercise of the states’ reserved powers and the states responded by exercising those powers, the Court counteracted by nullifying the legislation as a violation of the Fourteenth Amendment. Taken together, then, the doctrines of dual federalism and substantive due process constituted a lethal sequence of knock-out punches that killed off almost all social legislation. The end product of applying these two doctrines was not, strictly speaking, the maintenance of a laissez faire capitalist economy, however, as is commonly thought. Such a system of political economy envisions a total separation of government from economic institutions and would have necessarily entailed an end to any government aid that fostered business enterprise. Government’s economic support of business through protective tariffs continued unabated; it was only governmental regulation of business enterprise that the Supreme Court forbade.

The usual legislative clout that business and propertied interests possessed was backstopped, in times when it failed, by an unusually hospitable judiciary. Urged on by such men as Stephen J. Field and William Howard Taft, who repeatedly exhorted their brethren to take up the cudgels of private property against the attack of “radical” legislatures bent on “socialistic experimentation,” the Supreme Court truly became a “super-legislature.” Under the guise of an ostensibly neutral and almost mechanical process of constitutional interpretation, which talked of everyone’s right to bargain in the marketplace and receive his or her due, the gap between legal equality and real economic power suggested something else—that some were more equal than others. To many observers this underscored the inherently undemocratic character of judicial review.

The Rise of “Liberty of Contract”

The birth of economic substantive due process came in a state case, Wynehamer v. New York, 13 N.Y. (3 Kern) 378, decided in 1856. That case involved the criminal prosecution of a Buffalo tavern owner for violation of the state’s prohibition law. By a split vote, the New York Court of Appeals threw out the conviction and with it the statute. Such an

exercise of the police power was held to infringe the economic liberty of the tavern proprietor to practice his livelihood and, therefore, denied him due process of law. Seemingly, property rights and economic liberties were above the law and constituted some “higher law,” which could be used to test the validity of state legislation. The notion that due process encompassed these “higher law” elements and could be used to assess the substance of legislation, not simply how the legislation was applied, reached the U.S. Supreme Court 40 years later.

In the meantime, a Court less enthusiastic about its prospective role as the defender of capitalist enterprise temporarily repelled assaults on the exercise of the states’ police power. In 1873, in Butchers’ Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co., more commonly known as The Slaughterhouse Cases, it narrowly turned aside a challenge by independent New Orleans butchers to a Louisiana statute rigidly controlling the landing and slaughtering of livestock in the city and assigning sole franchise in that regard to one slaughterhouse. The Court rejected any notion that the butchers’ right to practice their profession constituted one of those privileges and immunities of citizens of the United States alleged to be protected from state infringement by the Fourteenth Amendment. Four years later, in Munn v. Illinois (p. 430), the Court sustained an act of the Illinois legislature—one of the so-called Granger laws—setting maximum rates that could be charged farmers by grain elevator operators. Validity of the exercise of state power, Chief Justice Waite wrote, turned on whether the business was “clothed with a public interest.” However, since it was impossible to calibrate and measure a quality that could not be defined with any degree of certainty from the beginning, the standard—though eloquently defended—was not very successfully applied.

**Butchers’ Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.**

**[The Slaughterhouse Cases]**

Supreme Court of the United States, 1873

83 U.S. (16 Wall.) 36, 21 L.Ed. 394

**Background & Facts** In the face of a faltering response to the problem by the New Orleans city government, the Louisiana legislature passed an act in 1869 to clean up the Mississippi River. The cause of the pollution and resulting contamination of the city’s water supply (which was producing a mounting incidence of cholera) was the dumping of refuse into the river from the many small independent slaughterhouses. What feeble ordinances the city council had managed to enact were ignored or were evaded by the movement of butchering facilities north of the city on the river beyond its jurisdiction. In the act, the legislature prohibited all landing and slaughtering of livestock in the city or surrounding parishes except at one large slaughterhouse, which was granted an exclusive franchise for 25 years. Aside from laying out the usual corporate specifications, the act also established maximum rates to be charged for the landing and slaughtering of livestock.

The Butchers’ Benevolent Association, a group of the small independent slaughterers who had been displaced by the legislation, challenged the act on the grounds that it violated the Thirteenth Amendment and the Privileges and Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment in taking away their livelihood. Both a state district court and the Louisiana Supreme Court rendered decisions in favor of the state-created monopoly held by the Crescent City Livestock Landing & Slaughterhouse Company. This case came to the U.S. Supreme Court on a writ of error along with two other cases.
involving the same controversy. Although defenders of the statute argued it was a legitimate and necessary response to a genuine public health problem, the independent butchers were outraged by the large-scale bribery that made possible its enactment. Some 6,000 shares of stock in the new slaughterhouse were distributed to members of the legislature as payoffs for their votes on the bill.

Mr. Justice MILLER delivered the opinion of the Court:

***

The plaintiffs in error * * * allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the 13th article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the 1st section of the 14th article of amendment.

This court is thus called upon for the first time to give construction to these articles.

***

[T]he distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.

[T]he * * * paragraph * * * relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument * * * in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.

The language is: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words “citizen of the state” should be left out when it is so carefully used, and used in contradistinction to “citizens of the United States” in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the state, * * * it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment.

***

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one
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. **These consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect 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; **that it would] radically change[e] the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people **.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states, which ratified them. **

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of Crandall v. Nevada, 73 U.S. (6 Wall.) 36, 18 L.Ed. 745 (1868). It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land-offices, and courts of justice in the several states.” **

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a
The judgments of the Supreme Court of Louisiana in these cases are affirmed.

Mr. Justice FIELD, dissenting:

***

*** The provisions of the Fourteenth Amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. ***

What, then, are the privileges and immunities which are secured against abridgement by state legislation?

***

*** The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. ***

***

*** [E]quality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a Republic only in name. The 14th Amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. ***
I am authorized by Mr. Chief Justice CHASE, Mr. Justice SWAYNE and Mr. Justice BRADLEY, to state that they concur with me in this dissenting opinion.

Mr. Justice BRADLEY, dissenting:

[\*\*\*]

Any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

[\*\*\*]

MUNN v. ILLINOIS

Supreme Court of the United States, 1877
94 U.S. (4 Otto) 113, 24 L.Ed. 77

BACKGROUND & FACTS Amid growing pressure from the Granger movement to prevent the continued exploitation of farmers by grain elevator operators, the Illinois legislature passed an act in 1871 that established maximum rates that warehouses and elevators could charge for the storage of grain and, in addition, required these businesses to obtain operating licenses. The state filed a complaint in Cook County Court against Ira Munn and another grain elevator operator for conducting their business in violation of the statute. Munn challenged the legislation on several constitutional grounds: (1) The act conflicted with the interstate commerce power of the Congress under Article I of the Constitution; (2) it gave preferential treatment to commerce in a state port; and (3) it conflicted with the Due Process Clause of the Fourteenth Amendment. The county court decided against Munn, and its judgment was affirmed on appeal by the Illinois Supreme Court, whereupon Munn appealed to the U.S. Supreme Court.

Mr. Chief Justice WAITE delivered the opinion of the court:

[\*\*\*]

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained.

The Constitution contains no definition of the word “deprive,” as used in the 14th Amendment. [\*\*\*]

[\*\*\*]

It is apparent that, down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

[\*\*\* Looking \*\*\* to the common law, from whence came the right which the Constitution protects, we find that when private property is “affected with a public interest, it ceases to be juris privati only.” This was said \*\*\* more than two hundred years ago \*\*\* and has been accepted
without objection as an essential element in
the law of property ever since. Property does
become clothed with a public interest when
used in a manner to make it of public
consequence, and affect the community at
large. When, therefore, one devotes his
property to a use in which the public has an
interest, he, in effect, grants to the public an
interest in that use, and must submit to be
controlled by the public for the common
good, to the extent of the interest he has
thus created. He may withdraw his grant by
discontinuing the use; but, so long as he
maintains the use, he must submit to the
control.

***

[It is difficult to see why, if the common
carrier, or the miller, or the ferryman, or the
innkeeper, or the wharfinger, or the baker,
or the cartman, or the hackney-coachman,
pursues a public employment and exercises
"a sort of public office," these plaintiffs in
error do not. They stand, to use again the
language of their counsel, in the very
"gateway of commerce," and take toll from
all who pass. Their business most certainly
"tends to a common charge, and is become a
thing of public interest and use." Every
bushel of grain for its passage "pays a toll,
which is a common charge" ***.

***

It is insisted, however, that the owner of
property is entitled to a reasonable compen-
sation for its use, even though it be clothed
with a public interest, and that what is
reasonable is a judicial and not a legislative
question.

***

We know that this is a power which 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.

***

We come now to consider the effect
upon this statute of the power of Congress
to regulate commerce.

*** The warehouses of these plaintiffs
in error are situated and their business
carried on exclusively within the limits of
the State of Illinois. They are used as
instruments by those engaged in State as
well as those engaged in interstate com-
merce, but they are no more necessarily a
part of commerce itself than the dray or the
cart *** [used to transfer grain] from one
railroad station to another. Incidentally
they may become connected with interstate
commerce, but not necessarily so. Their
regulation is a thing of domestic concern
and, certainly, until Congress acts in
reference to their interstate relations, the
State may exercise all the powers of
government over them ***. [Although]
a State, *** regulating its own affairs,
*** [may encroach] upon the exclusive
domain of Congress in respect to interstate
commerce, *** [it has not done so in this
case.]

***

The judgment is affirmed.

Mr. Justice FIELD, dissenting:

I am compelled to dissent from the
decision of the court in this case, and from
the reasons upon which that decision is
founded. The principle upon which the
opinion of the majority proceeds is, in my
judgment, subversive of the rights of private
property, heretofore believed to be pro-
tected by constitutional guaranties against
legislative interference, and is in conflict
with the authorities cited in its support.

***

*** No prerogative or privilege of the
Crown to establish warehouses was ever
asserted at the common law. The business of
a warehouseman was, at common law, a
private business, and is so in its nature. It
has no special privileges connected with it,
nor did the law ever extend to it any greater
protection than it extended to all other
private business. No reason can be assigned
to justify legislation interfering with the
legitimate profits of that business, that
would not equally justify an intermeddling
with the business of every man in the
community, so soon, at least, as his business
became generally useful.
I am of opinion that the judgment of the Supreme Court of Illinois should be reversed. [Justice STRONG concurred in the dissent.]

Over the next two decades, the Court experienced a significant change in its membership. By the end of that period, only two Justices who had sat in the Munn case, Harlan and Field, were left; only the latter remained from the days of the Slaughterhouse decision, and he dissented. The alteration in the composition of the Court, however, was not merely quantitative, but also qualitative. Gone was the alliance of old-line Democrats like Nathan Clifford and Lincolnian Republicans like Samuel Miller and David Davis capable of sustaining the state police power against assault. Now the Court was staffed predominantly with corporate and railroad lawyers anxious to examine the potential of the substantive due process doctrine for dismantling economic regulation. Their growing numbers produced two significant decisions that paved the way. In Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394, 6 S.Ct. 1132 (1886), the Court, without any elaborating discussion, held that corporations were “persons” within the meaning of the Fourteenth Amendment. And the following year in Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273 (1887), the Court, in the course of upholding a state prohibition law, warned that it would begin examining the substantive reasonableness of legislation. Speaking for the Court, Justice Harlan, who had also delivered the opinion in the Santa Clara case, announced that not all legislation supported by an exercise of the police power would pass. The Court would look to the substance of the legislation and would not be “misled by mere pretenses.” If the exercise of the police power, said Justice Harlan, “has no real or substantial relation to those objects [for which the legislation was enacted], or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge.”

Twenty years after the Munn decision and a decade after the ominous announcement in Mugler, the Court, relying on the constitutional approach known as economic substantive due process, invalidated its first piece of legislation. This occurred in what otherwise would have been an innocuous little consumer protection case. At issue in Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427 (1897), was a state statute that imposed a $1,000 fine to be paid by anyone initiating cargo insurance protection pursuant to a contract with an out-of-state marine insurance company that did not maintain a business office in the state or did not have agents in the state who could be served with legal process. The law thereby sought to dissuade purchasers of insurance from doing business with companies that were situated beyond the reach of the state. In this case, after paying premiums to a New York firm, Allgeyer notified the insurance company when he was ready to ship 100 pounds of cotton to a foreign destination so as to start the insurance coverage. The state attorney general then sued Allgeyer to collect the penalty. Allgeyer objected on grounds that the law violated his right under the Fourteenth Amendment to contract with whatever maritime insurer he liked. The U.S. Supreme Court unanimously held that the statute “deprived the defendants of their liberty without due process of law.” Speaking for the Court, Justice Peckham declared that the “liberty” protected by the Due Process Clause means “not only the right of the citizen to be free from the mere physical restraint of his person” but “the right *** to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to *** carrying out *** the[se] purposes ***.” He explained: “The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside it. *** The contract in this case *** was
A valid contract, made outside the state, to be performed outside the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract, upon whom *** devolved the right *** to send the notification in order that the insurance provided for by the contract may attach to the *** shipment ***[,] must have the liberty *** to give that notification ***[,] any prohibition of the state statute to the contrary notwithstanding.” With this reasoning, the Supreme Court accepted the doctrine of “liberty of contract.”

The articulation of this freedom by the Court as a constituent of those “higher laws,” which Justice Harlan had previously characterized as “fundamental” in Mugler, was important because the concept would soon find ready application in the area of labor-management relations. An economic liberty used to preserve the right of consumers to be preyed upon by unscrupulous insurance companies soon became the vehicle by which to enforce “equal” bargaining rights between employees and employers.

Sympathetic legislatures by the turn of the century sought to modify the enormous disparity in bargaining power between the individual employee and the giant corporation, which, thanks to a legal fiction, was now a “person” within the meaning of the Fourteenth Amendment. The use of the state police power either to encourage workers to band together and through unionization achieve real parity in bargaining strength with a corporate employer or to set outside limits on the provisions of labor contracts—wages, hours, working conditions—that management might offer received a generally hostile response from the Court. Relying upon the Due Process Clause of the Fourteenth Amendment to invalidate state legislation and upon an identical clause in the Fifth Amendment to strike down reform legislation passed by Congress for the District of Columbia, the Supreme Court in Adair v. United States, 208 U.S. 161, 28 S.Ct. 277 (1908), and Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240 (1915), declared unconstitutional acts that outlawed “yellow dog” clauses (promises by laborers not to join or, if a member, to withdraw from a union) in employment contracts. As the Court put it in Adair:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee ***.

And, in a tone strikingly reminiscent of Marie Antoinette, the Court finished off the point in Coppage:

[I]t is said *** to be a matter of common knowledge that “employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof.” No doubt; wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. *** And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment, in declaring that a state shall not “deprive any person of life, liberty, or property without due process of law,” gives to each of these an equal sanction; it recognizes “liberty” and “property” as coexistent human rights, and debars the states from any unwarranted interference with either.
Utilizing the same concept of substantive due process with regard to the Fifth and Fourteenth Amendments, the Court also struck down minimum wage legislation. See Adkins v. Children’s Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923), and Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 56 S.Ct. 918 (1936).4

The Court was somewhat less rigid, though still exacting, when it scrutinized legislative efforts to regulate the maximum number of hours one might be compelled to work. It found redeeming merit and the requisite relation to protecting health when, in Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383 (1898), it sustained the constitutionality of a Utah statute limiting the workday to eight hours for those employees in the mining and smelting industry. In Lochner v. New York (p. 435) seven years later, however, the Supreme Court failed to discover any convincing justification for New York’s maximum hours legislation covering bakers. In dissent, Justice Holmes argued eloquently for the exercise of self-restraint and protested this process by which Justices in the majority were riveting into the Constitution their own personal economic values.

Though Lochner’s reputation lived on as a classic period piece in the history of the Court’s jurisprudence, its constitutional effect was fleeting. In two cases that followed, Muller v. Oregon (p. 438) and Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435 (1917), the Court upheld the constitutionality, respectively, of state acts to limit the workday for women to 10 hours and to extend this maximum hours limitation to all mill and factory workers. The Bunting case, brought by an employee in a flour mill, was significant principally because it accomplished de facto the overturning of Lochner. In one sense, the effect of the Muller case was more subtle. It rested on the Court’s acceptance of an unconventional form of argument presented by Louis Brandeis, then counsel for the state and later Justice. To substantiate the legislature’s claim that a 10-hour workday limitation for women was reasonable and bore a direct and substantial relation to their health and welfare, Brandeis presented in his brief sociological data supporting that connection. The significance of the “Brandeis brief,” which in this case drew extensively on physiological and medical studies to show that long hours of standing or lifting had devastating effects on women’s health, was that it took legal argument out of the exclusive province of precedents and deductive logic and gave it the added dimension of empirical research.

While it was doubtless true that women were better off employment-wise after Muller than before it,5 the paternalistic and patronizing tone of the Court’s opinion could hardly be thought encouraging about the status of women, at least by contemporary standards. To be sure, Oregon was one of the most progressive states, recognizing equal rights with men to make contracts and incur civil liability, but women were still denied the vote. A few states, like Wyoming, gave women the vote, but the Supreme Court had held in Minor v. Happersett, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627 (1875), that states did not abridge the Fourteenth Amendment if they limited the franchise to men. Indeed, in Bradwell v. State, 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1873), the

4. The decision in Morehead turned on the Due Process Clause of the Fourteenth Amendment, but the ruling in Adkins was based on the Due Process Clause of the Fifth Amendment, although the “liberty” the Court was protecting under both clauses was the “liberty of contract.” The Fifth rather than the Fourteenth Amendment was invoked in Adkins since the case involved a constitutional challenge to a federal minimum wage law for the District of Columbia. Because the District of Columbia is not a state, it is unaffected by the Fourteenth Amendment, so the Court relied upon the Due Process Clause of the Fifth Amendment as the relevant constitutional limitation on Congress’s power to legislate.

5. This is true, of course, with respect to the requirement of maximum hours of regular employment. Unfortunately, Brandeis’s logic cut both ways: If the physiology of women was such as to justify a limit on the maximum hours that could be worked, it also froze women out of overtime work at higher rates of pay.
Supreme Court upheld an Illinois law that denied women the right to practice law. Women, of course, obtained the right to vote with the passage of the Nineteenth Amendment in 1920; other forms of gender-based discrimination continue to be challenged as violations of the Equal Protection Clause, as the materials in Chapter 14, section E illustrate.

LOCHNER V. NEW YORK
Supreme Court of the United States, 1905
198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937

BACKGROUND & FACTS  Joseph Lochner was found guilty of violating an 1897 New York law that prohibited employers from allowing bakers to work more than 60 hours per week or more than 10 hours per day, and he was fined $50. This labor restriction was part of the statute’s comprehensive regulation of the baking industry. Other parts of the law required that rooms in a bakery be made of materials that could be cleaned easily and forbade the quartering of animals there. Bakery rooms had to be properly ventilated and equipped with adequate drainage; storage of flour and other baking staples had to be in clean, dry places; and washrooms were to be separate from and not connected to rooms used for baking. The maximum hours limitation was enacted to protect both the health of bakers and the public welfare. The intense heat in the baking rooms was exhausting to workers, and, when tired, their job performance was less careful. The flour dust, to which they were exposed for prolonged periods, increased the likelihood that respiratory problems, particularly consumption, would develop. Two state courts upheld the constitutionality of the maximum hours provision and affirmed Lochner’s conviction.

Mr. Justice PECKHAM delivered the opinion of the court:

* * * The mandate of the statute, that “no employee shall be required or permitted to work,” is the substantial equivalent of an enactment that “no employee shall contract or agree to work,” more than ten hours per day; and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day’s work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours’ work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427 (1897). Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of
which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. * * *

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract * * *, it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.

* * *

There is a limit to the valid exercise of the police power by the state. * * * Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. * * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. * * *

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the
occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

* * * The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

* * *

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, * * * there would seem to be no length to which legislation of this nature might not go. * * *

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. * * *

* * * Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

* * *

Reversed.

Mr. Justice HOLMES, dissenting:

* * *

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics. * * *

Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end.
Every opinion tends to become a law. I think that the word “liberty,” in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Mr. Justice HARLAN (with whom Mr. Justice WHITE and Mr. Justice DAY concurred) dissenting:

***

* * * We are not to presume that the state of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the state has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. * * *

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MULLER v. OREGON
Supreme Court of the United States, 1908
208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551

BACKGROUND & FACTS Curt Muller owned the Grand Laundry in Portland, Oregon, and was fined $10 after being convicted of violating a state law that prohibited female employees from working more than 10 hours in any one day. The Oregon Supreme Court upheld the constitutionality of the statute and affirmed his conviction. Muller, arguing that the law was not a valid exercise of the state’s police power in light of Lochner v. New York, appealed.

Mr. Justice BREWER delivered the opinion of the court:

***

It is undoubtedly true * * * that the general right to contract in relation to one’s business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual’s power of contract. * * *

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this has continued to the present. As minors, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one’s eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is affirmed.

It must also be remembered that the Court’s reliance upon substantive due process, as a doctrine with which to support the established economic order, was not an isolated phenomenon. The antilabor bias inherent in vindicating the liberty of contract was equally, if not more, evident in the application of the provisions of the Sherman Anti-Trust Act to work stoppages, particularly the secondary boycott (coercion applied to customers or suppliers to get them to withhold their business from an employer experiencing labor difficulties). In a host of cases, notably *Loewe v. Lawlor*, 208 U.S. 274, 28 S.Ct. 301 (1908); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S.Ct. 172 (1921); *Coronado Coal Co. v. United Mine Workers of America*, 268 U.S. 295, 45 S.Ct. 551 (1925); and *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Association*, 274 U.S.
37, 47 S.Ct. 522 (1927), the Court repeatedly found strike practices to be “unlawful restraints on trade.” By narrowly circumscribing the Clayton Act’s exemption of strikes from the application of the antitrust statutes, the judiciary became a haven of business interests—issuing a flurry of injunctions to halt labor protests, using the contempt power to punish strikers for continued disobedience to court orders, and awarding triple damages to the corporations for any injury they sustained because of these union activities.

It was the judges’ values and attitudes, then, not the deductive application of any preexisting constitutional rules, that gave economic liberties during this era the exalted status of “preferred freedoms.” The operative principle was summed up very well by Chief Justice Taft, writing for the Court in Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 43 S.Ct. 630 (1923), when he declared, “Freedom”—economic freedom, that is—“is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances.”

The End of “Liberty of Contract”

The rigid logic and high abstraction of substantive due process, like its constitutional blood brother, dual federalism, were overtaken in the end by experience—and that experience was the Great Depression. The neat, stale categories of judicial construction were simply done in by the reality of violent industrial disputes, massive unemployment, and long bread lines. The convulsion of a national, industrialized, interdependent economy had suffused the dissenting opinion of Justice Holmes in *Lochner* with a pressing relevance.

A harbinger of the limited future ahead for substantive due process was the Supreme Court’s decision in Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934), a case involving the constitutionality of New York’s legislation aimed at shoring up plummeting milk prices. Concluding that the perils of destructive competition were sufficient to justify the imposition of a schedule of minimum and maximum prices for the sale of milk by the state Milk Control Board, the Court rejected the claim that such regulation contravened the Fourteenth Amendment. What is significant about the ruling is not simply that it turned aside a substantive due process challenge, but also that in doing so the Court overturned as insubstantial the most liberal existing regulatory standard. Reviewing the business-affected-with-a-public-interest doctrine enunciated in *Munn v. Illinois*, Justice Roberts, speaking for the majority, remarked that “there is no closed class or category of business affected with a public interest * * *.” All business was subject to regulation, and legislation accomplishing that purpose was not to be invalidated unless “arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt * * *.” Above all, legislation was not to be nullified because the Justices thought it to be “unwise.”

The demise of substantive due process in economic matters was not only a dimension to the Constitutional Revolution of 1937, but in fact provided the opening shot. The decisions in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (p. 311) and *Steward Machine Co. v. Davis* (p. 351), overturning the doctrine of dual federalism, were announced respectively on April 12 and May 24, 1937. The decision in *West Coast Hotel Co. v. Parrish* (p. 441) preceded the ruling in *Jones & Laughlin* by two weeks. Speaking for the new majority, Chief Justice Hughes, feigning astonishment that a “liberty of contract” could have been gleaned from anywhere in the Constitution, laid economic substantive due process to rest and articulated the new norm of self-restraint to be followed in the future review of economic legislation. The Court’s four hard-core conservatives entered bitter dissents.

The Court’s staunch adherence to the posture of judicial self-restraint in economic matters is well illustrated by more recent decisions in *City of New Orleans v. Dukes* (p. 443) and *Minnesota v. Clover Leaf Creamery Co.* (p. 445). Indeed, the ruling in *Dukes* is
particularly illuminating in that regard because the Court availed itself of the opportunity to overrule—and in a quite perfunctory manner—its only instance of economic activism since the New Deal.

**West Coast Hotel Co. v. Parrish**

Supreme Court of the United States, 1937

300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703

**BACKGROUND & FACTS** Elsie Parrish, an employee of the West Coast Hotel Company, and her husband brought suit to recover the difference between her wage and the minimum wage of $14.50 per week of 48 hours set by the Industrial Welfare Committee of the State of Washington under a state law enacted in 1913. The law was passed by the state legislature to protect the health and welfare of women and minors by assuring them a minimum wage from their employers. The trial court’s decision against Parrish was reversed by the state supreme court. West Coast Hotel appealed to the U.S. Supreme Court, challenging the state law on grounds it conflicted with the Due Process Clause of the Fourteenth Amendment.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington.

***

The appellant relies upon the decision of this Court in Adkins v. Children’s Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923), *** which held invalid the District of Columbia Minimum Wage Act (40 Stat. 960) *** under the due process clause of the Fifth Amendment. ***

***

*** The Supreme Court of Washington has upheld the minimum wage statute of that state. *** The state court has refused to regard the decision in the *Adkins* Case as determinative ***. We are of the opinion that this ruling of the state court demands on our part a re-examination of the *Adkins* Case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the *Adkins* Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

***

*** The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins* Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

***
This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day; * * * in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages; * * * in forbidding the payment of seamen's wages in advance; * * * in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; * * * in prohibiting contracts limiting liability for injuries to employees; * * * in limiting hours of work of employees in manufacturing establishments; * * * and in maintaining workmen's compensation laws. * * * In dealing with the relation of 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. * * *

We think that the views thus expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. * * *

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. * * * [T]here is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. * * *

* * *

Our conclusion is that the case of Adkins v. Children's Hospital, supra, should be, and it is, overruled. The judgment of the Supreme Court of the state of Washington is affirmed.

Affirmed.

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment of the court below should be reversed.

* * *

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say * * * that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have
applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

* * *

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. * * *

* * *

CITY OF NEW ORLEANS v. DUKES
Supreme Court of the United States, 1976
427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511

BACKGROUND & FACTS As originally enacted, a New Orleans ordinance barred vendors from selling foodstuffs from pushcarts in the city's Vieux Carre, or French Quarter, but an amendment adopted in 1972 excepted from that ban "vendors who have continually operated the same business within the Vieux Carre * * * for eight years prior to January 1, 1972 * * *." Dukes, the owner of a pushcart business operating throughout the city, but selling in the Vieux Carre for only two years before the ordinance was amended, was barred from doing business there. She sued the city for declaratory and injunctive relief. Originally, her complaint challenged the old version of the ordinance, but she modified it to attack the 1972 amendment as a violation of equal protection. A federal district court granted the city's motion for summary judgment, but that decision was reversed on appeal.

Relying on Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344 (1957), the appeals court focused on the "exclusionary character" of the ordinance and highlighted its "creation of a protected monopoly for the favored class member." The court concluded that there was an "insubstan[ial] * * * relation between the nature of the discrimination and the legitimate governmental interest in conserving the traditional assets of the Vieux Carre," since the criteria chosen to distinguish permissible vending from impermissible vending bore no relation to either (1) assuring that the favored class members would "continue to operate in a manner more consistent with the traditions of the [French] Quarter than would any other operator," or (2) "instill[ling] in the [favored] licensed vendors (or their likely transient operators) the kind of appreciation for the conservation of the [French] Quarter's tradition." The appeals court declared the ordinance a violation of the Equal Protection Clause and remanded the case for consideration as to the severability of the "grandfather clause" portion from the remainder of the ordinance, whereupon the city appealed.
PER CURIAM.

* * *

The record makes abundantly clear that the amended ordinance, including the "grandfather provision," is solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans.

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. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488–489, 75 S.Ct. 461, 464–65 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines * * *. in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. * * *

The Court of Appeals held in this case * * * that the "grandfather provision" failed even the rationality test. We disagree. The city's classification rationally furthers the purpose * * * "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." * * * The legitimacy of that objective is obvious. The City Council plainly could further that objective by making the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the heart of the city's tourist industry, might thus have a deleterious effect on the economy of the city. They therefore determined that to ensure the economic vitality of that area, such businesses should be substantially curtailed in the Vieux Carre, if not totally banned.

It is suggested that the "grandfather provision," allowing the continued operation of some vendors was a totally arbitrary and irrational method of achieving the city's purpose. But rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible. * * *

The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the "grandfather clause"—both of whom had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Nevertheless, relying on Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344 (1957), as its "chief guide," the Court of Appeals held that even though the exemption of the two vendors was rationally related to legitimate city interests on the basis of facts extant when the ordinance was amended, the "grandfather clause" still could not stand because "the hypothesis that a present eight year veteran of the pushcart hot dog market in the Vieux Carre will continue to operate..."
in a manner more consistent with the traditions of the Quarter than would any other operator is without foundation.”

We have concluded that the equal protection analysis employed in that opinion should no longer be followed. Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. Morey is, as appellee and the Court of Appeals properly recognized, essentially indistinguishable from this case, but the decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice MARSHALL concurs in the judgment.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

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NOTE—MINNESOTA v. CLOVER LEAF CREAMERY CO.

Relying on the kind of analysis invoked to treat constitutional challenges to legislation affecting economic interests that the Court reaffirmed its commitment to in Dukes, the Supreme Court five years later in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981), turned its attention to the constitutionality of a state statute that “banned the retail sale of milk in plastic, nonreturnable, nonrefillable containers, but permitted such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons.” Opponents of the legislation argued and presented empirical evidence to support their claims that the legislation would not further environmental interests, that it would increase the retail price of milk, and that it would only prolong the use of paperboard milk containers. Speaking for the Court, Justice Brennan observed at the outset that “[t]he parties agree that the standard of review applicable to this case under the Equal Protection Clause is the familiar ‘rational basis’ test” and that “they agree that the purposes of the Act cited by the legislature * * * are legitimate state purposes,” so that “the controversy in this case centers on the narrow issue whether the legislative classification between plastic and nonplastic nonreturnable milk containers is rationally related to achievement of the statutory purposes.” Noting that the states “are not required to convince courts of the correctness of their legislative judgments” and are entitled to have the benefit of the doubt where “the question is at least debatable,” Justice Brennan went on to canvass four reasons identified by the state why the discrimination between plastic and nonplastic, nonreturnable containers was rationally related to the purposes articulated in the statute: (1) The elimination of the popular plastic milk jug will encourage the use of environmentally superior containers; (2) the “ban on plastic nonreturnable milk containers will reduce the economic dislocation foreseen from the movement toward greater use of environmentally superior containers”; (3) “the Act will help to conserve energy”; and (4) “the Act will ease the State’s solid waste disposal problem.” Because of “the theoretical connection between a ban on plastic nonreturnables and the[se] purposes articulated by the legislature,” he found there to be “a rational relation to the State’s objectives * * *.”

As the dust settled from the fracas over what role the Court ought to play in economic affairs and the New Deal appointees swarmed onto the Bench, the Justices began to turn their attention to the next major question: Must a Court committed to the practice of judicial self-restraint in adjudicating economic claims be equally bound to practice that role in evaluating infringements of civil liberties?
C. THE REGULATION AND “TAKING” OF PROPERTY

The protection of vested rights through the Contract Clause and later by way of the “liberty of contract” declined for different reasons. As a bulwark for the protection of property rights, the former was limited by the fact that economic regulation increasingly took the form of legislation governing the conditions under which contracts could be made rather than attempting to alter the terms of existing contracts. In the case of the latter, the reality of economic interdependence made evident by the Great Depression generated such political pressure on the Court that it was forced to abandon the constitutional doctrine. The adoption of the Fifth Amendment in 1791 as part of the Bill of Rights provided a third important instrument for the protection of property, the clause recognizing, but limiting, government’s power of eminent domain (government’s authority to take private property for a public use), as when a municipality takes someone’s house and land for the purpose of constructing a road, a school, or a hospital. In addition to the guarantee provided by the Due Process Clause that “property”—like “life” and “liberty”—cannot be taken without due process (which means that government must follow well-established and customary procedures—such as giving notice), the Takings Clause declares, “[N]or shall private property be taken for public use, without just compensation.” Thus, the Fifth Amendment obligates government to compensate the owner of private property when government takes it. Since the 1890s, the Supreme Court has held that this requirement applies to government at all levels, not just the national government (see pp. 447–448, 481). Moreover, the amendment requires government to pay “just compensation”—that means fair value—for any property taken.

The critical question triggering the protection afforded by the Takings Clause is whether government has “taken” private property. When a city condemns a homeowner’s land to put up a school, it is clear that private property has been taken. But when government only restricts the use to which private property may be put—when, for example, a municipality enacts zoning regulations—it does not constitute a “taking” of property. The determination whether private property has been “taken” or simply regulated is, therefore, critical: If property has been “taken,” the burden falls on the government, or more accurately on the taxpayers, to foot the bill; if property is only being regulated, the burden falls on the property owner to absorb the financial impact of the regulation—usually a reduction in the value of the property. As the following Supreme Court opinion in Penn Central Transportation Co. v. City of New York shows, there is no set formula to determine the answer to that question. Since the time of the Great Depression, the Court reached its conclusion on a case-by-case basis after considering a number of relevant factors. Moreover, since its disastrous confrontation with the Roosevelt administration over the control of economic policy in the 1930s, the Court conducted its examination of such factors from a posture of judicial self-restraint. This meant that the Court treated the regulatory purposes of government at all levels quite generously. In the Penn Central case, for instance, the Court had little difficulty sustaining New York City’s Landmark Preservation Law.

Penn Central Transportation Co. v. City of New York
Supreme Court of the United States, 1978
438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631

BACKGROUND & FACTS New York City adopted the Landmark Preservation Law in 1965. What motivated the city to act was “the conviction
that ‘the standing of [New York City] as a worldwide tourist center and world capital of business, culture, and government’ would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character.” The law is typical of many such municipal enactments in that it mainly seeks to achieve its purpose of heritage preservation not by acquisition of historic properties, but instead by involving public bodies in land-use decisions involving those properties. The law does not place special restrictions on landmark properties per se and does seek to ensure owners of such properties a “reasonable return” on their investments and maximum latitude to use the properties for purposes that are not inconsistent with preservation goals. Where permission is not given for further development of a landmark site, the law allows a transfer of development rights to another parcel of land nearby if it is held by the owner.

The Penn Central Transportation Company owns Grand Central Station and other land on the city block on which it stands. Built in 1913, the terminal is one of the city’s most famous buildings. The edifice “is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French Beaux Arts style.” Shortly after the legislation went into effect, the city’s Landmarks Preservation Commission, created by the Law, designated the terminal a “landmark” and the city block a “landmark site.” In 1968, Penn Central signed a 55-year, renewable agreement with a British corporation for construction of a 50-story-plus office building on land adjacent to the terminal, which is only an eight-story structure housing the railroad, its offices, and numerous commercial establishments renting space from Penn Central. In its agreement to lease the property, the British corporation agreed to pay Penn Central $1 million a year during construction and at least $3 million a year thereafter. This money, however, would have been offset in part by the loss of up to $1 million a year then paid to Penn Central by concessionaires who used the property. The commission denied permission for construction, calling the plan “an aesthetic joke,” since the “sheer mass” of the tower would “overwhelm” the terminal and would reduce it “to the status of a curiosity.” Penn Central subsequently filed suit for a declaratory judgment, injunctive relief, and damages, alleging that the city, through application of the landmark preservation legislation, had “taken” the company’s property without just compensation in violation of the Fifth and Fourteenth Amendments. The trial court granted declaratory and injunctive relief, but an intermediate state appellate court reversed this ruling. Judgment in the city’s favor was affirmed by the New York Court of Appeals, whereupon Penn Central sought review by the U.S. Supreme Court.

Mr. Justice BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a “taking” requiring the payment of “just compensation.” Specifically, we must decide whether the application of New York City’s Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners’ property in violation of the Fifth and Fourteenth Amendments.

***

[The guarantee against] * * * a “taking” of * * * property [without payment of just compensation] for a public use within the meaning of the Fifth Amendment. * * * of
course is made applicable to the States through the Fourteenth Amendment, see Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239, 17 S.Ct. 581, 585 (1897). * * *

A

[In applying] the Fifth Amendment injunction “nor shall private property be taken for public use, without just compensation[,] * * *] this Court * * * has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons. * * * Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the Government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” * * *

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. * * * 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.

“Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159 (1922) * * *.

[T]his Court has upheld land use regulations that destroyed or adversely affected recognized real property interests. * * * Zoning laws are of course the classic example, see Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926) (prohibition of industrial use), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. * * *

[T]aking challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court * * * held that the State might properly make “a choice between the preservation of one class of property and that of the other” and since the apple industry was important in the State involved, concluded that the State had not exceeded [its constitutional powers] * * *.

[Justice BRENNAN then went on to note several other cases in which the Court had ruled there had been only a regulation, not a “taking,” of property: Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143 (1915), which upheld an ordinance prohibiting the operation of a brickyard as inconsistent with neighboring uses of property; Goldbatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987 (1962), which sustained a safety ordinance banning any excavations below the water table, although the operator of a sand and gravel company had been in business for 30 years before the prohibition was imposed; and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), which upheld a state law aimed at
protecting the safety of homeowners by forbidding excavations under their lots by coal companies who retained mining rights to the land underneath.]

B
In contending that the New York City law has "taken" their property in violation of the Fifth and Fourteenth Amendments, appellants * * * essentially urge that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. * * * [A]ppellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants * * * accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. * * *

[Appellants] first observe that the air space above the Terminal is a valuable property interest * * *. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal * * * entitling them to "just compensation" measured by the fair market value of these air rights.

[T]hat appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole, here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. * * * [D]iminution in property value, standing alone, can [not] establish a taking, see Euclid v. Ambler Realty Co., supra (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, supra, (87% diminution in value) * * *, and that the taking issue in these contexts is resolved by focusing on the uses the regulations permit. * * * [A]ppellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would of course invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true * * * that both historic district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But * * * landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. * * * In contrast to discriminatory zoning, which is the antithesis of land use control as part of some
comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and * * * over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark “is inevitably arbitrary or at least subjective because it basically is a matter of taste,” * * * thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. * * *

**

[A]ppellants’ repeated suggestions that they are solely burdened and unbenefted is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in Miller, Hadacheck, Euclid, and Goldblatt.

**

C

Unlike the governmental acts in Goldblatt, Miller, * * * and Hadacheck, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but to obtain a “reasonable return” on its investment.

Appellants, moreover, exaggerate the effect of the Act on its ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission’s actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. * * * Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. * * * [T]hese rights * * * are * * * transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. * * * [T]hese rights * * * mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. * * *

We conclude that the application of New York City’s Landmarks Preservation Law has not effected a “taking” of appellants’ property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but
afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

Affirmed.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE [BURGER] and Mr. Justice STEVENS join, dissenting.

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Only in the most superficial sense of the word can this case be said to involve “zoning.” Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but for the common benefit of one another. * * *

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions * * [because] the landowner is not simply prohibited from using his property for certain purposes, [but is also] under an affirmative duty to preserve his property as a landmark at his own expense. * * *

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While neighboring landowners are free to use their land and “air rights” in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever main-
the buildings in New York for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the “taking” protection is directed. ***

***

* * * The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the damage.

Until the appointment of Ruth Bader Ginsburg in 1993, all of the Justices since 1967 (when President Johnson appointed Thurgood Marshall) were named by Republican Presidents. Particularly with the Reagan and Bush appointees, the Court tended more often than before to side with business and property owners and against the government in cases involving economic regulation. The Justices seemed more willing to see intrusions on property rights as amounting to a “taking” of property. Court decisions of the late 1970s and early 1980s sometimes adopted the posture of Penn Central. For example, in Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318 (1979), the Court unanimously upheld federal regulations that prohibited buying, selling, or trading the body parts of rare birds thus denying the owners the most profitable uses of artifacts made from endangered species. And in Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980), the Court unanimously sustained land-use regulations that restricted construction of new homes overlooking scenic San Francisco Bay to single-family dwellings with a minimum lot size of an acre.

More often, however, the Court’s decisions fell on the other side of the line, so that government was required to compensate owners for the fair value of property now deemed to have been “taken.” In Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1970), the Court ruled that the government could not require a marina-style housing division to open its waters to free public access simply because it constituted a navigable waterway and was connected to a bay. Nor, in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982), was the nominal payment of only a dollar held sufficient to compensate apartment house owners for the permanent intrusion on their property resulting from the required fixed installation of wiring and other equipment for cable television.

Sensitivity to the “taking” of property escalated under the Rehnquist Court. In Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987), the Court—albeit by a bare majority—held that a state land-use commission could not require waterfront property owners to suffer the intrusion of providing public access to the beach where the regulation did not serve some specific public purpose beyond the general belief that the public interest would be well served by providing people with continuous access to the beach. The Rehnquist Court appeared to further ratchet up the protection of property rights with its decision in Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 112 S.Ct. 2886 (1992), five years later. In that case the plaintiff sued to obtain compensation because of the effect of state environmental regulations designed to address coastal erosion by prohibiting new construction. Lucas had purchased two residential lots along the South Carolina coast intending to build single-family homes on the land, which was immediately adjacent to a barrier beach, and had an architect draw up the plans. At the time he bought the lots, the property was not subject to the state’s coastal zone building regulations because the land did not fall within the “critical zone” that required the
commission’s approval prior to any construction. Two years later, the state legislature, responding to a serious erosion problem, passed a statute that enlarged the “critical zone” so as to extend the ban on all construction seaward of a line that ran behind Lucas’s property. Although Lucas conceded the state had the power to prohibit construction, the statute in this instance made his property worthless and deprived him of its value without fair compensation. By a 6–3 vote, the Court held that the Takings Clause does not require the payment of compensation when an owner is prohibited from putting his land to a use specified banned in regulations on the books at the time of purchase. But if a new regulation declares “off-limits” all economically productive or beneficial uses of the land, compensation must be paid unless the owner is putting the property to traditionally recognized “harmful or noxious uses,” that is, unless the property is used in such a manner as to constitute a public nuisance.

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465 (2002), the Court emphasized that Lucas only applied to regulatory takings that deprived the owner of all economically productive and beneficial uses of the land. The just compensation guarantee of the Fifth Amendment was not necessarily triggered where a comprehensive land-use plan only imposed a moratorium on the development of private property. Since regulatory takings are different from the physical taking of property (as when government takes private land in order to construct a public road), whether the property owner is entitled to compensation depends on examining the impact of the regulation on a case-by-case basis rather than on the application of categorical rules. While the moratorium in this instance lasted 32 months and was an important factor, it was not the only factor to be taken into account. It did not deprive the property owner of all development value; when the moratorium expired, the property would recover value. The six-Justice majority rejected any categorical rule that a moratorium on property development lasting longer than a year necessarily interfered with legitimate investment back expectations and required just compensation. Where a regulatory taking did not result in the loss of all value of the property, the majority continued to rely on Penn Central’s case-by-case approach.

Decisions such as Nollan, Lucas, and Dolan v. City of Tigard have prompted many contemporary Courtwatchers to ask whether a new round of judicial enthusiasm for the defense of property rights—last seen in the early 1930s—is at hand. Dissenting in Dolan, Justice Stevens exclaimed that “property owners have surely found a new friend today.” In light of the heightened scrutiny to be applied in some future takings cases, he noted the parallel with decisions of a bygone day and “hope[d] * * * [it did] not signify a reassertion of the kind of superlegislative power the Court exercised in the Lochner era.” Given the decision in Dolan, do you think the Court today would reach the same conclusion in the Penn Central case?

Dolan v. City of Tigard
Supreme Court of the United States, 1994
512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304

Background & Facts The city of Tigard, Oregon, a community of 30,000 residents located on the southwestern edge of Portland, developed a comprehensive land use plan that required property owners in the central business district to leave 15 percent of the space open or landscaped. In other words, buildings and paved parking combined could constitute no more than 85 percent of the land
area. The city also developed a plan for a pedestrian/bicycle pathway that required new development to facilitate these modes of transportation in order to relieve traffic congestion. Finally, the city developed a master drainage plan promoting channel excavation to deal with stormwater runoff because of the increased risk of flooding that arises when large amounts of urban area are covered with concrete and asphalt. The city was particularly concerned about flooding along Fanno Creek and adopted policies that restricted construction on the floodplain and encouraged greenways to minimize future flooding.

Florence Dolan owned an electrical and plumbing supply store and applied to the city for a permit to allow construction that would double the size of her store to 17,600 square feet and pave a 39-space parking lot that heretofore had been gravel. The city planning commission granted the building permit, subject to the following conditions: She had to dedicate that portion of her property lying within the creek’s floodplain for the improvement of a storm drainage system, and she had to devote an additional 15-foot strip of land adjoining the floodplain as a pedestrian/bicycle pathway. The conditions in total required her to give up 7,000 square feet of land, or 10 percent of her property, to the city for these uses. Dolan argued that these conditions amounted to a taking of her property, but a land-use appeals board found that the city’s conditions were supported by substantial evidence that they furthered legitimate regulatory policies. After both an Oregon appellate court and the state supreme court agreed with that conclusion, she petitioned the U.S. Supreme Court for certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

*** Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. ***

On the other ***[hand,] the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926). ***A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land.” Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980).

The sort of land use regulations discussed in the[se] cases[,] *** however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In Nollan [v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987)], we held that *** the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. ***

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner *** argues
that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. * * * If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. * * *

* * * Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. * * * It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of stormwater run-off into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers * * *.

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development. * * * [T]he Oregon Supreme Court deferred to what it termed the "city's unchallenged factual findings" supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner's business. * * *

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. * * * We think * * * "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. * * *

* * * Increasing the amount of impervious surface will increase the quantity and rate of storm-water flow from petitioner's property. * * * Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. * * * [B]ecause petitioner's property lies within the Central Business District, the Community Development Code already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. * * * But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. * * * It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request. * * *
* * * We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. * * * But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand * * * and lessen the increase in traffic congestion."

[T]he city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. * * *

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BLACKMUN and Justice GINSBURG join, dissenting.

* * * The Court recognizes as an initial matter that the city's conditions satisfy the "essential nexus" requirement announced in Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141 (1987), because they serve the legitimate interests in minimizing floods and traffic congestions. * * * The Court goes on, however, to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition. * * * The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an "individualized determination" that the condition in question satisfies the proportionality requirement. * * *

* * * The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are "conducive to fulfillment of authorized planning objectives." * * *

* * *

In her objections to the floodplain condition, Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers "trampling along petitioner's floodplain," * * * are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of * * * useless land a liability rather than an asset. * * *

The Court's rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path "could" offset some of the increased traffic flow that the larger store will generate, but [predictions of whether 100%, or 35%, or only 5% of the automo-
tive traffic will be replaced by cyclists] *** are inherently nothing more than estimates. *** If the Court proposes to have the federal judiciary micromanage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. ***

*** The city’s conditions are by no means immune from constitutional scrutiny *** [but one] can only hope that the Court’s *** disavowal of the term “rational basis” to describe its new standard of review *** do[es] not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.

The Court has decided to apply *** heightened scrutiny to a single strand [of property rights]—the power to exclude [others] *** [i]n its application of what is essentially the doctrine of substantive due process ***.

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action’s constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

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[Justice SOUTER also dissented.]

Whatever harbingers of economic judicial activism an observer might have discerned by reading the tea leaves in the *Nollan*, *Lucas*, and *Dolan* decisions, the Court’s most recent Takings Clause decisions hue much more strongly to judicial self-restraint. In the *Kelo* decision that follows—arguably the most important Takings Clause decision of the Rehnquist Court—Justice Kennedy supplied the critical fifth vote that allowed the dissenters in *Dolan* to carry the day.

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**KELO V. CITY OF NEW LONDON**

Supreme Court of the United States, 2005

545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439

**BACKGROUND & FACTS** Designated a “distressed municipality” by a state agency a decade earlier, New London, Connecticut, approved an urban development plan in 2000 that was projected to create more than 1,000 jobs, substantially increase tax revenues, and revitalize its downtown and waterfront areas. The city’s population had dropped to 24,000 (the lowest since the 1920s), its unemployment rate was double the state average, and the recent closure of a federal
facility had idled 1,500 workers. Some of the land for the urban renewal project was purchased from willing sellers, but other parcels were to be obtained by the city’s exercise of eminent domain from residents who did not want to give up their homes, even though they would receive just compensation. The centerpiece of the city’s plan was a waterfront conference center surrounded by a “small urban village” with restaurants, shopping, and recreational areas. There would be a pedestrian riverwalk, a state park, a museum, marinas, and some 80 new residences. Adjacent to part of the area, which was to contain 92,000 square feet of research and office space, was to be a facility of the Pfizer drug company. The plan was intended to capitalize on the arrival of Pfizer and to create commercial opportunities.

The city instituted condemnation proceedings to obtain properties from landowners unwilling to sell. Among those was Susette Kelo, who bought her house three years before the city approved the redevelopment plan, and who had made extensive improvements to the property which she prized for its waterfront view. Wilhelmina Dery was another property owner unwilling to sell. She had been born in the house she owned and had lived there for 87 years. Kelo and Dery sued to halt the city’s acquisition of their properties on grounds the city’s use of eminent domain violated the Takings Clause of the Fifth Amendment which states, “[N]or shall private property be taken for public use, without just compensation.” They argued that their properties would, in turn, be leased by the city to other private entities—whether businesses or residents—not necessarily with public access, and therefore not constituting a “public use.” A state trial court found for the plaintiffs and entered a permanent restraining order against the city. On appeal, the Connecticut Supreme Court, on a 4–3 vote, reversed that judgment and held for the city. Kelo and Dery then successfully petitioned the U.S. Supreme Court for certiorari.

Justice STEVENS delivered the opinion of the Court.

*** The question presented is whether the city’s proposed disposition of this property qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

*** On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. *** Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a “carefully considered” development plan. *** The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, *** the City’s development plan was not adopted “to benefit a particular class of identifiable individuals.”

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the
private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” * * * Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. Not only was the “use by the public” test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as “public purpose.” * * *

* * * Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98 (1954), [for example,] this Court upheld a redevelopment plan targeting a blighted area of Washington, D.C., in which most of the housing for the area’s 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a “better balanced, more attractive community” was not a valid public use. * * *

Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area “must be planned as a whole” for the plan to be successful. * * * The Court explained that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.” * * * The public use underlying the taking was unequivocally affirmed:

“We do not sit to determine whether a particular housing project is or is not desirable. 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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.” * * *

* * *

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs. * * * For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

[The] determination [of those who govern the City] * * * that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no
means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

PETitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. * * * Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. * * *

* * *

It is * * * argued that without a bright-line rule nothing would stop a city from transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a “reasonable certainty” that the expected public benefits will actually accrue. * * * The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

We also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project. “It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.” Berman, 348 U.S., at 35–36, 75 S.Ct., at 104.

In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. * * * [T]he necessity and wisdom of using eminent domain to promote economic development are certainly
matters of legitimate public debate. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

The judgment of the Supreme Court of Connecticut is affirmed.

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Justice O’CONNOR, with whom THE CHIEF JUSTICE [REHNQUIST], Justice SCALIA, and Justice THOMAS join, dissenting.

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Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.

***

Where is the line between “public” and “private” property use? We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. ***

***

This case *** presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain ***.

***

[In previous cases] the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society *** [and] the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *** Thus a public purpose was realized when the harmful use was eliminated. Because each taking directly achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm. ***

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.

***

[Who among us can say she already makes the most productive or attractive
possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

The fallout from [today’s] decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

I would hold that the takings are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

Justice THOMAS, dissenting.

The Constitution allow[s] the government to take property not for “public necessity,” but instead for “public use.” Defying this understanding, the Court replaces the Public Use Clause with a “[P]ublic [P]urpose” Clause, a restriction that is satisfied, the Court instructs, so long as the purpose is “legitimate” and the means “not irrational.” This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a “public use.”

If such “economic development” takings are for a “public use,” any taking is, and the Court has erased the Public Use Clause from our Constitution. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution.

I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

In June 2006, the House of Representatives—in a salvo aimed squarely at the Supreme Court—voted 365–33 to pass a “sense of the House resolution” which put that body on record as disapproving the decision in Kelo and called upon state and local governments to restrict the use of eminent domain to “those purposes that serve the public good in accordance with the Fifth Amendment.” A week later, the House voted 231–189 to amend the Transportation-Treasury-Housing appropriations bill for the Fiscal Year 2006 to bar the use of any federal funds to enforce the Kelo decision. Congressional Quarterly Weekly Report, July 4, 2005, pp. 1818, 1844, 1846. The appropriations bill that finally passed contained language that prohibited the use of federal funds to support any project unless the power of eminent domain was employed for a public use. The law, 119 Stat. 2396, § 726, leaves the door open to the use of eminent domain for purposes of economic development so long as it is not used primarily to benefit private parties. The law also directed the Government Accountability Office to complete a study within the next year that would report the uses and results of eminent domain as employed by federal, state, and local governments. In June 2006, President George W. Bush issued Executive Order 13406 (71 Fed. Reg. 36973), which directed federal agencies not to seize private property unless it was for public projects, such as parks, hospitals, roads, and medical facilities. For a discussion of the deployment of congressional powers to limit the states’ use of eminent domain, see Bernard W. Bell, “Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism and Congressional Powers,” 32 Journal of Legislation 165–219 (2006).
A good illustration of the point made by Justice Stevens in the penultimate paragraph of the Court's opinion in <i>Kelo</i> is the subsequent decision of the Michigan Supreme Court in <i>County of Wayne v. Hathcock</i>, 471 Mich. 445, 684 N.W.2d 765 (2004), holding—as a matter of state constitutional law—that governmental entities there are barred from using the power of eminent domain to take private property and turn it over to a private developer, even if the project would benefit the community. And in November 2004, Oregon voters adopted by 60% to 40% a ballot measure that property owners, who can prove their investments have been hurt by environmental or zoning rules, could force government to compensate them for their losses. New York Times, Nov. 26, 2004, pp. A1, A26. In the aftermath of the <i>Kelo</i> decision, two dozen state legislatures passed measures restricting the use of eminent domain, and four states put the matter on the ballot for voters' approval. By 2006, the unpopularity of <i>Kelo</i> was so great that ballot propositions to prevent governments from taking private property and transferring it to private users outnumbered voter initiatives on any other issue. Nine states approved such a limitation on eminent domain. By whatever means reaction to <i>Kelo</i> was measured, the Court's decision was unacceptable.

As Justice Stevens points out in <i>Kelo</i>, however, the problem with more strictly scrutinizing exercises of the eminent domain power to ensure that the property taken serves a public purpose is that it invites judges to become the final arbiters on the relevant economic questions: What is a proper "public use"? How much public access must be permitted before there is enough "public" in "public use"? Given the reality of a modern economy with interdependent parts, the distinction between a public use and a private use is not likely to be a difference in kind, but a difference in degree. To be sure, our sympathies are aroused in <i>Kelo</i> because the parties most directly affected were small bungalow owners, not large corporations. But—as with the dissent in <i>Dolan</i>—the point is that heightening the scrutiny of legislation regulating property rights and economic liberties risks unlearning the lessons of what transpired in the years before the Constitutional Revolution of 1937: Judicial invalidation of economic legislation operated overwhelmingly to the advantage of the well-to-do minority at the expense of the rest of the populace. Writing in 1937 at the height of the Court-packing controversy, Professor (later Judge) Henry Edgerton canvassed the Court's decisions declaring unconstitutional acts of Congress to that point and declared: "There is not a case in the entire series which protected the 'civil liberties' of freedom of speech, press, and assembly; * * * not one that protected the right to vote; * * * not one which protected the vital interests of the working majority of the population in organizing or in wages * * *." On the contrary, he found the Court's record littered with "the Dred Scott case, which helped to entrench slavery; the Civil Rights and related cases, which protected the oppression of Negroes; the employers' liability and workmen's compensation cases, which protected the hiring of women and children at starvation wages; the income tax cases, which prevented the shifting of tax burdens from the poor to the rich; and * * * many minor instances in which the Court's review * * * [did] harm to common men."6

The Court's decisions in <i>Penn Central</i> and <i>Kelo</i>, unlike that in <i>Dolan</i>, reflect the trend of judicial decisions in the seven decades since the confrontation between the Old Court and President Franklin Roosevelt. By and large, the Justices have turned their backs on

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6. Henry W. Edgerton, “The Incidence of Judicial Control over Congress,” 22 Cornell Law Quarterly 299, 348 (1937). Although the Court's record of invalidating state legislation was not perhaps as bleak as this in absolute terms, the difference was so small as to be barely noticeable, something a reading of the cases in Chapter 5 and this chapter readily confirms. See also Robert A. Dahl, “Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker,” 6 Journal of Public Law 279 (1957).
constitutional challenges to economic regulation by government and have directed their attention instead to the Bill of Rights, the Fourteenth Amendment, and the protection of liberties fundamental to the democratic process.

D. NON-TRADITIONAL PROPERTY INTERESTS

The property and liberty interests covered in the preceding sections of this chapter deal with traditional financial interests: money, wages, real estate, and contracts. But since the 1960s, the Court’s decisions have recognized new forms of property. Forty years ago, a seminal article by Charles Reich, “The New Property,” 73 Yale Law Journal 733 (1964), took notice of government as a major source of wealth. It argued that various forms of government largesse—licenses, franchises, public employment, services, benefits, contracts, and grants—were supplementing, or even supplanting, traditional private forms of wealth. For much of our legal history, valuables dispensed by government were classified as privileges (as opposed to traditional “property” in which one had rights) and thus could be denied, even arbitrarily, without the possibility of violating due process or any other constitutional rights. But as Reich’s view took hold, and the courts expanded upon the sorts of interests which qualified as protected property interests, two thorny questions emerged: (1) What interests qualified as property within the protection of the due process clauses of the Fifth and Fourteenth Amendments (or other constitutional guarantees, such as freedom of speech)? and (2) Exactly what amount of process was due before someone could be deprived of these valuables by government? If trial-type hearings were not required before someone could be deprived of his driver’s license, social security benefits, worker’s compensation, medicare, passport, or defense contract, what less than that would suffice? Would the same amount of due process be required in each instance, or might the degree of due process vary from one situation to another?

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970), for example, the Court held that procedural due process required that an evidentiary hearing be held before public assistance payments could be discontinued to a welfare recipient. This in-person opportunity to present his or her side of the case required: (1) “timely and adequate notice detailing the reasons for a proposed termination”; (2) “an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally”; (3) retained counsel, if desired; (4) a neutral decisionmaker; (5) a decision resting “solely on the legal rules and evidence adduced at the hearing”; and (6) a statement of reasons for the decision and the evidence supporting it. How much process is due, the Court made clear, six years later, in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976), depends upon balancing such factors as: (1) the importance of the interest at stake, (2) the risk of erroneous deprivation, (3) the fairness and reliability of existing procedures, and (4) the financial costs and administrative burden to the government of implementing more extensive procedural steps. So, suspending a driver’s license might call for less due process than, say, expelling a student from school.

In the case that follows, the Supreme Court was confronted with a novel argument: that a restraining order directed at an abusive spouse was the sort of government action entitling the wife to its enforcement. When government failed to take steps to enforce the restraining order—with tragic consequences—she argued that such dereliction of duty violated the property interest she had in the order, and she sued the police and the town for damages. The Court did not address any steps the government should have taken because it concluded no property interest of hers was violated.
BACKGROUND & FACTS In connection with divorce proceedings, Jessica Gonzales obtained a court order which restrained her husband from disturbing her or their three children (ages 10, 9, and 7) or coming within 100 yards of the family home. Pre-printed on the reverse side of the order was the following text: “WARNING: Knowing violation of a restraining order is a crime. You may be arrested without notice if a law enforcement officer has probable cause to believe you have knowingly violated this order.” The pre-printed text on the back of the order also contained a “NOTICE TO LAW ENFORCEMENT OFFICIALS” which read, in part: “You shall use every reasonable means to enforce this restraining order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order.” Two weeks after the restraining order was originally issued, it was made permanent and modified so as to give the husband the right to spend time with the three children on alternate weekends, for two weeks in the summer, and “upon reasonable notice” for a mid-week dinner visit arranged by the parties. The modified order allowed him to visit the home to pick up the children on these occasions. He had been served with a copy.

On a Tuesday afternoon two and a half weeks later, the husband took the three children who were playing outside the family home without any notice or advance arrangements. When Mrs. Gonzales noticed the children were missing, she suspected he had taken them. At about 7:30 P.M., she called the Castle Rock Police Department which dispatched two officers. When the officers arrived at the home, she showed them a copy of the restraining order and asked them to arrest her husband and return the children. The officers said there was nothing they could do and suggested she call the department again in three hours if the children had not returned. When she called the police department at 10:00 P.M., she was told to wait until midnight. After calling yet again, she went to her husband’s apartment but found no one there. She called the department a fourth time, at 12:10, and was told to wait for an officer to arrive. None did. Forty minutes later, Mrs. Gonzales went to the police department and filed an incident report. But instead of attempting to enforce the restraining order, the officer who took the report went to dinner. At 3:20 A.M., the husband arrived at the police station and opened fire with a semi-automatic handgun. Police returned fire and killed him. Inside the cab of his pickup truck, they discovered the bodies of the three children.

Mrs. Gonzales sued the police and the town under 42 U.S.C.A. § 1983 for violating the Due Process Clause of the Fourteenth Amendment. Her complaint alleged that the department had an official policy or custom of failing to enforce restraining orders and tolerated non-enforcement by its police officers. She characterized the town’s inaction as wantonly indifferent to her civil rights. A federal district court dismissed the suit, but was reversed on appeal by a 6–5 vote of the U.S. Court of Appeals for the Tenth Circuit sitting en banc. The town then petitioned the Supreme Court for review.
Justice SCALIA delivered the opinion of the Court.

We decide in this case whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.

We do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.

[A] true mandate of police action would require some stronger indication from the Colorado Legislature than “shall use every reasonable means to enforce a restraining order”. That language is not perceptibly more mandatory than the Colorado statute which has long told municipal chiefs of police that they “shall pursue and arrest any person fleeing from justice in any part of the state” and that they “shall apprehend any person in the act of committing any offense . . . and, forthwith and without any warrant, bring such person before a . . . competent authority for examination and trial.” It is hard to imagine that a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.

It is not clear whether respondent’s] interest lay in having police arrest her husband, having them seek a warrant for his arrest, or having them “use every reasonable means, up to and including arrest, to enforce the order’s terms”. Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed “entitled” to something when the identity of the alleged entitlement is vague. After the warrant is sought, it remains within the discretion of a judge whether to grant it, and after it is granted, it remains within the discretion of the police
whether and when to execute it. Respondent would have been assured nothing but the seeking of a warrant. This is not the sort of "entitlement" out of which a property interest is created.

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[It] is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a "property" interest for purposes of the Due Process Clause. Such a right would not, of course, resemble any traditional conception of property. Although that alone does not disqualify it from due process protection, the right to have a restraining order enforced does not "have some ascertainable monetary value," as our [other] "property-as-entitlement" cases have implicitly required. Perhaps most radically, the alleged property interest here arises incidentally, not out of some new species of government benefit or service, but out of a function that government actors have always performed—arresting people who they have probable cause to believe have committed a criminal offense.

**

We conclude, therefore, that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband. It is accordingly unnecessary to address the Court of Appeals' determination that the town's custom or policy prevented the police from giving her due process when they deprived her of that alleged interest.

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The judgment of the Court of Appeals is Reversed.

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Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

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The central question in this case is whether, as a matter of Colorado law, respondent had a right to police assistance comparable to the right she would have possessed to any other service the government or a private firm might have undertaken to provide.

There was a time when our tradition of judicial restraint would have led this Court to defer to the judgment of more qualified tribunals in seeking the correct answer to that difficult question of Colorado law. Unfortunately, although the majority properly identifies the "central state-law question" in this case as "whether Colorado law gave respondent a right to police enforcement of the restraining order," it has chosen to ignore our settled practice by providing its own answer to that question.

[It] would be a far wiser course to certify the question to the Colorado Supreme Court. Powerful considerations support certification in this case. First, principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters such as law enforcement and might well require the weighing of policy considerations for their correct resolution. Second, by certifying a potentially dispositive state-law issue, the Court would adhere to its wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law. Third, certification would promote both judicial economy and fairness to the parties. After all, the Colorado Supreme Court is the ultimate authority on the meaning of Colorado law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted and respondent will have been deprived of the opportunity to have her claims heard under the authoritative view of Colorado law.

Three flaws highlight the unwisdom of [the Court's] answer [to] the state-law question. First, the Court places undue weight on the various statutes throughout the country that seemingly
mandate police enforcement but are generally understood to preserve police discretion. As a result, the Court gives short shrift to the unique case of “mandatory arrest” statutes in the domestic violence context; States passed a wave of these statutes in the 1980’s and 1990’s with the unmistakable goal of eliminating police discretion in this area. Second, the Court’s formalistic analysis fails to take seriously the fact that the Colorado statute at issue in this case was enacted for the benefit of the narrow class of persons who are beneficiaries of domestic restraining orders, and that the order at issue in this case was specifically intended to provide protection to respondent and her children. Finally, the Court is simply wrong to assert that a citizen’s interest in the government’s commitment to provide police enforcement in certain defined circumstances does not resemble any “traditional conception of property”; in fact, a citizen’s property interest in such a commitment is just as concrete and worthy of protection as her interest in any other important service the government or a private firm has undertaken to provide.

***

This Court has “made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.” The “types of interests protected as ‘property’ are varied and, as often as not, intangible, ‘relating to the whole domain of social and economic fact.’” Our cases have found “property” interests in a number of state-conferring benefits and services, including welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970); disability benefits, Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976); public education, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975); utility services, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978); government employment, Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985); as well as in other entitlements that defy easy categorization, see, e.g., Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971) (due process requires fair procedures before a driver’s license may be revoked pending the adjudication of an accident claim).

Police enforcement of a restraining order is a government service that is no less concrete and no less valuable than other government services, such as education. The relative novelty of recognizing this type of property interest is explained by the relative novelty of the domestic violence statutes creating a mandatory arrest duty; before this innovation, the unfettered discretion that characterized police enforcement defeated any citizen’s “legitimate claim of entitlement” to this service. If respondent had contracted with a private security firm to provide her and her daughters with protection from her husband, it would be apparent that she possessed a property interest in such a contract. Here, Colorado undertook a comparable obligation, and respondent—with restraining order in hand—justifiably relied on that undertaking. Respondent’s claim of entitlement to this promised service is no less legitimate than the other claims our cases have upheld, and no less concrete than a hypothetical agreement with a private firm. The fact that it is based on a statutory enactment and a judicial order entered for her special protection, rather than on a formal contract, does not provide a principled basis for refusing to consider it “property” worthy of constitutional protection.

Because respondent had a property interest in the enforcement of the restraining order, state officials could not deprive her of that interest without observing fair procedures. Her description of the police behavior in this case and the department’s callous policy of failing to respond properly
to reports of restraining order violations clearly alleges a due process violation. At the very least, due process requires that the relevant state decisionmaker listen to the claimant and then apply the relevant criteria in reaching his decision. The failure to observe these minimal procedural safeguards creates an unacceptable risk of arbitrary and “erroneous deprivation[s]” **.*.*.

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**Appendix A**

**Time Chart of the U.S. Supreme Court**

The following table is designed to aid the user in identifying the composition of the Court at any given time in American history. Each listing is headed by the Chief Justice, whose name is italicized. Associate Justices are listed following the Chief Justice in order of seniority. In addition to dates of appointment, the table provides information on political party affiliation. Following each Justice is a symbol representing his party affiliation at the time of appointment:

- **F** = Federalist
- **DR** = Democratic-Republican (Jeffersonian)
- **D** = Democrat
- **W** = Whig
- **R** = Republican
- **I** = Independent

This chart will aid you in accounting for all of the votes cast in any of the major decisions included in this casebook. In order to identify how each Justice voted in a given case, find the listing of the Court’s membership for the year in which the case was decided. The process of identifying the votes then proceeds by elimination: Since all dissenting votes have been noted as well as any nonparticipations, all of the remaining members of the Court can be counted as voting to join the judgment of the Court, although since all concurring opinions have not been included or noted throughout the casebook, all of the remaining Justices may not necessarily have also joined the Opinion of the Court.

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1. Rutledge was a recess appointment; his nomination was rejected by the Senate after the 1795 Term.
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</tr>
<tr>
<td>1853–57</td>
<td>J. Marshall (F), Ellsworth (F), Cushing (F), W. Johnson (DR), Story (DR), McLean (D), Baldwin (D), Wayne (D), Catron (D), Daniel (D), Nelson (D), Grier (D)</td>
</tr>
<tr>
<td>1858–60</td>
<td>J. Marshall (F), Ellsworth (F), Cushing (F), W. Johnson (DR), Story (DR), McLean (D), Baldwin (D), Wayne (D), Catron (D), Daniel (D), Nelson (D), Grier (D)</td>
</tr>
<tr>
<td>1861</td>
<td>J. Marshall (F), Ellsworth (F), Cushing (F), W. Johnson (DR), Story (DR), McLean (D), Baldwin (D), Wayne (D), Catron (D), McKinley (D), Daniel (D), Nelson (D), Woodbury (D)</td>
</tr>
<tr>
<td>1862</td>
<td>J. Marshall (F), Ellsworth (F), Cushing (F), W. Johnson (DR), Story (DR), McLean (D), Baldwin (D), Wayne (D), Catron (D), McKinley (D), Daniel (D), Nelson (D), Grier (D)</td>
</tr>
</tbody>
</table>

2. After 1853–54, Justice McLean identified with the Republican party. Although doubtless it was the case that he came to find far greater ideological compatibility with the Republican party, especially given his pronounced antislavery views, it was equally true that he possessed an overwhelming ambition to be President. Although appointed to the Court when he was a Democrat, his four presidential candidacies demonstrated a remarkable freedom from the encumbrance of party loyalty. In his announced tries for a presidential nomination, McLean was respectively an Anti-Mason (1832), an Independent (1836), a Whig and Free Soiler (1852), and a Republican (1856).
### Appendix A Time Chart of the U.S. Supreme Court

<table>
<thead>
<tr>
<th>Year</th>
<th>Judges</th>
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</thead>
<tbody>
<tr>
<td>1863</td>
<td>Taney (D), Wayne (D), Catron (D), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1864–65</td>
<td>S. P. Chase (R), Wayne (D), Catron (D), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1866</td>
<td>S. P. Chase (R), Wayne (D), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1867–69</td>
<td>S. P. Chase (R), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1870–71</td>
<td>S. P. Chase (R), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1872–73</td>
<td>S. P. Chase (R), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1874–76</td>
<td>Waite (R), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1877–79</td>
<td>Waite (R), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1880–87</td>
<td>Waite (R), Nelson (D), Grier (D), Clifford (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
</tr>
<tr>
<td>1888–92</td>
<td>Fuller (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
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<td>1893</td>
<td>Fuller (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
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<td>Fuller (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
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<td>1895–97</td>
<td>Fuller (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
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<tr>
<td>1902</td>
<td>Fuller (D), Swayne (R), Miller (R), Davis (R), Field (D)</td>
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3. Upon the deaths of Catron in 1865 and Wayne in 1867, their positions were abolished according to a congressional act of 1866. The Court's membership was reduced to eight until a new position was created by Congress in 1869. The new seat has generally been regarded as a re-creation of Wayne's seat.
<table>
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<th>Year Range</th>
<th>Chief Justice</th>
<th>Associate Justices</th>
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<td>1903–05</td>
<td>Fuller (D)</td>
<td>Harlan (Ky.) (R) Brewer (R) Brown (R) E. White (D) Peckham (D) McKenna (R) Holmes (R) Day (R)</td>
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<tr>
<td>1906–08</td>
<td>Fuller (D)</td>
<td>Harlan (Ky.) (R) Brewer (R) E. White (D) Peckham (D) McKenna (R) Holmes (R) Day (R) Moody (R)</td>
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<tr>
<td>1909</td>
<td>Fuller (D)</td>
<td>Harlan (Ky.) (R) Brewer (R) E. White (D) McKenna (R) Holmes (R) Day (R) Moody (R) Lurton (D)</td>
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<tr>
<td>1910–11</td>
<td>E. White (D)</td>
<td>Harlan (Ky.) (R) McKenna (R) Holmes (R) Day (R) Lurton (D) Hughes (R) Van Devanter (R) J. Lamar (D)</td>
</tr>
<tr>
<td>1912–13</td>
<td>E. White (D)</td>
<td>McKenna (R) Holmes (R) Day (R) Lurton (D) Hughes (R) Van Devanter (R) J. Lamar (D) Pitney (R)</td>
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<tr>
<td>1914–15</td>
<td>E. White (D)</td>
<td>McKenna (R) Holmes (R) Day (R) Hughes (R) Van Devanter (R) J. Lamar (D) Pitney (R) McReynolds (D)</td>
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<tr>
<td>1916–20</td>
<td>E. White (D)</td>
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<td>1921</td>
<td>Taft (R)</td>
<td>McKenna (R) Holmes (R) Day (R) Van Devanter (R) Pitney (R) McReynolds (D) Brandeis (R)</td>
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<td>1922</td>
<td>Taft (R)</td>
<td>McKenna (R) Holmes (R) Day (R) Van Devanter (R) Pitney (R) McReynolds (D) Brandeis (R)</td>
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<tr>
<td>1925–29</td>
<td>Taft (R)</td>
<td>Holmes (R) Van Devanter (R) Brandeis (R) Sutherland (R) Butler (D) Sanford (R) Stone (R)</td>
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<td>1930–31</td>
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<td>Holmes (R) Van Devanter (R) McReynolds (D) Brandeis (R) Sutherland (R) Butler (D)</td>
</tr>
<tr>
<td>1932–36</td>
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<td>McReynolds (D) Brandeis (R) Sutherland (R) Butler (D) Stone (R) O. Roberts (R)</td>
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<td>1937</td>
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<td>1940</td>
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<td>1941–42</td>
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<td>1943–44</td>
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<td>1946–48</td>
<td>Vinson (D)</td>
<td>Black (D) Reed (D) Frankfurter (I) Douglas (D) Murphy (D) R. Jackson (D) W. Rutledge (D) Burton (R)</td>
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<td>1949–52</td>
<td>Vinson (D)</td>
<td>Black (D) Reed (D) Frankfurter (I) Douglas (D) R. Jackson (D) Burton (R) Clark (D) Minton (D)</td>
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<td>1953–54</td>
<td>Warren (R)</td>
<td>Black (D) Reed (D) Frankfurter (I) Douglas (D) R. Jackson (D) Burton (R) Clark (D) Minton (D)</td>
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<td>1955</td>
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<td>1956</td>
<td>Warren (R)</td>
<td>Black (D) Reed (D) Frankfurter (I) Douglas (D) R. Jackson (D) Burton (R) Clark (D) Minton (D) Harlan (N.Y.) (R) Brennan (D)</td>
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<td>1957</td>
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<td>1958-61</td>
<td>Warren (R), Black (D), Frankfurter (I), Douglas (D), Clark (D), Harlan (N.Y.) (R), Brennan (D), Whittaker (R), Stewart (R)</td>
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<td>1962-65</td>
<td>Warren (R), Black (D), Douglas (D), Clark (D), Harlan (N.Y.) (R), Brennan (D), Stewart (R), B. White (D), Goldberg (D)</td>
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<td>1966-67</td>
<td>Warren (R), Black (D), Douglas (D), Clark (D), Harlan (N.Y.) (R), Brennan (D), Stewart (R), B. White (D), Fortas (D)</td>
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<td>1967-69</td>
<td>Warren (R), Black (D), Douglas (D), Harlan (N.Y.) (R), Brennan (D), Stewart (R), B. White (D), T. Marshall (D), Blackmun (R), Burger (R)</td>
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<tr>
<td>1971</td>
<td>Blackmun (R)</td>
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<td>1972-75</td>
<td>Burger (R), Douglas (D), Brennan (D), B. White (D), T. Marshall (D), Blackmun (R), Powell (D), Stevens (R), Scalia (R)</td>
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<td>1975-79</td>
<td>Burger (R), Chief Justice Rehnquist (R), Brennan (D), White (D), T. Marshall (D), Blackmun (R), Stevens (R), O'Connor (R), Kennedy (R)</td>
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<tr>
<td>1979-81</td>
<td>Burger (R), Chief Justice Rehnquist (R), Brennan (D), White (D), T. Marshall (D), Blackmun (R), Stevens (R), O'Connor (R), Kennedy (R)</td>
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<tr>
<td>1981-86</td>
<td>Burger (R), Chief Justice Rehnquist (R), Brennan (D), B. White (D), T. Marshall (D), Blackmun (R), Powell (D), Rehnquist (R), Stevens (R), Scalia (R)</td>
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<tr>
<td>1986-87</td>
<td>Chief Justice Rehnquist (R), Brennan (D), White (D), T. Marshall (D), Blackmun (R), Stevens (R), O'Connor (R), Scalia (R)</td>
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<tr>
<td>1991-93</td>
<td>Chief Justice Rehnquist (R), White (D), Blackmun (R), Stevens (R), O'Connor (R), Scalia (R), Kennedy (R), Souter (R), Thomas (R)</td>
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<tr>
<td>1993-94</td>
<td>Chief Justice Rehnquist (R), White (D), Blackmun (R), Stevens (R), O'Connor (R), Scalia (R), Kennedy (R), Souter (R), Thomas (R), Ginsburg (D)</td>
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<td>1994-2005</td>
<td>Chief Justice Rehnquist (R), White (D), T. Marshall (D), Blackmun (R), Stevens (R), O'Connor (R), Scalia (R), Kennedy (R), Souter (R), Ginsburg (D), Breyer (D)</td>
<td></td>
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<tr>
<td>2006–</td>
<td>J. Roberts (R), Stevens (R), Scalia (R), Kennedy (R), Souter (R), Thomas (R), Ginsburg (D), Breyer (D), Alito (R)</td>
<td></td>
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</tbody>
</table>
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APPENDIX B

BIOGRAPHICAL CHART OF SUPREME COURT JUSTICES SINCE 1900

THE FOLLOWING CHART summarizes in easy-to-read form certain basic biographical information about past and present members of the Supreme Court. Chief Justices are identified by an asterisk. Attendance at law school is noted only for those Justices who graduated from a program of formal study. The numbers in parentheses following each entry regarding prior experience show the approximate number of years spent. Membership in the U.S. House of Representatives or Senate is indicated by “House” or “Senate”; membership in the upper and/or lower house of a state legislature is denoted simply by “state legis.” Although several Justices, including John Jay, James Byrnes, and Arthur Goldberg to name only a few, continued their careers of public service after resigning, information on this chart is restricted to that occurring before appointment to the Court. Four Presidents made no appointments to the Court and are, therefore, not included on this chart: William Henry Harrison (March–April 1841); Zachary Taylor (1849–1850); Andrew Johnson (1865–1869); and Jimmy Carter (1977–1981).

While the entries for each Justice are self-explanatory, in the aggregate the data yield several general observations. First, a significant majority of Justices have had some experience in public life before coming to the Court, which suggests that they have had more than a nodding acquaintance with the political process and belies the icy remoteness we frequently attribute to judges. Second, Presidents overwhelmingly appoint Justices of their own political party, since they want to leave their mark on the political complexion of the Court, and—some notable exceptions to the contrary notwithstanding—they usually succeed. The impact, in fact, is sometimes still felt decades after a President has left office.

Third, the formal study of law—following a prescribed program of study at a law school resulting in the conferral of a law degree—is a comparatively modern route of entry into the legal profession. Before well into the twentieth century, those lawyers who became Justices, like the vast majority of their attorney-colleagues, got into the profession by what was called “reading the law,” that is, by studying law books and clerking for a practicing attorney who supervised their on-the-job training to a point where the young aspiring lawyers could pass the bar exam and were thus entitled to practice on their own. Indeed, of the 58 Supreme...
Court Justices whose appointments preceded those listed in this biographical chart, only Justice George Shiras (1892–1903) had a law degree (Yale). Robert H. Jackson, the last Justice who did not have a law degree, left the Court in 1954. The lack of a law degree did not keep him from becoming one of the most skilled and effective advocates to argue cases before the Court and one of its most gifted and eloquent Justices when he ascended to the Bench. Even more remarkably, Justice Jackson did not have a college education either. All of the Justices, of course, have been lawyers, but the Constitution does not require it.

Fourth and finally, there is absolutely no correlation between prior experience as a judge and “greatness” as a Justice. Oliver Wendell Holmes, Jr. and Benjamin Cardozo together spanned nearly forty years of prior judicial experience; the cumulative total for John Marshall, Joseph Story, Louis Brandeis, Hugo Black, Felix Frankfurter, and William J. Brennan, Jr. was eight and a half years (Brennan served for seven years on the New Jersey Supreme Court and Black was a city judge for a year and a half). All of these men, however, are widely acclaimed as among the very best to have graced the Court.

<table>
<thead>
<tr>
<th>JUSTICE YEARS OF SERVICE</th>
<th>BORN–DIED</th>
<th>LAW SCHOOL</th>
<th>RESIDENCE</th>
<th>PRIOR EXPERIENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theodore Roosevelt</td>
<td>1901–1909</td>
<td></td>
<td></td>
<td>Law prof. (2); State judge (20)</td>
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<tr>
<td>Oliver Wendell Holmes, Jr.</td>
<td>1902–1932</td>
<td>1841–1935</td>
<td>Harvard</td>
<td>Ohio</td>
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<tr>
<td>William R. Day</td>
<td>1903–1922</td>
<td>1849–1923</td>
<td>Ohio</td>
<td>Local judge (4); Asst. Sec’y of State (1); Sec’y of State (1/2); Fed. judge (4)</td>
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<tr>
<td>William H. Moody</td>
<td>1906–1910</td>
<td>1853–1917</td>
<td>Mass.</td>
<td>City atty. (2); Dist. atty. (5); House (7); Sec’y of the Navy (2); U.S. Att’y Gen. (1 1/2)</td>
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<tr>
<td>William Howard Taft</td>
<td>1909–1913</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Horace H. Lurton</td>
<td>1909–1914</td>
<td>1844–1914</td>
<td>Cumberland</td>
<td>State judge (10); Law prof. &amp; dean (12); Fed. judge (17)</td>
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<tr>
<td>Charles Evans Hughes</td>
<td>1910–1916</td>
<td>1862–1948</td>
<td>Columbia</td>
<td>Spec. counsel to legis. invest. comms. (2); Law prof. (4); Gov. (2); Later appointed Chief Justice</td>
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<tr>
<td>Edward D. White</td>
<td>1910–1921</td>
<td>1845–1921</td>
<td>La.</td>
<td>Promoted from Associate Justice</td>
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<tr>
<td>Willis Van Devanter</td>
<td>1910–1937</td>
<td>1859–1941</td>
<td>Cincinnati</td>
<td>City atty. (1); Terr. legis. (1); State judge (1); Chmn., Rep. state comm. (1); Chmn., Rep. nat. comm. (1); Asst. U.S. Atty. Gen. (6); Fed. judge (7)</td>
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<tr>
<td>Mahlon Pitney</td>
<td>1912–1922</td>
<td>1858–1924</td>
<td>N.J.</td>
<td>House (4); State legis. (2); State judge (14)</td>
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<td>YEARS OF SERVICE</td>
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<td>LAW SCHOOL</td>
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<tr>
<td>Warren G. Harding</td>
<td>Rep.</td>
<td>1921–1923</td>
<td>1857–1930</td>
<td>Cincinnati</td>
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<tr>
<td>George Sutherland</td>
<td>Rep.</td>
<td>1922–1938</td>
<td>1862–1942</td>
<td>Utah</td>
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<tr>
<td>Pierce Butler</td>
<td>Dem.</td>
<td>1922–1939</td>
<td>1866–1939</td>
<td>Minn.</td>
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<td>John H. Clarke</td>
<td>Dem.</td>
<td>1916–1922</td>
<td>1857–1945</td>
<td>Ohio</td>
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<tr>
<td>Benjamin N. Cardozo</td>
<td>Dem.</td>
<td>1932–1938</td>
<td>1870–1938</td>
<td>N.Y.</td>
</tr>
<tr>
<td>Charles Evans Hughes</td>
<td>Rep.</td>
<td>1930–1941</td>
<td>1862–1948</td>
<td>Columbia</td>
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<td>JUSTICE</td>
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<tr>
<td><strong>Hugo L. Black</strong></td>
<td>Dem.</td>
<td>1937–1971</td>
<td>1886–1971</td>
<td>Alabama</td>
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<td><strong>Stanley F. Reed</strong></td>
<td>Dem.</td>
<td>1938–1957</td>
<td>1884–1980</td>
<td>Ky.</td>
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<td><strong>William O. Douglas</strong></td>
<td>Dem.</td>
<td>1939–1975</td>
<td>1898–1980</td>
<td>Columbia</td>
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<td><strong>Frank Murphy</strong></td>
<td>Dem.</td>
<td>1940–1949</td>
<td>1893–1949</td>
<td>Michigan</td>
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<td><strong>Wiley B. Rutledge</strong></td>
<td>Dem.</td>
<td>1943–1949</td>
<td>1894–1949</td>
<td>Colorado</td>
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<td><strong>Charles E. Whittaker</strong></td>
<td>Dem.</td>
<td>1945–1958</td>
<td>1888–1964</td>
<td>Harvard</td>
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<tr>
<td><em>Fred M. Vinson</em>*</td>
<td>Dem.</td>
<td>1946–1953</td>
<td>1890–1953</td>
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<td><strong>Sherman Minton</strong></td>
<td>Dem.</td>
<td>1949–1956</td>
<td>1890–1965</td>
<td>Indiana</td>
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<td><strong>Earl Warren</strong></td>
<td>Rep.</td>
<td>1953–1969</td>
<td>1891–1974</td>
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**APPENDIX BB BIOGRAPHICAL CHART OF SUPREME COURT JUSTICES SINCE 1900**
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<td>Clarence Thomas</td>
<td>Rep.</td>
<td>1991–</td>
<td>1948–</td>
<td>Yale</td>
<td>Mo.</td>
<td>Asst. State Atty. Gen. (3); Asst. Sec’y of Educ. (1); Fed. agency (8); Fed. judge (1 1/2)</td>
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<td>Dem.</td>
<td>1994–</td>
<td>1938–</td>
<td>Harvard</td>
<td>Mass.</td>
<td>U.S. Justice Dept. (3); Law prof. (10); Watergate Special Pros. Force (1); Senate Judiciary Comm. staff (1); Chief counsel, Senate Judiciary Comm. (1); Fed. judge (14)</td>
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Appendix C

Biographies of the Current Justices

Following are brief biographical sketches of the current Justices of the U.S. Supreme Court. For more biographical information about them, see the following websites: http://www.oyez.org/courts/roberts/robt2 and http://www.supremecourtus.gov. In the following biographies, Left describes a judicial voting record generally favoring government over business in economic regulation cases and the individual over government in civil rights and liberties cases; Right describes a judicial voting record generally favoring business over government in economic regulation cases and government over the individual in civil rights and liberties cases.

Chief Justice

John G. Roberts, Jr.


Associate Justices

John Paul Stevens


Antonin Scalia


Anthony M. Kennedy


David H. Souter


Clarence Thomas


Ruth Bader Ginsburg


Stephen G. Breyer


Samuel A. Alito, Jr.

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APPENDIX D

THE CONSTITUTION OF THE UNITED STATES

PREAMBLE

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

ARTICLE I

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

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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

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

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.
[5] The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

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

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

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

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

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

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

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

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace,
be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

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

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

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

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

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

[7] To Establish Post Offices and Post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

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

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations:

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
[13] To provide and maintain a Navy;  
[14] To make Rules for the Government and Regulation of the land and naval Forces;  
[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;  
[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;  
[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And  
[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [1] The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.  
[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.  
[3] No Bill of Attainder or ex post facto Law shall be passed.  
[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.  
[5] No Tax or Duty shall be laid on Articles exported from any State.  
[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.  
[7] No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.  
[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.  
[2] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.  
[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.
ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greater Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[6] In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of
militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, bribery, or other high Crimes and Misdemeanors.

**ARTICLE III**

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort.
No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

**ARTICLE IV**

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

**ARTICLE V**

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

**ARTICLE VI**

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I—[1791]

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

AMENDMENT II—[1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III—[1791]

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

AMENDMENT IV—[1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—[1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—[1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII—[1791]

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

AMENDMENT VIII—[1791]

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

AMENDMENT IX—[1791]

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

AMENDMENT X—[1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI—[1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII—[1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII—[1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.
AMENDMENT XIV—[1868]

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

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

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

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV—[1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

AMENDMENT XVI—[1913]

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

AMENDMENT XVII—[1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

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

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

AMENDMENT XVIII—[1919]
Section 1. After one year from the ratifica-
 tion 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 inopera-
 tive unless it shall have been ratified as an 
 amendment to the Constitution by the 
 legislatures of the several States, as provided 
 in the Constitution, within seven years from 
 the date of the submission hereof to the 
 States by the Congress.

AMENDMENT XIX—[1920]
[1] The right of citizens of the United States 
 to vote shall not be denied or abridged by 
 the United States or by any State on 
 account of sex.

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

AMENDMENT XX—[1933]
Section 1. The terms of the President and 
 Vice President shall end at noon on the 
 20th day of January, and the terms of 
 Senators and Representatives at noon on 
 the 3d day of January, of the years in which 
 such terms would have ended if this article 
 had not been ratified; and the terms of their 
 successors shall then begin.

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

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

Section 4. The Congress may by law 
 provide for the case of the death of any of 
 the persons from whom the House of 
 Representatives may choose a President 
 whenever the right of choice shall have 
 devolved upon them, and for the case of the 
 death of any of the persons from whom the 
 Senate may choose a Vice President when-
 ever 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 inopera-
 tive unless it shall have been ratified as an 
 amendment to the Constitution by the 
 legislatures of three-fourths of the several 
 States within seven years from the date of its 
 submission.

AMENDMENT XXI—[1933]
Section 1. The eighteenth article of amend-
 ment to the Constitution of the United 
 States is hereby repealed.
Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

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

**AMENDMENT XXII—[1951]**

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

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

**AMENDMENT XXIII—[1961]**

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

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

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

**AMENDMENT XXIV—[1964]**

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States, or any State by reason of failure to pay any poll tax or other tax.

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

**AMENDMENT XXV—[1967]**

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

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

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

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of
such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**Amendment XXVI—[1971]**

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

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

**AMENDMENT XXVII—[1992]**

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

*Authored by James Madison, this was the second of 12 proposed constitutional amendments approved by Congress and sent to the states for ratification on September 25, 1789. Ten of those were approved by the required three-fourths of the states by 1791 and became the Bill of Rights. Nearly 203 years elapsed between the date this amendment was proposed and Michigan’s approval of it on May 7, 1992, making it the 38th state to ratify. New Jersey followed suit later that day. Unlike the customary practice with amendments proposed in the twentieth century, this amendment contained no deadline for ratification. Six states ratified the amendment in the eighteenth century, one in the nineteenth, and the remaining states did so between 1978 and May 1992.

Constitutionally speaking, it is an open question whether ratification so long delayed is still valid. Nonetheless, the Archivist of the United States has certified the amendment as adopted. Although anyone whose salary was affected by the amendment would have the right to challenge its constitutionality, the Supreme Court in *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972 (1939), held that the question of timeliness in the ratification of proposed amendments to the Constitution presented a political question and was thus a matter for Congress to decide. *Coleman* involved a challenge to action taken by the Kansas legislature in 1937 approving the proposed Child Labor Amendment. The disputed close vote by the Kansas Senate, followed by the concurrence of the Kansas House, came 12 years after the state’s legislature had initially rejected the amendment. The proposed Child Labor Amendment likewise contained no ratification deadline.
A BRIEF GUIDE TO LEGAL CITATIONS AND RESEARCH

According to an old saying, a lawyer is not necessarily someone who knows the law, but someone who knows where to find it. Although lawyers have been meticulous and thorough in indexing and cross-referencing the law so that information can be retrieved efficiently—even before the advent of the computer age—to someone unfamiliar with these resources, finding the law can be “a puzzlement.” The aim of this essay is to introduce you to the sorts of legal resources you are most likely to need, short of a legal research course in law school. This brief introduction to legal resources is divided, logically and for the sake of clarity, into six parts: law reports, statutes, index and search books, citation books, miscellaneous, and electronic materials.

Abbreviations used in the citation of various sources appear in parentheses below; typically, in citing a source the abbreviated series title is preceded by the volume number and followed by the page number on which the item begins: for example, The War Powers Resolution, 87 Stat. 555; Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 288 (2000); Coalition for Economic Equity v. Wilson, 946 F.Supp. 1480 (N.D.Cal. 1996), order vacated, 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963, 118 S.Ct. 397 (1997); Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). Sometimes, opinions in cases have not yet been published in a printed volume of court reports and are indicated by a citation to an electronic source, such as WESTLAW; for example: In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 2002 WL 1949263 (F.I.S.Ct.). Citations to federal appellate and district court decisions, and to state court decisions as well, also identify the jurisdiction of the court deciding the case.

LAW REPORTS

Law reports contain the text of judicial opinions in cases, and such opinions are published roughly in the order they are delivered, which is to say chronologically. Since the United States has a federal system of government, cases decided by federal courts and those decided by state courts are reported separately.

As noted in the footnote in Chapter 1 at pp. 4–5, cases decided by the U.S. Supreme Court are reported in three different series of reports, although the text of the opinions is

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<td>Pennsylvania, Rhode Island, Vermont, and District of Columbia Court of</td>
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<td>Patent Appeals from 1929 to 1982; U.S. Emergency Court of Appeals</td>
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<td>and Temporary Emergency Court of Appeals from 1972</td>
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<td>Reporter</td>
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<td>Army, Navy, Air Force, and Coast Guard</td>
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EXHIBIT E.1 THE NATIONAL REPORTER SYSTEM
Although some states publish official reports of the decisions of their state supreme courts, many do not, and even fewer officially report the text of decisions by intermediate state appellate and trial courts. For that reason, the most complete and universally available source for cases decided by state courts is the particular unit of the National Reporter System that covers decisions of the state in which you are interested. The apportionment of the country into various regional reporters, containing the decisions of state courts of last resort, intermediate courts, and some trial courts, is also presented in the chart and on the map in Exhibit E.2. All units of the National Reporter System, federal and state, are kept current with the paperback publication of “advance sheets” every week or two containing the latest decisions. After a few months, the cases in accumulated advance sheets join the pertinent unit of the National Reporter System as hardback volumes.

The most current and up-to-date reporting of judicial decisions is available through several loose-leaf systems. Decisions of the U.S. Supreme Court are most quickly available in United States Law Week, usually within a couple days of delivery of an opinion. Use of Law Week is invaluable when time is of the essence and you do not want to wait the several weeks it takes for the opinions in a case to be published in the advance sheets. Besides publishing the text of the most recent Supreme Court opinions, Law Week also lists and describes all of the cases on the Court’s current docket and monitors their status, and other sections summarize the latest noteworthy lower federal court and state court decisions. Other loose-leaf systems, such as the Criminal Law Reporter and the Environmental Law Reporter, focus on the announcement of decisions—federal and state—in specialized areas of law.
STATUTES

Law reports contain only judge-made law. To find law made by a legislative body, one must look elsewhere. Legislation passed by Congress in the chronological order of its enactment is published in United States Statutes at Large (Stat.). Between the time that Congress enacts a law and the time that the text of the law appears in the Statutes, the law is available in loose form, known as slip laws. Because organizing statutory law by subject is a much more helpful and efficient way to facilitate its retrieval, the text of the statutes passed by Congress has been reorganized into the United States Code (U.S.C.), which arranges statutory provisions by subject matter and then alphabetizes the subjects into various numbered titles and sections. More helpful still is the United States Code Annotated (U.S.C.A.), which maintains the organization of the U.S.C. and adds to it paragraph-long summaries of judicial decisions (annotations) interpreting every provision of the Code. Each annotation concludes with a complete citation to the case interpreting a given statutory provision so such cases can easily be found. The U.S.C.A. is kept up to date by a cumulative supplement or pocket-part inserted in the back of each volume every year. Several volumes at the end of the U.S.C.A. are devoted to a very thorough index of topics. Citations to the U.S.C.A. contain the title number preceding U.S.C.A. and a section number ($) following it. If you want to know not just what Congress has enacted, but also how courts have construed what Congress has legislated, you should use the U.S.C.A. Statutory materials for each state are available in similar formats.

INDEX AND SEARCH BOOKS

Several general reference works, not limited to the law of a particular jurisdiction, are also helpful when what is needed is an understanding of some legal concept or the law on some general topic. Two major legal encyclopedias are available, Corpus Juris Secundum (C.J.S.) and American Jurisprudence 2d. These provide complete, integrated summaries of law on subjects arranged alphabetically and footnoted with extensive case citations. Subjects are indexed in the end volumes. This material does not cover statutes. Summaries of law in particular jurisdictions are provided in other encyclopedic works, such as Federal Practice, Illinois Law and Practice, and so on. Legal encyclopedias are places to begin the search for what the law is; they are not usually cited as authoritative legal sources.

The points of law identified in the headnotes to cases published in the units of the National Reporter System are accumulated and published in various digests. There is a Supreme Court Digest, and there are regional, federal, state, and decennial digests. The Decennial Digest (1658–1896, 1897–1916, 1917–1926, 1927–1936 up to the eleventh edition, which covers 1997 to date) divides law into 420 broad topics and then into thousands of subtopics and summarizes points of law under each.

The meaning of legal terms is detailed extensively in the multivolume Words and Phrases, which also provides numerous citations to cases as authorities for the definitions. A handier source for regular use is Black’s Law Dictionary.

Law review articles, analyses and discussions of cases and doctrines in legal journals, and reviews of books on legal topics can be found in the Index to Legal Periodicals. The Index functions rather like a legal Readers’ Guide to Periodical Literature and consists of annual bound volumes and paperback supplements to keep coverage current.

CITATION BOOKS

Because judicial decisions are generally governed by the principle of stare decisis, it is essential that we know when and where a case has been cited in later decisions, whether a
case has been followed or distinguished, and—most important of all—whether it has been questioned or overruled. Unless we could find all of the subsequent citations and discussions of a case, we could never know whether the law announced in a given case is still good law. The standard resource for finding all the occasions on which a case has been cited by any court is *Shepard’s Citations*. There are separate editions of *Shepard’s Citations* for Supreme Court decisions, federal cases, the regional reporters, the Constitution and federal statutes, and so on. *Shepard’s* is used only when you have the principal case and you want to find all the subsequent cases that cite it. Various alphabetical cues appear in the *Shepard’s* listings to indicate how a subsequent case treated the case you are researching: “f” indicates it was followed, “e” means it was explained, “d” signifies it was distinguished, “q” denotes it was questioned, “o” shows it was overruled, and so forth. When using *Shepard’s* remember to consult all of the recent paperback citation books in addition to all of the relevant hardback volumes. Practically the same thing can be accomplished with a few strokes of the finger using KeyCite on WESTLAW (see “Electronic Sources” at p. E-6).

**MISCELLANEOUS MATERIALS**

Some other materials are also worth mentioning. In addition to finding the text of legislation passed by Congress, you may want to unearth the legislative history of a statute or resolution. A quick and relatively convenient resource for obtaining an overview of a law’s enactment is *Congressional Quarterly*. The current session of Congress is followed in CQ’s *Weekly Report*, and developments occurring in past sessions are detailed in annual single-volume editions of *Congressional Quarterly Almanac*. House and Senate reports on various pieces of legislation, and committee hearings as well, are published by the government. The text of legislation and the relevant committee reports are also available in *U.S. Code Congressional & Administrative News* in both bound volumes for past sessions of Congress and paperback advance sheets for the current session. The *Congressional Record*, published daily by the Government Printing Office, carries a verbatim account of debate on the floors of the House and Senate.

The *Federal Register*, also published daily, contains the text of executive orders signed by the President and all administrative regulations issued by departments, agencies, and commissions of the U.S. government. The body of current administrative regulations is codified and published in the *Code of Federal Regulations* (C.F.R.) under titles similar to those appearing in the U.S.C.A. Various independent regulatory agencies, such as the ICC, the FTC, and the SEC, also publish their decisions and opinions in separate official reports. Interpretations of law rendered by the U.S. Attorney General at the request of the President or the various department heads are available in the *Official Opinions of the Attorneys General* (Ops. Att’y Gen.).

Briefs and oral arguments in major cases argued before the U.S. Supreme Court are available in *Landmark Briefs & Arguments of the Supreme Court of the United States: Constitutional Cases*, edited by Philip Kurland and Gerhard Casper and published by University Publications of America. A brief (one- or two-page) summary of oral argument in some of the more important cases just argued appears in the third section of *Law Week*, which covers proceedings of the Court. Coverage varies according to the importance of the case and space available. For additional description of accessibility to materials presenting the arguments in cases currently pending before the Supreme Court, see the next section.

A wonderful collection of oral arguments in nearly two dozen landmark Supreme Court cases is readily available in *May It Please the Court* (1993), edited by Peter Irons and Stephanie Guitton. Edited oral argument in cases from *Brown v. Board of Education* to
Bowers v. Hardwick may be listened to on six audiotapes or read from printed transcripts. Narrative comments throughout provide guidance in following the argument and identify individual Justices as they ask questions.

**Electronic Sources**

There are two particularly prominent electronic sources to statutes, court decisions, and other legal documents that you should be aware of: WESTLAW and Lexis/Nexis. Citations in this book to legal materials not yet available in hardcopy or not obtainable at all in printed form may take the form of a WESTLAW citation, such as that illustrated in the first paragraph of this appendix. In a WESTLAW citation, the year of the document is followed by WL and the document number. An electronic legal search system, such as WESTLAW or Lexis/Nexis, which operates on a pay-for-use basis, may not be accessible except through a law school or college library. But such systems are indispensable to retrieve very recent decisions or to conduct searches for opinions when you do not know the title of the case. Electronic search systems can retrieve cases based on use of certain key words, the date on which the decision was rendered, the judge writing the court’s opinion, a concurrence, a dissent, or the statutory or constitutional provision at issue. Electronic search systems, like their hardcopy counterparts, put the same legislative enactments, court decisions, administrative rules, and executive orders at your fingertips, but permit you to search through them in ways that are customized to your needs and would otherwise not be possible by thumbing through printed books. Guides are available that identify the various databases and help you plan and execute searches. Lexis/Nexis provides research capability similar to WESTLAW.

An invaluable source for information about the U.S. Supreme Court is its official website, http://www.supremecourtus.gov. You can access descriptions of the Court’s history and traditions, biographies of the Justices, and information concerning its procedures, rules, and docket. There is information on visiting the Court and much of the building’s interior is shown. It posts the schedule of oral argument in cases being heard by the Court. Most important of all, the Court’s website provides access to the Court’s decisions immediately after their announcement in the form of slip opinions (opinions in newly released cases, before the decisions are consecutively arranged and bound in volumes). The Court also makes available a complete transcript of oral argument on its website shortly after a case has been heard. Another website that provides access to Supreme Court decisions, information about the cases to be argued before the Court, and the briefs filed in those cases, is http://supreme.lp.findlaw.com/supreme_court.

The contents of petitions for certiorari, reply petitions, briefs for the opposing parties, and amicus briefs in cases currently pending before the Supreme Court are also frequently available on WESTLAW. The relevant WESTLAW document numbers for those materials are available by searching on WESTLAW or by looking in the “United States Supreme Court Actions” section in the front of current paperback advance sheets for the Supreme Court Reporter. The paperback advance sheets for all units of the National Reporter System also contain an invaluable “Judicial Highlights” section that flags recent noteworthy or unusual decisions of federal and state courts.
GLOSSARY

a fortiori with stronger reason; a form of argument to the effect that because one fact exists, another fact that is included within it or analogous to it, that is less improbable, also exists

absolutism reading the Constitution as a set of rules; strict construction; also known as interpretivism

abstention a doctrine that holds that federal courts should refrain from deciding federal constitutional issues involving a matter of state law until the state court has had a chance to render an authoritative decision as to the law's meaning

acquittal a finding of not guilty

action a lawsuit

actual malice a term associated with libel law requiring proof that material was published with knowledge it was false or with reckless disregard as to its falsity

admiralty a type of law or court relating to maritime cases and arising out of acts on the high seas

adverse possession a method by which title to property is acquired simply by possessing it for a certain period of time

advisory opinion a statement of legal rights and obligations by a court without deciding a real case and controversy

affidavit a written statement made under oath attesting to a certain set of facts

affirm to confirm or ratify a previous judgment

affirmative action taking into account race, ethnicity, or gender in employment or admissions decisions so as to increase the number of minorities and women

amicus curiae a friend of the court; a party who has interests to protect, but who has no right to appear in the instant suit and who, by leave of the court, is permitted to introduce argument or evidence bearing on the policy question before the court

appeal the removal of a case from a lower court to a court of superior jurisdiction for the purpose of reviewing the judgment

appellant the party who lost in the lower court and who seeks review of that court's judgment by a higher court

appellate jurisdiction the authority of a higher court to review the judgments of a lower court

appellee the party who won the judgment in the lower court

arguendo for the sake of argument

arraignment the occasion on which the charges against the accused are read and the accused is asked how he or she pleads

attempt a crime for which liability is established by the risk created when the accused has gone sufficiently far toward the commission of a target offense that, unless he or she is apprehended, the criminal goal will be achieved—for example, attempted murder, attempted robbery, attempted rape, and so on

balancing of interests an approach to adjudication that sees the role of the judge as attempting to harmonize competing social interests in a case

bench memorandum a memorandum to a judge from a law clerk

bench trial a trial in which the judge decides all questions of fact, including the guilt of the defendant, because the defense has waived the right to trial by jury

bill of attainder a legislative act that imposes punishment on a particular individual without a hearing or trial

Brandeis brief a presentation of legal arguments buttressed by scientific or social science facts rather than by citation of legal authorities such as previous court decisions

brief a written statement of legal arguments submitted by an attorney

capital offense a crime punishable by death

capital punishment the death penalty

case and controversy a dispute properly before a court in which the party bringing the suit asserts the injury or likely injury of real and personal interests and requests the court to take some binding action that redresses or prevents such damage

cause of action the facts that entitle someone to judicial relief

censorship preventing something from being expressed, whether in speech, writing, or pictorially

cert. pool a panel of law clerks (one from each of the chambers of participating Justices) who prepare a memorandum for each case in which Supreme Court review is being sought summarizing the facts of the case and appraising its "certworthiness," i.e., whether it presents a sufficiently substantial federal question to warrant oral argument and decision by the Supreme Court

certification a method of exercising appellate jurisdiction in which a lower court presents a higher court with
certain novel questions of law to which it needs answers in order to decide the case

certiorari a discretionary method of exercising appellate jurisdiction in which a higher court directs a lower court to send up the record in a particular case

civil case any case that is not a criminal case

class action a suit that is brought not only in the interest of the plaintiff, but also in behalf of all persons in similar circumstances

collateral attack a strategy of attacking the judgment in a case by bringing suit in another tribunal other than on direct appeal; for example, by seeking a writ of habeas corpus to reopen a constitutional challenge to certain criminal procedures that led to the defendant’s conviction once he or she has exhausted the process of direct appeal and has gone to prison

comity the due regard and respect one sovereign gives the legal actions of another, as between states or between the federal government and a state

common law the system of law that began in medieval England in which judges reported what they had done in the cases they decided and these accumulated decisions became precedents for the decision of future cases; judge-made law, as distinguished from law made by a legislative body and stated in a code

collusion the party to a suit who agrees to refrain from engaging in certain conduct

congressional powers powers exercised by both the national and the state governments; for example, the power to tax

criminal case a case that involves charges brought by the government in the exercise of its monopoly power over penal justice

deciduous a superfluous statement of law not necessary to the decision of the case at hand

decision by private individuals about where they want to place housing patterns that occurs by private, as distinguished from official, action; for example, segregation in housing patterns that arises from decisions by private individuals about where they want to live

decomposing a form of response in which the defendant argues that, even if the facts are as the plaintiff alleges, no actionable wrong has occurred

dictum an opinion written by a judge who dissents from the decision of the case at hand

direct appeal; for example, by seeking a writ of habeas corpus to reopen a constitutional challenge to certain criminal procedures that led to the defendant’s conviction once he or she has exhausted the process of direct appeal and has gone to prison

direct action a suit that is brought not only in the interest of the plaintiff, but also in behalf of all persons in similar circumstances

direct appeal a discretionary method of exercising appellate jurisdiction in which a higher court directs a lower court to send up the record in a particular case

doe or is likely to be injured; the plaintiff

demurrer a form of response in which the defendant argues that, even if the facts are as the plaintiff alleges, no actionable wrong has occurred

dictum a superfluous statement of law not necessary to the decision of the case at hand

discernable a superfluous statement of law not necessary to the decision of the case at hand

discussion list a list of cases prepared by the Chief Justice that identifies cases deemed to be "certworthy" and which functions as the agenda of cases to be discussed by the Justices at conference prior to a vote on granting certiorari

dissenting opinion an opinion written by a judge who votes for the losing party in a lawsuit

distributive justice the notion that the role of judges is limited to applying the law to parties in suits before them (and does not extend to reviewing the lawmaking authority of legislative bodies)

diversity jurisdiction the authority of federal courts to hear suits between citizens of different states

docket the list of cases to be heard by a court during a given term

double jeopardy being tried twice for the same offense

dual federalism a conception of the federal system that views the powers of the national and state governments as mutually exclusive and set in a state of constant tension against one another to prevent the dangerous accumulation of excessive political power; in such a scheme, the two levels of government are seen as dual sovereigns, each supreme in its different area of jurisdiction.
easement a privilege that an owner of a parcel of land
has in land owned by another, as in a right-of-way across
a neighbor's property
eavesdropping overhearing a conversation
eminent domain the legal doctrine that private prop-
erty may be taken for public use; the Fifth Amendment
requires that, when this is done, just compensation must
be paid
en banc the practice of a court, in which cases are
normally tried before panels of judges, to collectively sit
and hear a case with the full complement of judges present
enjoin to command or require; to require a person by an
injunction to do something or refrain from doing something
enumerated powers those powers specifically given to
the national government in Article I, section 8 of the
Constitution
equity that branch of the common law in which the
specifics of relief in a given case could not be found in
existing procedures and remedies, but instead called for
the exercise of justice and fairness by the judge
error (writ of) the method by which cases reached the
Supreme Court before 1925 as a matter of its appellate
jurisdiction and over which the Court had no control
evolution the theory that human beings did not
originally appear in their present form, but are descended
from earlier animal life-forms and gradually developed
their present characteristics over a long period of time
ex parte on the side of, or on the application of
ex post facto law a law that makes something a crime
that was not illegal at the time the act was done or
that increases the penalty after a crime was committed
exclusionary rule a doctrine that forbids the admissi-
bility at trial of illegally obtained evidence
federal question a dispute over the interpretation of a
provision of the U.S. Constitution or a statute passed by
Congress
fee simple estate property owned by a person that he or
she has unconditional power to dispose of during his or
her lifetime and that descends to his or her heirs upon
death according to the terms of a will
felony a serious criminal offense for which the penalty
is usually more than a year's confinement in a state or
federal prison
fiat decree or say-so
fiduciary one who handles the property of others in a
position of trust or confidence; for example, a trustee, a
banker, a stockbroker
franchise the right to vote
fruit of the poisonous tree a doctrine that bars the
admissibility of evidence in a criminal trial that was
obtained from leads disclosed through illegal police
behavior, as when information contained in a coerced
confession leads police to the location where certain
physical evidence has been buried; the evidence that
police indirectly acquire is said to be the fruit of the
poisonous tree because it is tainted by the previous illegal
police behavior
general election at the state and national level, an
election held in November at which voters fill elected
governmental offices by choosing from various political
party nominees and independent candidates; some
contests, such as those to fill judgeships, may be
nonpartisan, for example, where candidates run without
party designation
gerrymander to draw the boundaries of legislative
districts in such a way as to maximize partisan advantage
grand jury a body empowered to bring formal charges
against individuals whom it has probable cause to believe
have committed criminal acts
habeas corpus (writ of) a court order directing the
release of someone who is judged to have been confined
illegally
harmless error a term used by an appellate court to
characterize an error committed by a trial court that did
not prejudice the rights of the party alleging the error, so
that there is insufficient basis for reversing the judgment
below
impeachment the bringing of formal charges of wrong-
doing in office against a government official for the
purpose of initiating his or her removal from office, as
when the U.S. House of Representatives impeaches a
federal official and the Senate then sits in judgment to
see if there is sufficient evidence to warrant his or
her removal; the practice of presenting evidence at
trial to cast doubt upon the credibility or veracity of a
witness
implied powers that authority under the Necessary
and Proper Clause (Art. I, § 8, cl. 18) of the Constitution that
empowers Congress to select any means appropriate for
realizing the enumerated powers
in camera in chambers; when a judge considers a matter
in camera, he or she examines materials in the privacy
and secrecy of his or her chambers
in forma pauperis in the manner of a pauper; a way of
proceeding in which someone—often a prisoner—is
exempted from the usual requirements of filing paper-
work (such as a petition for certiorari and briefs) with the
Supreme Court because he or she is too poor to pay the costs
in haec verba in these words
in re in the matter of
in terrorem by way of threat or warning
incorporation theory the process of including provisions
of the Bill of Rights as aspects of "liberty" protected by the
Due Process Clause of the Fourteenth Amendment
and thus restricting the legislative power of the states
indictment a statement of formal criminal charges against
a named individual voted by a grand jury
inferior courts lower courts; depending upon the con-
text of the reference, it may mean only trial courts or trial
courts and intermediate appellate courts
information a statement of formal criminal charges
filed by the prosecuting attorney against a named
individual in a jurisdiction that does not employ a grand
jury
infra below
inherent powers powers possessed by an official or a
government that are implicit in the concept of
sovereignty and that do not depend for their existence
upon designation in a constitution
injunction or injunctive relief a court order requiring someone to do something or to refrain from doing something
inter alia among other things
interest balancing see balancing of interests
interpretivism see absolutism
intervenor an affected party who, with the court’s permission, participates in a lawsuit after its inception by either joining with the plaintiff or uniting with the defendant
intrastate within the boundaries of a state, as distinguished from across state boundaries, which would make something interstate
ipse dixit something that is asserted, but not proved
judgment the official decision of a court
judicial federalism state court reliance upon state constitutional grounds as an independent basis to provide greater protection for civil rights and liberties than is required by the U.S. Supreme Court’s interpretation of the U.S. Constitution; a state court interpreting a provision of its own state’s constitution may provide more, but not less, constitutional rights than the U.S. Constitution requires.
judicial power the power to decide cases and controversies
judicial review the power of a court to pass upon the constitutionality of acts of a coordinate branch of government
jurisdiction the authority of a court to hear a case
jurisprudence the philosophy of law; the collection of law on a given topic, such as the Court’s First Amendment jurisprudence
justiciability the character of a dispute being in the proper form to be considered by a court
lacunae gaps in writing
lame duck an official who serves out his term of office after having been defeated in an election; an official who serves out his term in office without the prospect of serving another term
legislative courts federal courts that derive their authority from the legislative article (Article I) of the Constitution and whose judges are not protected by the principle of judicial independence
legislative veto legislative action by the Congress invalidating a policymaking decision made by the President or an agency of the executive branch
libel an injury to reputation caused by circulating written untruths about someone
litigant a party to a lawsuit
magistrate judge a kind of junior federal trial judge who serves for a fixed period of time and whose duties vary widely by federal district, but which may include conducting many types of pretrial proceedings and, with the consent of the parties, trying and deciding civil cases and criminal misdemeanor cases
malapportionment the combined effect of legislative districts whose boundaries are improperly drawn
malice unlawful intent
mandamus (writ of) a court order directing an officer of the government to perform some nondiscretionary act associated with his or her office
mandate a command or order of a court that its judgment be executed
martial law the state of affairs that exists when military authorities exercise authority over civilians and otherwise govern domestic territory
material important or relevant, as in a material issue, material fact, or material witness
mechanical jurisprudence a conception of a judge’s role that holds that he or she merely applies rules to facts in order to render a decision; merely applying the law according to the canons of deductive logic, as distinguished from creating law or legal doctrines
memorandum opinion an opinion written by a judge for the record, as distinguished from one deciding a case; an example is Justice Rehnquist’s memorandum opinion in Laird v. Tatum, 409 U.S. 824, 93 S.Ct. 7 (1972), in which he explained why he denied a motion to recuse himself
merits the substantive issues that divide the parties in a legal dispute, as distinguished from arguments about procedural or jurisdictional issues
ministerial act an action by a government official, which is dictated by law and about which he or she has no power to exercise discretion or to make a policy judgment
misdemeanor a lesser type of criminal offense for which punishment can be confinement for up to a year in the county jail
moot no longer a live controversy
motion a request or application for a decision
next friend a person acting for the legal benefit of someone not legally competent to act for himself or herself
non sequitur a conclusion that does not follow logically from the premises
obiter dictum see dictum
obscenity pornographic expression that is not protected by the First Amendment
opinion of the court an opinion that is subscribed to by at least a majority of the judges participating in the decision of the case and that presumably binds the court as a matter of policy
original intent the intent of the Framers either of the original Constitution or of an amendment
original jurisdiction the authority of a court to hear a case in the first instance or for the first time; the authority to hear a case possessed by a trial court
overbreadth or overbroad regulation of a fundamental right that reaches beyond the legitimate and demonstrated interest of the government; violation of the third element of strict scrutiny
overrule the action taken by a court when the policy announced in an opinion in a current case explicitly annuls or supersedes a statement of law in a previous opinion, so that the preceding statement of law is no longer authoritative
packing the Court appointing sufficient new members to the Court with the aim of changing policy
pardon an act of grace by executive authority that blots out the existence of guilt and restores the offender to the same legal rights as if he or she had never committed the offense
parole to release from confinement on certain conditions
paternity fatherhood
penumbra a term borrowed from astronomy, which denotes the area of shade between full sunlight and complete darkness caused in an eclipse; a gray area of implicit rights existing somewhere between explicit statement in a constitutional provision and total silence
per curiam opinion an unsigned opinion for the Court; often used when the conclusion in a case is so straightforward that no extended discussion seems necessary or, in the opposite extreme, when a collegial court is so fragmented there is agreement only on the result announced
per se by itself or inherently
peremptory challenge the removal of a prospective juror during jury selection, which is at the complete discretion of one of the parties to the case and for which the party removing the juror need give no reason, as distinguished from removal for cause where the party must show bias, conflict of interest, or some other impediment to a juror's impartial consideration of the case; each side in a case is allotted a certain number of peremptory challenges, whereas the number of challenges for cause is unlimited
petit jury a trial jury
petitioner one who seeks a writ or court order
plain meaning rule the principle that, in the interpretation of a constitutional or statutory provision, words should be given their ordinary and accepted meaning
plaintiff the party bringing the suit
plea bargain the result of negotiation between the prosecution and the defense that led the defendant to plead guilty to a reduced charge or for a lesser sentence than would be the case had the government insisted on the maximum permitted under the law
plenary complete or exclusive; as in saying that the regulation of interstate commerce is a plenary power of the national government
plurality opinion an opinion written for several, but not a majority, of the Justices on the winning side in a case; their votes are crucial to the decision of the case, but their reasons do not state policy that is binding on the Court in future cases
political question doctrine a doctrine that excuses federal courts from considering matters that, even though they may constitute a case and controversy, are not the sorts of things that are proper for a court to decide
pornography material that depicts erotic behavior and is intended to cause sexual excitement
post after
precedent a previous court decision thought to be analogous in some important respect to a current case
preemption the effect of federal law superseding state law in a particular field
preliminary injunction a court order directed at preserving the existing state of affairs until argument can be heard on the matter in dispute; in order to obtain such a temporary restraining order, the party seeking preservation of the status quo must show that irreparable injury would otherwise occur
presumptive privilege exemption from an ordinary legal obligation that exists unless the party opposing the possessor of the privilege can state a claim of need in the case at hand sufficient to override the claim of privilege; for example, executive privilege and, in some jurisdictions, a journalist's privilege in the confidentiality of sources
prima facie sufficient evidence to make a case until it is contradicted or overcome by opposing evidence
primary or primary election an election in which party candidates are chosen to run in the general election
probable cause such evidence as would lead a reasonable person to believe that it is likely a particular individual committed a crime or that certain evidence will be found in a particular place
probation allowing someone convicted of a minor criminal offense to remain at large during good behavior and under supervision
procedural due process the principle of fairness that governs the means by which government deprives a person of some life, liberty, or property interest
prohibition (writ of) an order issued by a superior to an inferior court directing it to cease consideration of some matter so as to prevent it from usurping jurisdiction it does not have
pure speech expression by means of the spoken or written word
quash to vacate or annul
quorum the minimum number required to be present by law in order to permit business to be done
reapportionment the redrawing of the boundaries of legislative districts
reasoning by analogy the method of legal reasoning in which the facts in the current case are thought to be sufficiently like the facts in a previous case, so that the holding in the previous case should also be the holding in the instant case
rebuttable presumption a presumption that the law makes, but that may be refuted by a certain amount of evidence, as distinguished from a conclusive or an irrebuttable presumption, which cannot be overcome by any amount of evidence
recuse to disqualify oneself from participating in a case because of some real or apparent bias or conflict of interest that might reasonably lead someone to question a judge's impartiality and detachment
remand to send back to a lower court for further proceedings
res judicata a matter adjudged; the legal principle that prevents interminable relitigation of the merits of a case by foreclosing other than the pertinent appellate tribunals from deciding the merits of a case once a court of competent jurisdiction has rendered judgment
reserved powers the police powers possessed by the states, the existence of which is acknowledged by the Tenth Amendment
respondent the party that opposes a petitioner's request for a court order
restraining order an injunction
restrictive covenant  a provision in a deed that bars transfer of the property to one or more classes of people, usually minorities, identified therein; enforcement of such discrimination has been held to constitute state action in violation of the Fourteenth Amendment

reverse  the action of an appellate court concluding that the trial court should have rendered judgment for the other side in a case

riding circuit  the traveling of a judge to various localities within a court’s jurisdiction so that sessions of court are made more accessible

ripeness  a principle that precludes courts from hearing cases prematurely; for example, until the facts in the dispute have crystallized sufficiently so that judges do not have to guess about pertinent facts

scienter  awareness of such facts as permit a finding of criminal guilt; to act knowingly

self-fulfilling prophecy  the phenomenon by which something eventually happens simply because it was expected or predicted to occur; for example, advocates of judicial self-restraint, by continually pointing out that courts are politically weak institutions, contribute to the political vulnerability of courts simply by saying this over and over, or—to use the famous example associated with Justice Harlan’s warning in Plessy v. Ferguson—racial segregation that was justified as a way of dealing with hostility between the races actually creates racial hostility where none or much less hostility existed beforehand

self-incrimination  giving testimony that implicates one’s self in a crime

separation of powers  the doctrine according to which the powers of government are divided among several branches: legislative, executive, and judicial

seriatim  individually or one after another; in the days when U.S. Supreme Court Justices delivered seriatim opinions in cases, each wrote his own opinion, and they were delivered one after another

shield law  legislation that relieves certain individuals of the obligation of giving testimony under particular circumstances; for example, a rape shield law limits inquiry by the defense into the past sexual relations of the complaining witness; a media shield law limits or precludes inquiry about a reporter’s confidential news sources

slander  an injury to reputation caused by speaking untruths about someone

sovereign immunity  the doctrine that government cannot be sued without its consent

special master  a kind of hearing officer appointed by the court to receive evidence, hear testimony, and formulate conclusions that are then presented to the court; one or both of the parties to the case may then take issue with the special master’s findings, and argument on the matter is then heard by the court, which thereafter renders its judgment; the procedure by which the Supreme Court usually functions when it hears cases within its original jurisdiction

specific intent  a form of criminal intent where the accused in committing a crime acts with a subjective desire for the achievement of certain criminal consequences; acting purposely

speech plus  that variety of behavior in which speech and action elements are intertwined; for example, picketing, flag burning, marching, nude dancing

standing  the element of justiciability that measures whether the plaintiff has alleged direct, personal, and sufficiently substantial injury to entitle him or her to have the suit heard by a court; the element of justiciability that connects the party bringing the suit to the alleged injury, so that it can be said the plaintiff has a personal stake in the outcome

stare decisis  the practice of adhering to settled law, as contained in previous court decisions; reliance upon precedent

state action  actions or developments for which the state shares responsibility, whether by causing, sanctioning, or supporting them

stay  a court order halting the execution of a judgment

strict construction  a literal reading of the Constitution; see absolutism

sua sponte  on its own initiative without prompting, request, or suggestion

sub nom. (sub nomine)  under the name

sub silentio  covertly; without explicitly saying so

subpoena  a court order directing an individual to appear and give testimony

subpoena duces tecum  a court order directing that certain documents be turned over

substantive due process  the conception of due process that interprets liberty in the Due Process Clause of the Fourteenth Amendment as a shorthand reference for certain fundamental rights, which government may not infringe without overcoming a presumption of unconstitutionality

summary judgment  a judgment rendered by the court without hearing oral argument

supra  above

surrogate  a person or thing acting in place of another; a substitute

suspect classification  a disfavored basis for creating categories in law; usually a distinction drawn on the basis of race, alienage, or some other characteristic beyond the control of the affected individuals that reflects societal prejudice and that usually operates to impose disabilities on the affected class

symbolic speech  expression through symbolic acts rather than using the spoken or written word, such as burning a draft card, desecrating the flag, or wearing an armband

tort  an act causing injury for which remedies exist in law

ultra vires  beyond the scope of its powers

vacate  to set aside or annul

vagrancy  at common law, the crime of going about from place to place without any visible means of support and of being idle although able-bodied and capable of working

vagueness  a statute or regulation that is void for vagueness is one that imposes penalties without giving a reasonable person a clear idea of the sort of conduct that is prohibited; such a statute or regulation essentially
punishes a person for guessing wrong about what the law means to prohibit rather than for failing to live up to a legal obligation and violates the entitlement to notice beforehand that is implicit in the concept of due process

vel non or not

venue the location of a trial

vested rights property rights

voire dire the process by which a jury is selected or empaneled

warrant a writ directed to a competent legal authority ordering that an act be done

wiretapping overhearing a conversation by means of another line that is connected to someone's telephone line

writ a court order, see the names of particular writs
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